

# Federal Administrative Adjudication Outside the Administrative Procedure Act



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## About the Administrative Conference of the United States

The Administrative Conference is an independent federal agency dedicated to improving the fairness, efficiency, and effectiveness of federal agency processes and practices through consensus-driven applied research. The Conference's members include: the Chairman and 10 other presidential appointees, who comprise the Council; 50 senior government officials drawn from federal agencies, boards, and commissions; and 40 public members drawn from the private sector, including academia, who reflect a wide diversity of views and backgrounds. The work of the Conference is also supported by a small, full-time staff in the Office of the Chairman.

To fulfill its mission, the Conference and its staff perform a variety of functions. One of the chief activities of the Conference is conducting research that, in turn, serves as the foundation for identifying best practices and issuing formal recommendations to agencies, Congress, or the Judicial Conference. These recommendations have addressed a wide variety of administrative and regulatory issues, from the Conference's seminal work developing a practical framework to advance the use of alternative dispute resolution by federal agencies to more recent efforts aimed at e-Rulemaking, video hearings, and other innovative agency practices. Since its inception in 1968, the Conference has issued over 200 such recommendations—several of which Congress has enacted into law and numerous others of which have been followed by agencies and courts. The Conference also serves as a central resource for agencies, as well as other federal officials, by providing nonpartisan, expert advice and publishing reference guides on administrative procedural or regulatory topics. Conference staff also engages in extensive outreach by, for example, appearing as speakers and conducting workshops and forums (often in collaboration with other federal agencies or private sector groups) to promote best practices or further the implementation of its recommendations.

Administrative Conference of the United States

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FEDERAL ADMINISTRATIVE ADJUDICATION  
OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT



Michael Asimow



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## Chairman's Foreword

When Paul Verkuil became chairman of the reestablished Administrative Conference of the United States in 2010, he put administrative adjudication at the forefront of its agenda, where it remains today. The Conference has since issued a dozen formal recommendations and undertaken many other initiatives related to this subject of ever-increasing importance.

The most ambitious of these initiatives was a multi-year review, begun in 2013, of adjudication programs throughout the entire executive branch. Conference staff first undertook the laborious task of identifying nearly every program that, as a result of a statute, regulation, or executive order, provides for an evidentiary hearing. Staff then undertook the still more laborious task of cataloguing the most important features of each such program: the legal sources of its authority, the types and number of cases it adjudicates, the case-management techniques it employs, the key procedural rules governing its work, the intra-agency appellate review procedures to which its decisions are subject, and so forth. The research now resides in a database on the website of Stanford Law School under the title *Federal Administrative Adjudication* (<http://acus.law.stanford.edu>).

The Conference retained Professor Michael Asimow, among the foremost scholars of administrative adjudication, to study an important category of adjudication programs represented in the database: those not subject to the formal hearing requirements of the Administrative Procedure Act (APA), but which are often at least as formal (that is, court-like) in practice as those subject to them. (Professor Asimow has long eschewed the received terminology under which “formal” is reserved for APA adjudications, and “informal” is used for all other adjudications, no matter the actual formality of their proceedings.)

The Conference chose to limit the study to these programs for at least three related reasons. First, they have been, if not ignored, at least insufficiently studied, even though they involve matters of such consequence as immigration-asylum claims, patent-validity disputes, and veterans-benefit claims. Second, they far outnumber their APA counterparts and adjudicate many more cases. And third, the statutes that govern them often say little, if anything, about the basic procedures they must observe, and thereby leave procedural choices in agency hands. That makes them amenable to administrative reform—in some cases, the research would disclose, much-needed reform to enshrine basic procedural norms that should be expected of any trial-like adjudicative system—of the sort the Conference is uniquely situated to recommend.

Professor Asimow's ensuing report, *Evidentiary Hearings Outside the Administrative Procedure Act*, identified nearly two dozen “best practices” (some drawn from

the APA) in answer to such questions as: On the basis of what “record” should cases be decided? From whom (other than the parties) may adjudicators hear when deciding cases? What evidentiary rules should agencies follow? What inter-agency appeal rights should they give? Professor Asimow’s “best practices” answered these and other questions, and did so while recognizing the limits of uniformity in the heterogeneous world of agency adjudication.

Professor Asimow’s report was put before the Conference’s Committee on Adjudication for the formulation of a draft recommendation. So persuasive was the report that the Committee decided to include nearly all of its best practices (in most cases with few changes) in its proposed recommendation, *Evidentiary Hearings Not Required by the Administrative Procedure Act*. That recommendation was then forwarded to the full voting membership of the Conference, which adopted it as Recommendation 2016-4 at its December 2016 plenary session (81 Fed. Reg. 94,314 (Dec. 23, 2016)).

This Conference-published sourcebook is a substantially expanded version of Professor Asimow’s report—and much more: It not only elaborates upon Recommendation 2016-4’s best practices but also situates adjudication “outside” the APA in the larger context of agency adjudication, advances a new typology of administrative adjudication drawn along functional lines, and explains whether, what kind of, and why a hearing is required for each type of adjudication. Its concluding chapter offers a tentative assessment of, and some best practices for, adjudications that do not rely on formal evidentiary hearings.

No doubt this sourcebook will soon take its place—alongside the Conference’s recently published *Sourcebook of United States Executive Agencies* (2d ed. 2018)—as among the most valuable and widely used of the Conference’s many publications. Its main intended audience, Congress and federal agencies, will find it indispensable when designing new and reviewing existing adjudication programs. Courts and scholars will also, I am sure, find it equally useful, if for different reasons. Its typology of adjudication is already gaining currency in the academic literature. (See, e.g., Melissa Wasserman & Christopher J. Walker, *The New World of Agency Adjudication*, 107 Cal. L. Rev. (forthcoming 2019).)

I wish to offer Professor Asimow the Conference’s profound thanks. He has given over much of his professional life during the last few years—much more than the Conference had the right to expect—to working on this sourcebook and the larger adjudication project out of which it grew. Few legal academics could have done it as well, and none perhaps in the limited time allotted.

I also wish to thank former Chairman Verkuil. He initiated and structured the research project that gave rise to this sourcebook—drawing on his own pioneering work nearly forty years earlier (*A Study of Informal Adjudication Procedures*, 43 U. Chi. L. Rev. 739 (1976))—and then pushed it along to completion. No doubt it would be sitting uncompleted without his resolute leadership and good sense. This sourcebook, together with much of the Conference’s other work on adjudication, stands as an important part of his legacy.



In his acknowledgments, Professor Asimow thanks several members of the Conference staff without whom this project could not have been completed. I wish to add my own thanks to them (especially Frank Massaro, for getting the book to press) and also thank the following people: Nadine Mancini, the Chair of the Conference's Committee on Adjudication, for leading the committee discussions that resulted in Recommendation 2016-4; Funmi Olorunnipa, David Pritzker, and Stephanie Tatham, all former Conference staff, for doing much of the research reflected in the database; Daniel Sheffner, also formerly on the Conference staff, for helping to incorporate the *Sourcebook's* best practices into the reporter's comments accompanying the Conference's *Model Adjudication Rules* (rev. ed.) (83 Fed. Reg. 49,530 (Oct. 2, 2018)); and especially the many agency officials, too numerous to name, who responded to requests for information and sat for interviews with Professor Asimow.

Finally, I join Professor Asimow in thanking Stanford Law School for funding, helping to design, and hosting the database on its website. Much of the credit belongs to Elizabeth Magill, Stanford's former Dean.

A necessary disclaimer: This book, though commissioned and published by the Conference, reflects Professor Asimow's views alone. Only recommendations adopted by the Conference's voting members sitting in plenary session reflect the Conference's views. Several of them (including Recommendation 2016-4) are reproduced in the appendices here. All Conference recommendations appear at [www.acus.gov](http://www.acus.gov) along with their associated reports.

Matthew Lee Wiener  
*Acting Chairman*  
(Vice Chairman)



## About the Author

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Asimow has served as an ACUS consultant on numerous occasions. He also served as a consultant to the California Law Revision Commission in its project to study the California Administrative Procedure Act. He is a former chair of the ABA's Section on Administrative Law & Regulatory Practice and of the Administrative Law Section of the Association of American Law Schools. Asimow is co-author of *California Practice Guide: Administrative Law* (Rutter Group, 2018) and *State and Federal Administrative Law* (with Levin, 4d ed. 2014).

Asimow's recent articles on administrative law include *Hired Guns and Ministers of Justice: The Role of Government Attorneys in the United States and Israel*, 49 *ISR. L. REV.* 3 (with Dotan, 2016); *Open and Closed Judicial Review of Agency Action: The Conflicting US and Israeli Approaches*, 64 *AM. J. COMP. L.* 521 (with Dotan, 2016); *Five Models of Administrative Adjudication*, 63 *AM. J. COMP. L.* 3 (2015). His co-authored article *Between the Agency and the Court: Ex Ante Review of Regulations* is forthcoming.

Asimow's earlier books and articles that were based on ACUS studies include *Advice to the Public from Federal Administrative Agencies* (1973); *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 *MICH. L. REV.* 521 (1977); *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 *COLUM. L. REV.* 759 (1981); *Interim-Final Rules: Making Haste Slowly*, 51 *ADMIN. L. REV.* 703 (1999); *Civil Penalties for Inaccurate and Delinquent Tax Returns*, 23 *UCLA L. REV.* 637 (1976).



# Acknowledgments

The author previously served as the consultant for ACUS's project *Evidentiary Hearings Not Required by the Administrative Procedure Act*, which served as the basis for ACUS Recommendation 2016-4 and for this book. The author gratefully acknowledges the assistance of the ACUS leadership and staff in the preparation of the consultant's report and the manuscript for this book. Former ACUS chair Paul Verkuil and then acting chair Matt Wiener were tremendously supportive of this project. ACUS attorney advisors Amber Williams and Frank Massaro were indispensable to my efforts at every stage of the work.

As discussed in Chapter 1, Part D, ACUS and Stanford University undertook a joint project to prepare a database consisting of information about the adjudicatory functions of the federal government. The database (available at <https://acus.law.stanford.edu/>) was my jumping-off point in preparing the studies contained in the Appendix of this book, which, in turn, formed the basis for the best practice recommendations contained in Chapter 4. Preparation of this database was a labor-intensive process performed by numerous ACUS staff members and interns. I am enormously grateful for this effort. I also express my appreciation to Stanford Law School Dean Elizabeth Magill for helping to fund the database and to professional database builders Irina Zachs and Alex Shor for their inspired technical efforts in organizing it.



# Chapter 1

## INTRODUCTION

### A. INTRODUCTION TO ADMINISTRATIVE ADJUDICATION

Traditionally, the word “adjudication” means dispute resolution in courts of law administered by judges who perform no functions other than judging and who have no connection with the dispute prior to adjudicating it.

However, the world of adjudication is much broader than dispute resolution by courts. Federal, state, and local government agencies conduct a vast amount of adjudication. Often, but not always, government agencies conduct hearings in the course of making individualized adjudicatory decisions. Such hearings resemble court trials without juries, but are conducted in hearing rooms rather than courtrooms. Typically, each side calls witnesses and cross-examines witnesses called by the opposing side. The decision is based exclusively on the record created at the administrative hearing.

Most administrative hearings resolve disputes between private parties and government agencies, although some deal with private-versus-private disputes arising under administrative programs. “Combined-function” agencies both adjudicate disputes and act as one of the parties in the same dispute. “Tribunals,” on the other hand, only perform adjudication functions. The initial decisionmakers in government adjudication are sometimes called “administrative judges” or “administrative law judges,” but they are known by many other titles, such as “immigration judges,” “hearing officers,” or “referees.” Typically, these initial decisions are reviewed by higher-level officials in the adjudicating agency (often the head or heads of the agency).

Adjudication by government agencies results in legally binding judgments, just like court decisions. In nearly all cases, decisions of government adjudicators are judicially reviewable, although only a tiny percentage of them actually wind up in court. When the losing party invokes judicial review, the court does not retry the case but decides it based on the record made at the agency level. Broadly speaking, a court can overturn an agency decision because of an error of substantive or procedural law or because the agency acted unreasonably in finding the facts or exercising its discretion.

Many governmental adjudicatory decisions are not made after trial-type hearings. These decisions are generally made through an investigatory process in which the private party has an opportunity to furnish information and arguments. However, there are no witness presentations or cross-examination, and the decisionmaker is free to consult other sources of information.

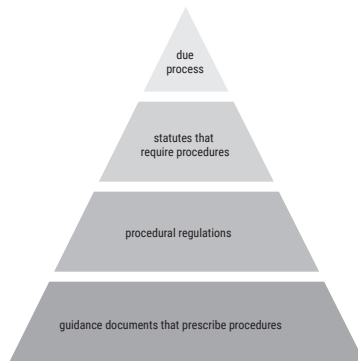
At the federal level, some of the adjudicatory schemes are immense. The system of adjudication of Social Security disability disputes is said to be the largest system of adjudication in the western world;<sup>1</sup> it hears more than one million cases a year. Other vast federal adjudicatory schemes involve veterans' benefits and immigration disputes (such as deportation and refugee status). But there are a great many other federal administrative schemes beyond these well-known ones.

At the state level, agencies adjudicate cases involving qualification for workers' compensation or unemployment compensation benefits as well as cases involving public utilities. Every state maintains systems of business and professional licensing and environmental protection; these regulatory schemes give rise to numerous disputes such as whether to revoke a doctor's license for malpractice or to penalize a company for water pollution. Every unit of local government must resolve countless issues relating to planning and zoning as well as business licensing. School boards must resolve issues relating to education plans for disabled children or the discharge of teachers. Local government must establish a system of adjudicatory hearings to resolve these issues. This book, however, covers only federal administrative adjudication.

## B. SOURCES OF PROCEDURAL PROTECTIONS IN AGENCY ADJUDICATION

The procedures to assure fairness in administrative adjudication are set forth in various sources of law. These sources can be visualized as a pyramid.

At the top of the pyramid are the procedural "due process" requirements set forth in both federal and state constitutions. Procedural due process is discussed in Chapter 3.<sup>2</sup> In the federal Constitution, the Fifth Amendment (applicable to the federal government) provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment applies the same



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1. See *Barnhart v. Thomas*, 540 U.S. 20, 28–29 (2003).

2. A separate branch of due process is called "substantive due process." Substantive due process requires various levels of justification before the government can deprive persons of life, liberty, or property. Substantive due process is not discussed in this book.



due process requirement to state and local government. Broadly speaking, procedural due process requires notice and a fair hearing conducted by a neutral and unbiased adjudicator. These requirements, however, are not precisely stated, and the degree of process that is due depends on the context in which the dispute arises. In addition, as discussed in Chapter 3, procedural due process requirements are inapplicable to many administrative adjudications.

The next level below the top consists of statutes called administrative procedure acts (APAs). The federal APA was enacted in 1946 and has seldom been amended. Every state has an APA, but very few local governments do. APAs contain detailed procedural provisions for administrative adjudication (as well as provisions relating to other administrative law subjects such as rulemaking and judicial review). However, federal and state APAs do not apply to every agency adjudication. Because the APA has been well studied by many other authors, this book concerns federal adjudicatory processes that are *not covered by the adjudication provisions of the federal APA*, an area that has been much less studied and is often overlooked in discussions of federal administrative adjudication. The level below the top also consists of agency-specific statutes that spell out procedural requirements for adjudication arising under that statute.

The next level down consists of procedural regulations adopted by the agency conducting the adjudication. Obviously, such regulations cannot conflict with due process, the APA, nor agency-specific statutes. When the APA applies, the regulations provide specific procedural rules that fill the gaps left by the APA provisions. Where no APA applies, the procedural regulations lay out the adjudicatory procedures (subject, of course, to due process or to provisions in the agency's enabling statute). Because this book does not cover adjudication governed by the APA, it focuses heavily on procedural regulations.

The bottom level of the pyramid consists of various agency guidance documents such as employee manuals that provide further detailed instructions for agency adjudicatory decisionmakers. Most of these manuals provide routine instructions for the decisionmaking process, but in some cases they spell out procedural protections that have not been specified in procedural regulations.

## C. TYPES A, B, AND C ADJUDICATION

In this book, the term "Type A adjudication" refers to adjudicatory systems governed by the formal adjudication sections of the federal APA.<sup>3</sup> With a few exceptions, Type A hearings are presided over by an official called an administrative law judge (ALJ).<sup>4</sup> Numerous provisions of the APA protect the independence of ALJs (even though ALJs usually work for the agency that is a party to the cases that the ALJ decides). As

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3. 5 U.S.C. §§ 554, 556, 557. The APA is cited in this book using the sections of Title 5 of the United States Code in which it was codified but without the prefatory "5 U.S.C."

4. APA § 556(b)(3).

already stated, this book concerns adjudication by federal administrative agencies that are *not* Type A adjudication and thus are not decided by ALJs.<sup>5</sup>

The term “Type B adjudication” refers to systems of federal agency adjudication that employ *evidentiary hearings* that are required by statutes, regulations, or executive orders, but are *not* governed by the formal adjudication provisions of the APA. Administrative judges (AJs) (or occasionally the agency head), rather than ALJs, preside over evidentiary hearings in Type B adjudication. Chapters 2 and 4 and Appendix A of this book concern Type B adjudication. These chapters discuss the boundaries between Types A, B, and C adjudication, survey the world of Type B adjudication (Chapter 2 and Appendix A), and suggest best practices for procedural regulations governing Type B hearings (Chapter 4).

The term “Type C adjudication” means adjudication by federal administrative agencies that does not occur through legally required evidentiary hearings. Chapter 5 describes the world of Type C adjudication and suggests a modest list of best practices for C adjudication. Chapter 3 discusses due process limitations and APA provisions primarily applicable to Type C adjudication but that apply to Types A and B as well.

At this point, the author freely concedes that the title of this book, *Federal Administrative Adjudication Outside the Administrative Procedure Act*, is not precisely accurate. The book concerns Types B and C adjudication that are not subject to the formal adjudication provisions of the APA<sup>6</sup> However, Types B and C adjudication are subject to several provisions of the APA<sup>7</sup> that are discussed in Chapter 3. Types B and C adjudication are also subject to the judicial review provisions of the APA.<sup>8</sup> A more precise title would have been too cumbersome. So my apologies to readers who are annoyed by the imprecision.

## **D. THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES**

This book originated in a study I performed for the Administrative Conference of the United States (ACUS).<sup>9</sup> This study led to an ACUS recommendation for best practices for Type B decisionmaking.<sup>10</sup>

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5. ALJs are occasionally loaned by the agency that employs them to other agencies that need to conduct Type A or Type B hearings but that do not employ any judges or whose judges are engaged in hearing other cases.

6. That is, APA §§ 554, 556, and 557 as well as to the various provisions protecting the independence of ALJs.

7. APA §§ 555, 558

8. APA §§ 701–706.

9. Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act* (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), <https://acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.

10. Admin Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,312, 94,314 (Dec. 13, 2016), reproduced as Appendix B to this book.

Since ACUS may not be familiar to readers of this book, I introduce it here. ACUS is a small independent federal government administrative agency created by statute in 1964 that began operation in 1968. Its function is to study the federal governmental administrative process and make recommendations for improvement of that process. ACUS has a small permanent staff, and it hires outside consultants to perform many of its studies. ACUS's Assembly consists of about 100 members, roughly 60% of whom are drawn from government agencies and the rest drawn from the private sector or academic institutions. The Assembly votes to adopt recommendations. Many of these recommendations have led to statutes or to administrative innovations in the federal government. Through its Office of the Chairman, ACUS also issues stand-alone reports and engages in other research-related activities, among them preparation of the database that underlies much of this book. ACUS was defunded in 1995, but the statute authorizing it was never repealed. It was refunded in 2009 and resumed operations soon thereafter. It is going strong today.<sup>11</sup>

My study of Type B adjudication began with the construction of a database that was jointly funded by ACUS and Stanford Law School. The database contains information about all of the schemes of Type A and Type B federal agency adjudication (with the exceptions of military and foreign affairs adjudication, which were omitted because of resource constraints).

ACUS staff did enormous amounts of work gathering, inputting, and verifying<sup>12</sup> information in the database, which I gratefully acknowledge here.<sup>13</sup> The database material was my starting point in researching Type B adjudication. The database is open to the public and can be accessed at <https://acus.law.stanford.edu>. The descriptions of Type B agency practice contained in the Appendices to this book contain database identifying numbers that enable the reader to access the relevant portions of the database quickly.

## E. FORMAL AND INFORMAL ADJUDICATION

This book does *not* refer to Type B adjudication as “informal” adjudication. The word “informal” is commonly used in practice and in scholarship to cover both Types B and C adjudication,<sup>14</sup> but this usage creates a false picture of Type B adjudication. The hearings in schemes of Type B adjudication usually contain most or all of the same

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11. See the numerous articles about ACUS in Symposium, *Fiftieth Anniversary of the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1133–1826 (2015).

12. The database was constructed from publicly available information; ACUS attempted to obtain verification from agency officials of the information in the database but was not always successful in obtaining it. The database indicates what information has been verified.

13. I also express my gratitude to Stanford Law School Dean Elizabeth Magill for helping to fund the database and to professional database builders Irina Zachs and Alex Shor for their tremendous technical efforts in organizing it.

14. See, e.g., Robert R. Kuehn, *Bias in Environmental Agency Decision Making*, 45 ENVTL. L. 957, 967–69 (2015).

formal elements and protections for private parties as Type A adjudication (aside from the requirement that ALJs preside).<sup>15</sup> Indeed, some systems of Type A adjudication (such as the inquisitorial Social Security disability program and disputes arising under Medicare) are *less* formal than many Type B schemes. Although scholarly works of administrative law as well as common practice lump Types B and C adjudication together as “informal adjudication,” this usage is incorrect and should be challenged. The term “informal adjudication” should be reserved for Type C adjudication in which decisions are not required to be based on evidentiary hearings.

Type B adjudication should be recognized as a distinct category of federal administrative adjudication, different from both Types A and C. Because Type B adjudication is characterized by legally required evidentiary hearings, it is feasible to prescribe a set of best practices for such hearings, as discussed in Chapter 4. Specific statutory provisions, procedural regulations and agency-produced guidance documents, rather than general statutes like the APA, establish the parameters of Type B adjudication. The procedural regulations that structure Type B proceedings are an important form of internal administrative law—that is, law generated by agencies themselves—as opposed to the external administrative law generated by statutes and court decisions.<sup>16</sup> In contrast, schemes of Type C adjudication, which are vastly more numerous than Type B schemes, lack any unifying procedural element. This makes prescription of detailed codes of best practices difficult. I discuss a modest set of best practices for Type C adjudication in Chapter 5.

The world of Type B adjudication is vast and formless. How to map it presents a methodological puzzle. My approach has been to study about a dozen of the more important Type B adjudication schemes. These studies are the subject of Appendix A to this book. I believe that the adjudicatory schemes described in the Appendix are representative of the tremendous diversity of the Type B world. These studies were the basis of the best practices recommendations (discussed in Chapter 4) that I believe should be embodied in agency procedural regulations.

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15. See Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039, 31,039 (July 5, 2017), dealing with best practices for posting of adjudicatory materials on agency websites. The recommendation explicitly recognizes the category of Type B adjudication. Its recommendations for Type A and Type B adjudication are the same. The underlying report, however, refers to Type B proceedings as “semi-formal.” Daniel J. Sheffner, *Adjudication Materials on Agency Websites 2* (Apr. 10, 2017) (report to Admin. Conf. of U.S.), <https://acus.gov/report/adjudication-materials-agency-websites-final-report-0>.

16. On the subject of internal administrative law, see Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017); Nicolas R. Parrillo, *Introduction: Jerry L. Mashaw’s Creative Tension with the Field of Administrative Law*, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT* (Nicolas R. Parrillo ed., 2017).

## F. JUDICIAL DEFERENCE TO STATUTORY INTERPRETATION IN TYPE B ADJUDICATION

Under *Chevron*,<sup>17</sup> reviewing courts must accept a permissible and reasonable agency interpretation of an ambiguous statute. Under *Auer*,<sup>18</sup> reviewing courts must accept an agency interpretation of the agency's own regulation unless it is "plainly erroneous or inconsistent with the regulation." Both *Chevron* and *Auer* deference are owed to agency interpretations that occur in the process of adjudication as well as rulemaking.

The subjects of *Chevron* and *Auer* deference are vast and largely beyond the scope of this book.<sup>19</sup> However, it is worth highlighting an important issue: Is *Chevron* or *Auer* deference owed to an adjudicatory opinion rendered in Type B adjudication? The issue is pertinent at this point in the discussion because the Supreme Court's analysis of the issue relies on the term "formal adjudication."

In *Christensen* and *Mead*, the Supreme Court made clear that *Chevron* deference is owed to decisions made in "formal adjudication."<sup>20</sup> In *Mead*, the Court stated: "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a *relatively formal administrative procedure* tending to foster the fairness and deliberation that should underlie a pronouncement of such force. Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or *formal adjudication*."<sup>21</sup>

It seems clear that the term "formal adjudication," as used by the Supreme Court in the *Mead* opinion, refers to Type B as well as Type A adjudication. Numerous decisions by the Board of Immigration Appeals cases in Type B adjudication have qualified for *Chevron* deference,<sup>22</sup> despite the troubled state of administrative decision-making in immigration cases.<sup>23</sup> For example, single-member-non-precedential BIA decisions are eligible for *Chevron* deference if they rely on previous precedential BIA opinions.<sup>24</sup> However, according to some of the judges on the U.S. Court of Appeals for the Federal Circuit, neither informative nor precedential decisions of the Patent

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17. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

18. *Auer v. Robbins*, 519 U.S. 452 (1997).

19. *Chevron* and *Auer* are subject to considerable legislative, judicial, and academic criticism, and both are likely to evolve or perhaps be abolished. At the time this book was written, however, they remain in place.

20. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000); *United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001).

21. *Mead*, 533 U.S. at 230 (emphasis added).

22. See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999) (immigration cases are particularly appropriate subjects for *Chevron* deference because of Attorney General's wide statutory discretion); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (no *Chevron* deference because statute unambiguous); *Negusie v. Holder*, 555 U.S. 511, 521–25 (2009) (no *Chevron* deference because agency incorrectly thought itself bound by distinguishable prior precedent).

23. See text at note 721. See Shruti Rana, *Chevron Without the Courts? The Supreme Court's Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313 (2012).

24. *Gonzalez v. U.S. Att'y Gen.*, 820 F.3d 399, 404 (11th Cir. 2016).

Trademark and Appeal Board (PTAB) are entitled to *Chevron* deference because Congress intended that the issues involved in those decisions be resolved through rulemaking rather than adjudication.<sup>25</sup>

## G. DEFINITIONS

This sub-section provides some definitions of terms that are used throughout the book.

### 1. Adjudication

The term “adjudication” (or “administrative adjudication”) means:

- a decision by government officials made through an administrative process
- to resolve a claim or dispute between a private party and the government or between two private parties
- arising out of a government program.

This book covers only federal administrative adjudication. Therefore, it excludes adjudication by state or local officials even in cases where the adjudication arises under a federal program and is governed by federal regulations. The book also does not discuss adjudicatory decisions by non-governmental federal contractors.

### 2. Decision

The term “decision” means an agency action of *specific applicability*, as distinguished from an action of *general applicability* such as rulemaking.

Thus, agencies often adopt rules and regulations (these two words mean the same thing in American parlance) that have *generalized* application (meaning they apply to a described class of persons rather than having individualized application). Regulations are adopted through a rulemaking process that is prescribed in the APA.<sup>26</sup> That process requires broad public notice, an opportunity for public comment, and an explanation of the final rule. Regulations contain both procedural and substantive provisions. Among many other subjects, procedural regulations prescribe how the agency should go about taking actions such as adjudication. Substantive regulations provide the necessary details to fill out the statutes applicable to the agency. Both procedural and substantive regulations have the force of law, although procedural regulations can be adopted by agencies without undergoing the APA’s costly notice-and-comment process.<sup>27</sup>

The term “decision,” as used in this book, does not include a “front-line” decision by agency staff that constitutes the initial agency determination about whether to deny an application, issue a complaint, or impose a regulatory sanction, when that

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25. *Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1328–34 (op. of Moore, J.), 1338–40 (op. of Reyna, J.) (Fed. Cir. 2017) (en banc). Other judges in *Aqua Products* would apply both *Chevron* and *Auer* to PTAB informative and precedential decisions. *Id.* at 1338 (op. of Taranto, J.), 1358–67 (op. of Hughes, J.).

26. APA § 553.

27. APA § 553(b)(A).

“front-line” determination could be challenged through a subsequent Type A, B, or C adjudicatory process before an agency or through a de novo challenge before a court.

For example, the decision of an agency staff member (or even of the agency heads) to issue a complaint against a private party seeking a particular sanction (such as a civil penalty) will become binding unless the party challenges it through whatever adjudicatory procedure the agency provides. Similarly, the decision to reject a patent application, which can be challenged through Type B adjudication, is a front-line decision. These front-line decisions are not treated as “decisions” for purposes of this book.

Similarly, the term “decision” does not include an agency investigatory process, even if that process includes a hearing, if the decision in the investigatory process can be challenged through a subsequent Type A, B, or C adjudicatory process or through a de novo challenge in court.

### 3. Policy Implementation

The definition of “decision” also excludes a broad category of federal decisionmaking that might generally be called “policy implementation” and which is sometimes referred to as a form of “informal adjudication.”<sup>28</sup> Policy implementation decisions are not adjudication as defined above because they do not resolve disputes between the government and a private party (or between two private parties). Nor are they rulemaking, because they do not produce a rule that individuals are required to comply with. Policy implementation decisions often are limited by substantive standards and include required procedures;<sup>29</sup> they are sometimes judicially reviewable.<sup>30</sup>

A particularly well-known instance of policy implementation was the Department of Transportation’s decision selecting the route of an interstate highway. The chosen route took the highway through a park in Memphis, in apparent violation of a federal statute. This decision was found to be reviewable in the famous and pivotal *Overton Park* case.<sup>31</sup>

Other examples of policy implementation include priority setting, maintaining databases, allocating funds between programs, closing a post office, approving state Medicaid rate adjustments, administering grant-in-aid programs managed by states, managing public institutions such as hospitals or prisons, conducting envi-

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28. See *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 361–62 n.37 (D.C. Cir. 1981) (referring to decision whether to build a particular lock on the Mississippi River as “informal adjudication”). See also text at note 397.

29. See *Izaak Walton League*, 655 F.2d at 363–65 (requiring Corps of Engineers to hold a legally required public hearing to allow public to comment on proposal to build a lock on the Mississippi River).

30. Edward Rubin suggests that a standard of instrumental rationality should be imposed on policy implementation decisions. Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 173–81 (2003).

31. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971). *Overton Park* found DOT’s discretionary decision to build a highway through a park to be judicially reviewable and mandated hard-look judicial review of that exercise of discretion.

ronmental impact assessments, making decisions involving multiple uses of public lands, designating (or perhaps un-designating) public lands as national monuments or prohibiting mineral extraction,<sup>32</sup> siting airports or power plants, and protecting habitats of endangered species.<sup>33</sup>

#### 4. Evidentiary Hearing

The term “evidentiary hearing” means an adjudicatory proceeding at which the parties make evidentiary submissions and have an opportunity to rebut testimony and arguments made by the opposition, and to which the *exclusive record principle* applies. The exclusive record principle means that the decisionmaker is confined to considering evidence and arguments from the parties produced during the hearing process (as well as matters officially noticed) when determining factual issues. As further discussed in Chapter 2, the word “evidentiary hearing” excludes a variety of agency adjudicatory proceedings that might be described as “hearings,” but that lack the attributes of a determination at which the parties have an opportunity to make evidentiary submissions and to which the exclusive record principle applies.

#### 5. The APA’s Definitions of Rulemaking and Adjudication

The federal APA contains a set of definitions of rulemaking and adjudication,<sup>34</sup> but these definitions are flawed and do not describe actual practice.<sup>35</sup> Under these definitions, agency “adjudication” covers agency action for the formulation of an “order;” an “order” is a final disposition of an agency in a matter other than rule making but including licensing.” And, critically, the APA defines the term “rule” as agency action of “general or *particular* applicability and future effect.”

However, the inclusion of the words “or particular” is a drafting error. To illustrate, a decision of the Federal Trade Commission (FTC) ordering a specific business to cease and desist from some sort of advertising has “particular applicability” and “future effect,” so under the APA definitions, the FTC’s cease and desist order would be treated as rulemaking rather than adjudication. However, in practice, everyone regards the FTC’s order as adjudication, not rulemaking. Because it is Type A adjudication, the APA’s formal adjudication provisions apply, not the rulemaking

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32. See Nat’l Mining Ass’n v. Zinke, 877 F.3d 845 (9th Cir. 2017).

33. See Michael Asimow & Yoav Dotan, *Open and Closed Judicial Review of Agency Action: The Conflicting U.S. and Israeli Approaches*, 64 AM. J. COMP. L. 521, 530–33 (2016).

34. APA § 551(4): “rule” means “an agency statement of general or particular applicability and future effect”; APA § 551(5): “rule making” means “agency process for formulating . . . a rule”; APA § 551(6): “order” means “a final disposition . . . of an agency in a matter other than rule making but including licensing”; APA § 551(7): “adjudication” means “agency process for the formulation of an order”; APA § 551(8): “license” includes “an agency permit . . . or other form of permission.”

35. See Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of “Rule”*, 56 ADMIN. L. REV. 1077 (2004).



provisions. As a result of this drafting error, the courts often benignly ignore the APA's definitions.

The unworkability of the APA's definitions of "rule" and "order" are illustrated by the *Neustar* decision.<sup>36</sup> The case arose out of a statutory provision requiring the Federal Communications Commission (FCC) to assure portability of phone numbers—thus allowing users to keep the same number when they switch local service providers. The statute and regulations required the FCC to appoint a private Local Number Portability Administrator (LNPA), which it did through a bidding process. The FCC selected Telcordia to replace Neustar as the LNPA through a Type C adjudication process. Neustar argued that the Telcordia was not qualified to be the LNPA. Moreover, it argued that the decision was the adoption of a "rule" and thus could only be adopted after pursuing the APA's rulemaking procedures (which require public notice and comment). After all, the decision to choose Telcordia was of "particular applicability and future effect"—the APA's definition of "rule."

The court decided that informal adjudication procedure was appropriate because the decision to choose Telcordia was an "order," not a "rule." The court basically ignored the APA definitions of rulemaking and adjudication. Instead it decided that adjudication was more appropriate to make this "fact-intensive determination that occurred on a case-by-case basis . . . . The individualized determination was not intended to impact law or policy; rather it resolved interests in a specific bidding situation."

Because the APA's definitions are flawed, I do not use them in this book but instead rely on the distinction between general and specific agency action. As discussed above, adjudication is agency action of specific application, and rulemaking is agency action of general application.<sup>37</sup>

## H. ADDITIONAL RESEARCH

For convenience of the reader, this sub-part summarizes the prior research on which I drew heavily in writing the ACUS study of Type B adjudication and this book as well as contemporaneous research on non-ALJ hearings.

A massive 1992 ACUS study, *The Federal Administrative Judiciary*,<sup>38</sup> described and analyzed both Type A and Type B adjudication and did extensive research into the

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36. *Neustar, Inc. v. FCC*, 857 F.3d 886, 895 (D.C. Cir. 2017).

37. *See also Safari Club Int'l v. Zinke*, 878 F.3d 331–34 (D.C. Cir. 2017), finding that agency action had generalized rather than particularized application. The disputed action was a press release by the Fish and Wildlife Service (FWS) that the killing of Zimbabwean elephants would not enhance the survival of the species. The result of this determination was a ban on imports of elephant trophies from Zimbabwe. In applying the APA, the court relied on the due process cases drawing the particularized/generalized distinction. *See text* at notes 34–36. Therefore, the agency action was not informal adjudication that required no procedures but rulemaking that required notice and comment.

38. Paul R. Verkuil, Daniel J. Gifford, Charles H. Koch, Jr., Richard J. Pierce, Jr., & Jeffrey S. Lubbers, *The Federal Administrative Judiciary*, 1992 ACUS 779 [hereinafter 1992 ACUS Study], <https://www.acus.gov/publication/federal-administrative-judiciary>. That report led to adoption of ACUS Recommendation 92-7, *The Federal Administrative Judiciary*, 57 Fed. Reg. 61,759 (Dec. 29, 1992).

status of the AJs who conduct Type B adjudication. The 1992 ACUS report questioned the existing allocation of adjudicatory schemes between Type A and Type B.<sup>39</sup>

Former ACUS Chair Paul Verkuil analyzed a number of schemes involving Type B and Type C adjudication.<sup>40</sup> Verkuil assessed the degree to which these schemes complied with the due process requirements sketched by *Goldberg v. Kelly*, the leading procedural due process case at that time.<sup>41</sup> He discussed the appropriateness of various forms of procedural protection in the context of the particular substantive scheme.

Two studies by John Frye and Ray Limon sought to map the world of Type B adjudication. These studies gathered statistical data on the caseload of the various Type B schemes and the judges who decided them. The studies take snapshots of Type B adjudication in 1992 and again in 2002.<sup>42</sup>

The American Bar Association's (ABA's) Section of Administrative Law and Regulatory Practice published a guide to Type A adjudication.<sup>43</sup> The Section also sponsored a resolution adopted by the ABA's House of Delegates that urged Congress to amend the APA to extend some (but not all) of the APA's Type A adjudication provisions to Type B adjudication.<sup>44</sup> I published an article supporting this resolution.<sup>45</sup>

Several works attempt to identify best practices for Type C adjudication<sup>46</sup> or consider the criteria for the study of decisionmaking in Type C adjudicatory schemes.<sup>47</sup> Another paper produced a comparative analysis of high-volume adjudicatory systems (both Types A and B).<sup>48</sup>

A recent ACUS study by Kent Barnett, Logan Cornett, Malia Reddick, and Russell Wheeler (hereinafter referred to for convenience as the Barnett study) broadly surveys

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39. 1992 ACUS Study, *supra* note 38, at 843–73.

40. Paul R. Verkuil, *A Study of Informal Adjudication Procedure*, 43 U. CHI. L. REV. 739 (1976).

41. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

42. John H. Frye, III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261 (1992); RAY LIMON, OFFICE OF PERS. MGMT., OFFICE OF ADMIN. LAW JUDGES, *THE FEDERAL ADMINISTRATIVE JUDICIARY THEN AND NOW: A DECADE OF CHANGE 1992–2002*.

43. *A GUIDE TO FEDERAL AGENCY ADJUDICATION* (Jeffrey B. Litwak ed., 2d ed. 2012) [hereinafter ABA Guide].

44. House of Delegates, Am. Bar Ass'n, Resolution 114 (Feb. 2005) [hereinafter ABA Resolution 114].

45. Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003 (2004).

46. Warner W. Gardner, *The Procedures by Which Informal Action is Taken*, 24 ADMIN. L. REV. 155 (1972).

47. William J. Lockhart, *The Origin and Use of "Guidelines" for the Study of Informal Action in Federal Agencies*, 24 ADMIN. L. REV. 167 (1972).

48. Daniel L. Skoler, *The Many Faces of High-Volume Administrative Adjudication: Structure, Organization, and Management*, 15 J. NAT. ASS'N ADMIN. L. JUDGES 43 (1996).

the subject of non-ALJ adjudicators in a variety of hearing schemes.<sup>49</sup> The Barnett study was based on survey instruments sent to numerous federal agencies that conduct Type B adjudication (including many that are not covered by my ACUS study or the Appendices in this book). The Barnett study focuses on the degree of non-ALJ independence from their employing agencies, including such important subjects as hiring, compensation, performance evaluation, removability, physical separation, and direct supervision. The Barnett study makes a number of recommendations relating to integrity of the decision-making process that are broadly consistent with the best practice recommendations discussed in Chapter 4 of this book.

## I. ABBREVIATIONS

For convenience of the reader, these are abbreviations of agencies (and in some cases adjudicatory schemes) used throughout the book.

CBCA	Civilian Board of Contract Appeals
DOE OHA	Department of Energy, Office of Hearings and Appeals
EEOC	Equal Employment Opportunity Commission
EOIR	Executive Office of Immigration Review
EPA-EAB	Environmental Protection Agency, Environmental Appeals Board
HHS-DAB	Department of Health and Human Services, Department Appeals Board
MSPB	Merit Systems Protection Board
PRRB	Provider Reimbursement Review Board
USDA PACA	U.S. Department of Agriculture, Perishable Agricultural Commodities Act
USPTO-PTAB	United States Patent and Trademark Office, Patent Trial and Appeal Board
USPTO-TTAB	United States Patent and Trademark Office, Trademark Trial and Appeal Board
VA BVA	Veterans Administration, Board of Veterans' Appeals

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49. Kent Barnett, Logan Cornett, Malia Reddick, & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight and Removal* (Feb. 14, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal>. Barnett's findings are also discussed in a forthcoming article, *Some Kind of Hearing Officer*, 94 WASH. L. REV. (forthcoming 2019).



## CHAPTER 2

# TYPES A, B, AND C ADJUDICATION

This chapter discusses the problem of distinguishing among Types A, B, and C adjudication (terms that were introduced in Chapter 1). It also provides statistical information about important schemes of Type B adjudication.

In Type A proceedings, the formal adjudication provisions of the APA<sup>50</sup> (supplemented by agency procedural regulations) prescribe the details of the required hearing. The most important of these APA provisions requires that an administrative law judge (ALJ) preside over the trial-type hearing (unless a relevant statute provides for a different presiding officer).<sup>51</sup> The APA also prohibits outsider *ex parte* contacts to the ALJ or agency head and assures separation of prosecutorial and adjudicatory functions.<sup>52</sup>

In Type B adjudication, federal law (in the form of a statute, regulation, or executive order) requires the agency to conduct an evidentiary hearing, but the details are prescribed by agency-specific statutory provisions and by procedural regulations, not by the APA. Normally, an administrative judge (AJ) presides over a Type B evidentiary hearing. In Type C adjudication, no evidentiary hearing is legally required.

### A. THE BORDER BETWEEN TYPE A AND TYPE B ADJUDICATION

The “gateway” provision of the APA defines which adjudicatory schemes are Type A proceedings. According to the gateway, the APA adjudication provisions cover “every case of adjudication required by statute to be determined *on the record* after opportunity for an agency hearing.”<sup>53</sup>

Some statutes explicitly declare whether the adjudicatory proceedings authorized by the statute are governed by the adjudicatory provisions of the APA. Unfortunately, in many cases, statutes that call for evidentiary hearings do not explicitly state whether the APA applies to them. This requires a court to decide whether the statute explicitly calls for a determination “on the record.” However, this “magic words” approach is defective. The decisionmaker at most evidentiary hearings maintains a “record” of the proceedings in the sense that what is said is written down or recorded, and the

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50. APA §§ 554, 556, 557.

51. APA § 556(b)(3). Under § 556(b)(1) or (2), the agency head or heads can preside at hearings, but this alternative is rarely employed.

52. APA §§ 554(d), 557(d).

53. APA § 554(a) (emphasis added). This section contains 6 exceptions.

normal assumption is that this record is “exclusive.” This means that the adjudicator is limited to that “record” (including material that is the subject of official notice) in deciding factual issues in the case. Because this kind of record is maintained at both Type A and Type B proceedings, the term “on the record” fails to distinguish Type A from Type B proceedings.

Consequently, there is a gray area in interpreting statutes that call for evidentiary hearings but do not explicitly resolve the issue of whether the APA applies. The prevailing approach is to interpret such statutes through *Chevron* methodology.<sup>54</sup> Statutes calling for a “hearing,” a “public hearing,” or an “appeal” (but not using the magic words “on the record”) are “ambiguous,” so that a reviewing court must defer to the agency’s reasonable interpretation that the APA does not apply.<sup>55</sup> Numerous authors have questioned this approach.<sup>56</sup> *Chevron* presumes that Congress intends to delegate interpretive authority to an agency by passing an ambiguous statute; it seems unlikely that Congress would have intended an agency to make the final call on whether a quasi-constitutional trans-substantive statute like the APA should apply to its adjudicatory proceedings.

Another approach to the question of applying the APA gateway provision is to assume that Congress wants the APA to apply to adjudicatory hearings involving serious issues of public policy. However, the leading authority to that effect has been overruled.<sup>57</sup>

Still another approach assumes that Congress does not want the APA to apply unless a statute explicitly says that it applies or explicitly uses the magic words “hearing on the record.”<sup>58</sup>

Finally, a fourth approach to the problem has recently emerged. Under this approach, the APA applies to statutes that call for evidentiary hearings that appear to assume record exclusivity but do not use the magic words “hearing on the record.” One line of cases involves the question of whether the Equal Access to Justice Act (EAJA)<sup>59</sup>

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54. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). Under *Chevron*, if a statute is “ambiguous,” the court must accept an agency’s reasonable interpretation of the statute. As this book is written, Congress is considering legislation that would abolish the *Chevron* doctrine. See Separation of Powers Restoration Act of 2017, S. 1577, 115th Cong. § 2 (2017). In addition, judicial reconsideration of *Chevron* is a definite possibility. In case of either legislative or judicial change to the *Chevron* doctrine, the courts would have to re-examine the prevailing approach to the gateway problem.

55. *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006); *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989).

56. See, e.g., William Funk, *Slip Slidin’ Away: The Erosion of APA Adjudication*, 122 PENN. ST. L. REV. 141, 150–52 (2017); Cooley Howarth, *Restoring the Applicability of the APA’s Adjudicatory Procedures*, 56 ADMIN. L. REV. 1043 (2004).

57. *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978), overruled by *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006). Arguably, *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977), stands for the same proposition as *Seacoast* and has not been overruled.

58. *City of W. Chi. v. NRC*, 701 F.2d 632 (7th Cir. 1983).

59. EAJA requires agencies to pay the attorney fees of a prevailing private party (up to a rather low limit) when the government’s position in an agency adjudication or federal-court case the case was not “substantially justified.” 5 U.S.C. § 504 (agency adjudication), 28 U.S.C. § 2412(d) (federal court case).

applies to decisions by the National Appeals Division (NAD) of the Department of Agriculture (USDA). The Supreme Court has made it clear that EAJA is applicable only to hearings governed by the APA's formal adjudicatory provisions—that is, Type A proceedings.<sup>60</sup> NAD resolves disputes arising under numerous statutory provisions relating to agricultural grants, loans, or insurance. The statute calls for evidentiary hearings that are conducted by administrative judges (AJs) appointed by the Secretary of Agriculture, but the statute does not use the magic words “on the record.”

USDA interpreted the statute not to require it to follow the APA. Several decisions rejected USDA's position and held that the APA applies to NAD hearings, so that prevailing plaintiffs are entitled to EAJA attorney fee awards. These decisions held that the APA formal adjudication provisions apply to NAD hearings because the statutory provisions relating to those hearings contain most of the elements of Type A adjudication. As a result, NAD AJs are limited to the record in deciding factual issues.<sup>61</sup> After losing in three circuits, USDA conceded the issue and now applies the APA and EAJA to NAD hearings.<sup>62</sup>

A second line of cases, all decided by the Federal Circuit, hold that Patent Trial and Appeal Board inter partes trial cases<sup>63</sup> are “formal adjudication.” As a result, these decisions hold that the APA's provisions on notice, right to rebuttal, and findings and reasons<sup>64</sup> apply directly to PTAB decisionmaking.<sup>65</sup> None of the cases analyzes the existing body of law concerning whether a statute calling for a “hearing” is sufficient to trigger the APA.

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60. *Ardestani v. INS*, 502 U.S. 129 (1991).

61. *Lane v. USDA*, 120 F.3d 106, 108–10 (8th Cir. 1997); *Aageson Grain & Cattle v. USDA*, 500 F.3d 1038, 1043–46 (9th Cir. 2007); *Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1125–29 (7th Cir. 2008). *But see* *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 448–49 (D.C. Cir. 1989) (fact that statutory procedures approximate those of the APA is not sufficient to make EAJA applicable). *See* Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication* 18–21 (forthcoming).

62. 7 C.F.R. § 11.4(a). Normally, a decision that the APA applies to a particular hearing scheme means an ALJ must preside, which would have significantly disrupted USDA operations. However, these EAJA decisions do not require that ALJs preside in NAD hearings because the applicable statute permits USDA to utilize non-ALJ presiding officers selected from USDA's staff. The APA permits statutes to designate types of presiding officers other than ALJs. APA § 556(b).

63. *See* Appendix A-10 for discussion of PTAB trial cases.

64. *See* APA §§ 554(b)–(c), 557(c).

65. *Anacor Pharm., Inc. v. Iancu*, 889 F.3d 1372, 1379 (Fed. Cir. 2018); *Rovalma, S.A. v. Bohler-Edelstahl GmbH & Co.*, 856 F.3d 1019, 1029 (Fed. Cir. 2017); *Novartis AG v. Torrent Pharm. Ltd.*, 853 F.3d 1316, 1324 (Fed. Cir. 2017); *In re Nuvasive, Inc.*, 841 F.3d 966, 971 (Fed. Cir. 2016); *Dell, Inc. v. Acceleron LLC*, 818 F.3d 1293, 1301 (Fed. Cir. 2016); *Synopsis, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1322 (Fed. Cir. 2016); *Belden Inc. v. BerkTek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015). These cases are criticized in Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. (forthcoming 2019) (manuscript at 22–25).

Still another unresolved issue concerning APA applicability arises when an evidentiary hearing is required by due process but not by a statute.<sup>66</sup> In the famous *Wong Yang Sung* decision,<sup>67</sup> rendered in 1950 just a few years after the APA was adopted in 1946, the Supreme Court interpreted the APA to apply to evidentiary hearings required by due process (but not required by statute).<sup>68</sup>

The *Wong Yang Sung* decision has been mostly ignored in subsequent decades because it is impracticable.<sup>69</sup> As discussed in Chapter 3, beginning in the 1970s, the Supreme Court avoided a fixed template when it determined what process was due. Instead, the nature of procedural protections in a hearing governed by due process depends on the specific context. A court must balance the factors of the strength of the private interest involved in the case, the strength of the government's interest in avoiding the procedure under consideration, and the extent to which that procedure is likely to enhance the accuracy of the process.<sup>70</sup> This balancing analysis often calls for much less formality than the APA would require. Consequently, application of the APA would be inappropriate in many cases of hearings required by due process.

There is a pressing need for Congress or the Supreme Court to resolve the question of whether the APA applies to gray area cases and to evidentiary hearings required by due process but not by statute. This book takes no position on the issue of how to distinguish Type A and Type B adjudication. If the agency conducts legally required evidentiary hearings but does not presently apply the APA, this report assumes that its evidentiary hearings are Type B proceedings.

The question of whether Congress should transfer Type B adjudicatory schemes to Type A is beyond the scope of this book.<sup>71</sup> The 1992 ACUS study<sup>72</sup> rec-

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66. See Chapter 3 for discussion of due process. As relevant to this discussion, when due process is applicable, it requires notice, a fair hearing, and a neutral decisionmaker.

67. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50–51 (1950).

68. “It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake. We hold that the Administrative Procedure Act [§ 554] does cover deportation proceedings conducted by the Immigration Service.” *Id.*

69. See Robert E. Zahler, Note, *The Requirement of Formal Adjudication Under Section 5 of the Administrative Procedure Act*, 12 HARV. J. ON LEGIS. 194, 218–41 (1975); *Clardy v. Levi*, 545 F.2d 1241, 1244–46 (9th Cir. 1976) (declining to apply APA formal adjudication rules to federal prison disciplinary cases even though due process then required a hearing in such cases). *But see* *Funk*, *supra* note 56, at 150–52 (urging that *Wong Yang Sung* be followed). The Ninth Circuit has applied *Wong Yang Sung* so as to require the government to pay attorneys’ fees of prevailing parties in mining claim disputes. *See* text at notes 66–68. *Collord v. DOI*, 154 F.3d 933, 936–37 (9th Cir. 1998).

70. *See* text at notes 121–30.

71. *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643 (2016) (urging conversion of AJs to ALJs). *But see* Gary J. Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on “Ossifying” the Adjudication Process*, 55 ADMIN. L. REV. 787 (2003) (opposing conversion of Type B hearings to Type A but favoring the adoption of procedural standards for Type B).

72. *See* Recommendation 92-7, *supra* note 38. *See also* 1992 ACUS Study, *supra* note 38, and text at notes 38–41.



ommended that some existing schemes of Type B adjudication that involve serious sanctions implicating important liberty and property interests (such as deportation) be converted to Type A, because the use of ALJs instead of AJs would enhance the acceptability of the process.<sup>73</sup> However, Congress took no action in response to this recommendation.

The ABA has recommended that future statutes calling for a “hearing” should be governed by the APA unless Congress explicitly provides to the contrary.<sup>74</sup> Again, this book does not take a position on that issue. Nor does this book consider whether an agency conducting Type B adjudication should adopt regulations that convert its hearings into Type A rather than Type B. Such a decision (which would involve among other things turning AJs into ALJs) would involve complex legal and practical issues that I have not considered.<sup>75</sup>

## **B. THE BORDER BETWEEN TYPE B AND TYPE C ADJUDICATION**

An agency conducts Type B adjudicatory proceedings when a source of law (a statute, regulation, or executive order) requires it to conduct an evidentiary hearing before making an adjudicatory decision, but the APA’s formal adjudication provisions are inapplicable. In contrast, a Type C proceeding is one in which an evidentiary hearing is not legally required, even though the agency is empowered to render an adjudicatory decision that is binding on private parties or on itself. The definition of “evidentiary hearing” thus becomes critical, but it is not an easy term to define, and the definition is not always easy to apply.

As it is used in this book, the term “evidentiary hearing” means one in which both parties have an opportunity to offer testimony and rebut the testimony and arguments made by the opposition and to which the *exclusive record principle applies*. The exclusive record principle means that the decisionmaker receives written or oral submissions of information from the parties *and* the decisionmaker is confined to those inputs (as well as matters officially noticed) when making the decision.

The term “evidentiary hearing” does not require orality; in some Type B hearings, the decisionmaker considers only written documents (with or without an oral argu-

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73. 1992 ACUS Study, *supra* note 38, at 779, 1046–50. *See also* Recommendation 92-7, *supra* note 38.

74. House of Delegates, Am. Bar Ass’n, Resolution 113 (June 2000). For criticism of this recommendation, see Edles, *supra* note 71.

75. An ACUS study relating to the EEOC gave detailed consideration to whether EEOC could restructure its Type B federal discrimination adjudicatory scheme (see Appendix A-6) by converting its AJs to become ALJs, without first securing implementing legislation. The study indicates that the EEOC probably has power to do so. *See also* Matthew Lee Wiener et al., Admin. Conf. of the U.S., Office of the Chairman, Equal Employment Opportunity Commission: Evaluating the Status and Placement of Adjudicators in the Federal Sector Hearing Program 23–27 (Mar. 31, 2013), <https://www.acus.gov/report/equal-employment-opportunity-commission-evaluating-status-and-placement-adjudicators-federal> (discussing the EEOC’s authority to appoint ALJs to preside over its hearings). The budgetary cost to the EEOC of such a conversion would be quite substantial (several million dollars per year, depending on various assumptions). *Id.* at 42–48.

ment). Nor does the term “evidentiary hearing” require that a particular case involve a dispute about adjudicative or legislative facts. Even if a particular case centered on a dispute over legal interpretation of a statute or regulation or involved only an exercise of discretion, it would still be considered an “evidentiary hearing” if other cases arising under the same legal authority do contain factual disputes.

The term evidentiary hearing does *not* include:

- A “public hearing” at which the members of the public are invited to make statements (for example in response to an application for development), but the statements do not furnish the exclusive record for decision.<sup>76</sup>
- A legally required conference between a private party and the decisionmaker that is not intended to be the exclusive source of the information considered by the decisionmaker.
- A “review” that does not include an opportunity for submission of new evidence (such an intra-agency higher-level appeal of an initial decision).<sup>77</sup>
- Many hearings required by due process. As discussed in Chapter 3, many hearings required by procedural due process are not “evidentiary” hearings. Due process is sometimes satisfied by an informal conference that is not subject to the exclusive record constraint or other procedural protections.<sup>78</sup> Consequently, due process often calls only for Type C rather than Type B adjudication. Sometimes, due process is satisfied by judicial rather than administrative proceedings.<sup>79</sup> Of course, in many situations, due process does require evidentiary hearings, and the best practice recommendations set forth in Chapter 4 might be appropriate for such cases.<sup>80</sup>

In the end, a certain degree of judgment is called for in deciding whether a legally-required adjudicatory procedure is an evidentiary hearing. Fortunately, however, that boundary line need not be marked with precision, because this book does not

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76. For example, before issuing a permit for discharge of material into navigable waters, the Army Corps of Engineers must give public notice and conduct a public hearing. 33 U.S.C. § 1344(a).

77. Most agencies provide for some sort of intra-agency appeal or review of their initial adjudicatory decisions. *See* Best Practice Recommendation 4.b., Chapter 4. This review is based on the record made at the initial decision phase, not a *de novo* consideration of the case. The higher-level review function is not treated as a separate Type B proceeding.

78. For example, in the case of short-term school suspensions, due process requires only a conference between the student and the decisionmaker. *Goss v. Lopez*, 419 U.S. 565, 573 (1975). In the case of employee termination, a pre-termination hearing is required, but it is little more than a conference where employees can tell their side of the story. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542–46 (1985). In the case of termination of utility service for nonpayment of bills, only a conference with a utility staff member is required. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9–12 (1978).

79. *Ingraham v. Wright*, 430 U.S. 651, 678–80 (1977) (no agency hearing required in case of corporal punishment because state tort law provides remedy); *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196–98 (2001) (no agency hearing required when government breaches contract because court remedies are sufficient).

80. *Goldberg v. Kelly*, 397 U.S. 254, 269–71 (1970) (pre-termination hearings in welfare cases require elaborate procedural protections).

recommend adoption of a statute that turns on the distinction. It suggests only that agencies engaged in Type B adjudication incorporate certain best practices in their procedural regulations. It also recommends that agencies conducting Type C adjudication incorporate a much less demanding set of best practices in their procedural regulations. As a result, agencies would be encouraged to make common sense determinations as to whether their legally-required procedures fall into the Type B pigeonhole rather than the Type C pigeonhole. If Type C agencies decide to adopt some of the recommended Type B best practices, so much the better.

### C. STATISTICAL DATA ON IMPORTANT TYPE B ADJUDICATION SCHEMES

This part of Chapter 2 supplies recent statistical data about the world of Type B adjudication, usually for federal government fiscal year 2016. The Type B adjudicatory schemes covered in these tables are the same ones discussed in Appendix A. This book studies about a dozen of the most important schemes of Type B adjudication. Numerous other Type B adjudicating agencies were not studied.<sup>81</sup>

Table 1 concerns the workload of Type B agencies (as contrasted with their workload in 1992 and 2002, if that information is available). The final column supplies data on pending cases, but this information is incomplete.

For those schemes for which I was able to obtain current data and also comparable 1992 or 2002 data, the table shows a significant increase in workload. For example, EOIR's caseload increased from 152,372 (1992) and 254,000 (2002) to about 306,000 (combining Immigration Court (IC) and Board of Immigration Appeals (BIA) cases). BVA cases increased from 31,000 (2002) to 56,000. DOE security clearance cases increased from 65 to 106. EEOC federal employee cases rose from 6,227 (1992) to 8,086. Thus, the workload of Type B adjudicating agencies is growing steadily.

Many Type B agencies have significant backlogs. EOIR's backlog is well over 600,000 cases at the IC level and 13,390 at the BIA level; VA BVA's backlog is 67,000 cases.

In the following tables, a blank cell means information is not available. These are the abbreviations used in the tables:

ALJ	Administrative Law Judge
AJ	Administrative Judge
APJ	Administrative Patent Judge

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81. An ACUS study by Kent Barnett, Logan Cornett, Malia Reddick and Russell Wheeler surveyed non-ALJ adjudication. Barnett, *supra* note 49. The Barnett study provides similar data about numerous schemes of Type B adjudication that are not discussed in this book.

<b>BIA</b>	Board of Immigration Appeals
<b>BVA</b>	Board of Veterans' Appeals
<b>CBCA</b>	Civilian Board of Contract Appeals
<b>DOE</b>	Department of Energy
<b>EEOC</b>	Equal Employment Opportunity Commission
<b>EOIR</b>	Executive Office of Immigration Review
<b>EPA-EAB</b>	Environmental Protection Agency, Environmental Appeals Board
<b>HHS-DAB</b>	Department of Health and Human Services-Department Appeals Board
<b>MSPB</b>	Merit Systems Protection Board
<b>OHA</b>	Office of Hearing and Appeals, Department of Energy
<b>PRRB</b>	Provider Reimbursement Review Board
<b>USDA PACA</b>	U.S. Department of Agriculture, Perishable Agricultural Commodities Act
<b>USPTO-PTAB</b>	United States Patent and Trademark Office—Patent Trial and Appeal Board
<b>USPTO-TTAB</b>	United States Patent and Trademark Office—Trademark Trial and Appeal Board
<b>VA BVA</b>	Veterans Administration Board of Veterans Appeals

TABLE 1: WORKLOAD OF TYPE B ADJUDICATING AGENCIES				
Agency/scheme	Frey (1992 caseload) <sup>1</sup>	Limon (2002 caseload) <sup>2</sup>	Current caseload	Pending cases
USDA PACA	255		24	
CBCA			423	
Debarment & Suspension			4,249	
DOE Security Clearance		65	106	
DOE Whistleblowers			20	
EPA-EAB			about 60	
EEOC	6,227	See note <sup>3</sup>	8,086	10,363
EOIR	152,372	IC 254,070	IC 273,390 BIA 33,240	IC 600,000 BIA 13,930
HHS-DAB (Grants)			20 <sup>4</sup>	
MSPB	7,124	7,174	8,602 AJ; 1,180 Board	4,586
PRRB			3,907 <sup>5</sup>	7,124
USPTO-PTAB	5,782	5,319	10,000 appeals; 2,000 trials	13,000 appeals; 700 trials
USPTO-TTAB	3,503	754	649 appeals; 127 trials	65 appeals; 28 trials
VA BVA	42,000	31,557	56,000	67,000

Table 2 compares the number of AJs in the programs studied with the number of AJs in 1992 and 2002.<sup>82</sup> It also makes a rough estimate of the current annual caseload per AJ (cases filed or decided divided by the number of AJs). Table 2 shows a steady increase in the number of AJs from 1992 to 2002 to the present (although complete data are not available and some of the 1992 and 2002 statistics are not comparable to the present).

82. The figures given in Table 2 do not exactly match those given in Figure 1 of the Barnett study, *supra* note 49, at 19–21, though the numbers are roughly similar for the schemes that are discussed in both the Barnett study and this book. The authors of the Barnett study drew their information from survey instruments sent to agencies (some of whom did not respond to the request), whereas my figures are based in most cases on agency annual reports and other data posted on the internet. The difference in AJ numbers may, therefore, simply reflect AJ populations at different dates. The Barnett study also classified some decisionmaking personnel differently than I did. For example, Barnett included 7,856 patent examiners employed by the USPTO (the patent examiners constituted 72% of Barnett’s total of 10,831 non-AJJs). However, I did not include patent examiners since I treated them as front-line decisionmakers. The same is true of a number of VA regional-office personnel counted as non-AJJs by Barnett. See text at note 49.

TABLE 2: NUMBER OF AJS AND CASELOAD PER AJ

Agency/scheme	# AJs Frey Study (1992)	# AJs Limon Study (2002)	# AJs (Current)	Caseload per AJ per Year (Current)
USDA PACA	86			
CBCA			14	60
Debarment & Suspension			See note <sup>6</sup>	
DOE (Security & Whistleblowers)		19	12 OHA	21 OHA
EPA EAB		4	4	45 (panels of 3)
EEOC	79	See note <sup>7</sup>	110	65
EOIR	76	228	334 IJs; 17 BIA	>1,000 IJs; 1,750 BIA
HHS-DAB			See note <sup>8</sup>	
MSPB	66	62	60	143
PRRB				See note <sup>9</sup>
USPTO PTAB APJs	58	62 <sup>10</sup>	225	132 (panels of 3)
USPTO TTAB ATJs	9	15	25	96 (panels of 3)
VA BVA	44	56	72	660

**Table 1 Footnotes**

1. See Frye, *supra* note 42.
2. See LIMON, *supra* note 42.
3. Limon gives a figure of 21,734 for the EEOC workload. The figure does not seem comparable to current data. Limon may be counting non-government employees whose cases are investigated and mediated by the EEOC.
4. DAB resolves around 60 cases per year, and about one-third are grant cases; the balance are appeals from ALJ decisions and thus are Type A.
5. These figures are for FY 2013. Current information not available.

**Table 2 Footnotes**

6. Because debarment/suspension decisions are distributed over the entire government, it is not known how many SDOs are employed.
7. Figures not comparable.
8. DAB cases are heard by panels of the full Board. It does not use AJs.
9. PRRB has no AJs and decides all cases by the full five-member board. PRRB issues about 25 substantive decisions and hundreds of jurisdictional decisions per year. See Appendix A-11.
10. Limon figures are not comparable to current operations because PTAB's jurisdiction has greatly increased.

## CHAPTER 3

# PROCEDURAL PROTECTIONS

This chapter surveys constitutional and statutory procedural protections that apply to parties engaged in Types A, B, and C adjudication. These protections are derived from procedural due process, statutory requirements of a “hearing” or an “opportunity to comment,” and APA §§ 555 and 558. Of course, in Type A adjudication, most procedural protections are derived from §§ 554, 556, and 557 of the APA, which are not discussed in this book. In Type B adjudication, most procedural protections are derived from procedural regulations, as discussed in Chapter 4 and in Appendix A.

### A. PROCEDURAL DUE PROCESS<sup>83</sup>

#### 1. Basic Principles

Both the Fifth Amendment (applicable to the federal government) and the Fourteenth Amendment (applicable to state and local governments) provide that “no person . . . [shall] be deprived of life, liberty, or property without due process of law.”<sup>84</sup> Essentially, the due process clauses provide procedural protections for private individuals and business interests threatened by loss of liberty or property interests.<sup>85</sup> The requirement of due process attaches only to “state action,” meaning actions taken by government entities, rather than to actions taken by private entities.<sup>86</sup> In general, when due process applies, it guarantees fair notice, a fair hearing, and a neutral decisionmaker.

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83. See ABA Guide, *supra* note 43. I wrote the due process discussion in the first edition of the *Guide*; portions of this chapter are excerpted from the *Guide* with permission of the ABA. The case law and literature relating to procedural due process is vast, and this chapter attempts only to hit the high points, in order to provide a basis to discuss in other chapters the relationship of due process to adjudication outside the APA.

84. On due process, see generally RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* ch. 9 (5th ed. 2010); JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 107–53 (1985); Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1130–78 (1984).

85. Substantive, as opposed to procedural, due process concerns the level of justification the state must establish before depriving a person of life, liberty, or property. The subject of substantive due process is beyond the scope of this book.

86. The problem of distinguishing state and private action is beyond the scope of this book. See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) (workers’ compensation insurer is not a state agent merely because state regulates it and therefore is not subject to due process obligations).

Due process issues seldom arise when a federal agency engages in Type A or Type B adjudication. In the case of Type A, the APA provides far more procedural protection than due process requires. Nevertheless, due process issues do occasionally arise in Type A cases. For example, Social Security disability cases are Type A adjudication, but the Supreme Court had to rule on whether due process required an ALJ hearing before disability payments terminated as opposed to after they terminated.<sup>87</sup> Similarly, the Court ruled that the FCC violated the notice requirements of due process by changing a policy and applying the new policy retroactively.<sup>88</sup>

The same is true of Type B adjudication. Due process can apply to such adjudication, but it seldom does because the procedural regulations defining the requirements for a legally required evidentiary hearing generally guarantee private parties more protection than due process would require.<sup>89</sup> In the case of Type C adjudication, due process might require more procedural protection than is provided by agency procedural regulations or practice. However, the majority of Type C adjudicating schemes involve discretionary decisions that are not covered by due process.<sup>90</sup>

In order to conclude that a person is entitled to procedural due process, and to determine what process is due, it is necessary to determine

- that there exists a constitutionally protected interest (namely life, liberty, or property) (Subpart 2);
- that government action has “deprived” a person of such an interest (Subpart 3);
- when due process must be provided (Subpart 4);
- what procedural process must be provided (Subpart 5);
- whether the decisionmaker met the requirements of neutrality (Subpart 6); and
- that the dispute is adjudicative rather than legislative in nature (Subpart 7).

## 2. Constitutionally Protected Interests

Procedural due process applies only if government has deprived a person of “life, liberty, or property.” In federal administrative adjudication, property and liberty are usually the substantive interests at stake. The right to life is seldom

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87. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

88. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012).

89. For example, due process is frequently an issue in immigration cases which are Type B adjudication. *See, e.g.*, *Gomez-Velazco v. Sessions*, 879 F.3d 989, 992–96 (9th Cir. 2018) (due process protects right to counsel in immigration cases, but deprivation was non-prejudicial). Normally, however, procedural regulations that govern Type B adjudication more than satisfy due process requirements. For example, decisions by federal agencies to exclude private contractors from entering into procurement contracts with the government are subject to due process restrictions, but the FAR regulations (which apply across the entire government) satisfy the requirements of due process. *IMCO v. United States*, 97 F.3d 1422, 1427 (Fed. Cir. 1996); *Girard v. Klopfenstein*, 930 F.2d 738, 743 (9th Cir. 1991). For discussion of FAR regulations, see Appendix A-3.

90. *See* text at notes 99–100.



asserted (since the death penalty is imposed through the criminal justice process rather than administratively).

*a. Property*

The term “property” includes “old” property rights, such as real or personal property or money. These interests have the attributes normally associated with property, such as the ability to sell or bequeath it, subdivide it, and exclude other persons from using it. However, for due process purposes, “property” also includes so-called “new” property rights that lack many elements of old property (such as the ability to transfer, divide, or exclude). New property generally consists of “entitlements” and involves a protected relationship between individuals and government. Entitlements are created by rules or understandings that stem from an independent source of law such as a state or federal statute or (in some cases) a contract.<sup>91</sup>

One important entitlement is a government job that protects the employee from being discharged without good cause. Thus, the positions of civil service employees<sup>92</sup> or tenured college professors<sup>93</sup> are treated as property. Professional or occupational licenses that cannot be revoked without good cause are also entitlements. For example, the license of a physician, architect, or lawyer is a “property” interest because the government licensor cannot revoke the license without some cause specified in a statute.<sup>94</sup> Another important entitlement is a non-discretionary government benefit, such as welfare or disability payments,<sup>95</sup> public education,<sup>96</sup> or other essential public service.<sup>97</sup> People who meet statutory requirements are entitled to receive such benefits; the benefit cannot be withdrawn unless the person fails to satisfy some objective standard. In all these situations, if the government seeks to deprive a person of the entitlement, it must provide procedural due process protection.<sup>98</sup>

On the other hand, if a governmentally provided benefit or status can be granted or withdrawn in the discretion of a government official, it is not treated as “property.”

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91. *Bd. of Regents v. Roth*, 408 U.S. 564, 577–78 (1972). “Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and support claims of entitlement to those benefits.” *Id.* at 577.

92. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (civil servant who could be discharged only for good cause).

93. *Roth*, 408 U.S. at 576.

94. *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (horse trainer’s license is “property” for due process purposes).

95. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

96. *Goss v. Lopez*, 419 U.S. 565, 573 (1975) (public education).

97. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9–12 (1978) (utility service).

98. Many other relationships between individuals and government have been treated as entitlements, such as the right to utilize an adjudicatory process to remedy a legal wrong. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428–37 (1982) (agency destroyed employee’s right to obtain relief from employment discrimination by scheduling conference after deadline).

The most important example is a government employment relationship that can be terminated without cause by the employer (so called “at-will” employment). For example, a non-tenured teacher can be terminated in the employer’s discretion without establishing any cause (although not for reasons of prohibited discrimination). The employee is not entitled to procedural due process protection when discharged by the employer or when the employer refuses to renew an employment contract that has expired.<sup>99</sup> Similarly, some government permissions (such as whether to grant an applicant a bank charter or issue an owner a conditional use permit for property) are discretionary, and therefore the application process does not trigger due process.<sup>100</sup>

New property rights can be derived not only from statutes but also from express or implied contracts between the individual and the government.<sup>101</sup> If an independent source of law creates a property right as above defined, the holder of that right is entitled to the protections provided by due process, not to some lower level of protection provided by the statute in question.<sup>102</sup> The Supreme Court has repudiated the idea that some statutory entitlements are mere “privileges,” rather than “rights.”<sup>103</sup>

Whether a particular claim is an entitlement or whether it depends on the discretion of state actors is a difficult issue and requires an examination of the factual context.<sup>104</sup> In order to create a property interest, the statute or other source of law must contain substantive protections for the interest (such as a requirement that discharge from employment can occur only for cause), not merely procedural protections for an interest that can be terminated in the state’s discretion.<sup>105</sup> If government fails to honor a legally required procedural protection for an interest that is not otherwise treated as an entitlement, the denial does not violate due process (but it may violate the statute or regulation that provided that protection).<sup>106</sup>

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99. *Bd. of Regents v. Roth*, 408 U.S. 564, 576–78 (1972).

100. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756–66 (2005), involving police failure to enforce domestic violence restraining order. The applicable statute said that the police “shall arrest” a restrained person who violated the order. Based on historical understandings, the Supreme Court determined that enforcement was discretionary with the police, despite the use of the word “shall.” Even if that were not the case, the Court stated that the right to enforcement of a restraining order should not be considered as “property” since it had no ascertainable monetary value. *Id.* at 766–67.

101. *See Perry v. Sindermann*, 408 U.S. 593, 599–603 (1972) (right to tenured governmental employment based on implied contract); *Forgue v. City of Chi.*, 873 F.3d 962, 970 (7th Cir. 2017) (right to retirement card on police officer’s retirement can be established by unwritten policy and practice of the police department).

102. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). On this issue, *Loudermill* overruled *Arnett v. Kennedy*, 416 U.S. 134 (1974). A plurality of justices had held in *Arnett* that an employee must take “the bitter with the sweet,” meaning that the statute creating the property right could also define the procedural protections for that right.

103. *Roth*, 408 U.S. at 571.

104. *See Bishop v. Wood*, 426 U.S. 341, 345–47 (1976) (upholding lower court decision that policeman who was a “permanent employee” was employee at will and thus lacked a property interest in his job).

105. *Olim v. Wakinekona*, 461 U.S. 238, 249–51 (1983).

106. *Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927, 933 (9th Cir. 2017).

### *b. Liberty*

Liberty interests protected by due process entail freedom from physical confinement or physical punishment<sup>107</sup> or a change in physical status such as deportation.<sup>108</sup> In addition, “liberty” includes a broad panoply of rights derived from explicit provisions of the Constitution, such as the right of freedom of speech provided by the First Amendment.<sup>109</sup> The Supreme Court has defined “liberty” very broadly. Liberty “denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.”<sup>110</sup>

Liberty also includes reputational interests. Thus, a person is deprived of liberty by a governmentally imposed stigma.<sup>111</sup> Stigmatized employees are entitled to a hearing at which they can attempt to clear their names.<sup>112</sup> However, a state official who defames a person but does not do so in connection with some other government action (such as discharge from employment) does not infringe a liberty interest. This is often referred to as the “stigma-plus requirement.”<sup>113</sup> Claims of stigma unaccompanied by the plus factor must be rectified, if at all, under state defamation law rather than through a name-clearing hearing required by due process.

Prisoners, once they are deprived of physical liberty by a criminal conviction, have very limited liberty rights for due process purposes.<sup>114</sup> A prisoner’s liberty interest is infringed only if the action in question would inevitably affect the duration of the

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107. *Ingraham v. Wright*, 430 U.S. 651, 672–74 (1977).

108. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–50 (1950).

109. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 547 (1972) (retaliation against non-tenured teacher for exercising rights of free speech infringes a liberty interest).

110. *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (a substantive due process case).

111. *Roth*, 408 U.S. at 573–74 (failure to renew contract of non-tenured professor without explanation does not impose a stigma).

112. In order to trigger a name-clearing hearing, the employee must allege that the stigmatizing information is false. *Codd v. Velger*, 429 U.S. 624, 627–28 (1977). In addition, to create a stigma, the information must be publicly disclosed as opposed to being privately communicated to the employee. *Bishop v. Wood*, 426 U.S. 341, 348–49 (1976).

113. *See Paul v. Davis*, 424 U.S. 693, 701–02, 710–11 (1976). *Paul* held that plaintiff must establish not only that government made a derogatory and false statement about him but also must show some tangible and material state-imposed burden or alteration of his or her status. *See also Siegert v. Gilley*, 500 U.S. 226 (1991) (voluntary resignation from employment accompanied by stigmatic letter in file does not meet stigma-plus requirement).

114. *Sandin v. Conner*, 515 U.S. 472 (1995).

prisoner's sentence<sup>115</sup> or involves some restraint that "imposes atypical and significant hardship" going beyond the ordinary incidents of prison life.<sup>116</sup>

### 3. Deprivation

Due process protection arises in the case of a "deprivation" of liberty or property. Not every government action adversely affecting a protected property or liberty interest amounts to a "deprivation." For example, there is no deprivation of liberty or property if the impact on the plaintiff is indirect rather than direct.<sup>117</sup> In addition, the due process clause is not implicated by a negligent act of an official that causes unintended injury to a protected interest.<sup>118</sup>

As discussed above, state action that terminates an entitlement such as welfare payments is a "deprivation" of property. However, it remains unclear whether the denial of an application for the same benefit is a "deprivation" of the benefit. Lower court cases have treated the rejection of an application for welfare benefits as a deprivation that triggers due process,<sup>119</sup> but the Supreme Court has left the issue in doubt.<sup>120</sup>

### 4. When Process Is Due

Due process cases frequently present the question of whether the legally required hearing must be provided before deprivation occurs, as opposed to after it occurs. This issue is resolved through a judicial balancing of three factors: (1) the degree of

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115. *Sandin* approved the result, although not the reasoning, in *Wolff v. McDonnell*, 418 U.S. 539 (1974). *Wolff* held that due process applied to a prison disciplinary hearing. Under *Sandin*, the key fact in *Wolff* was that the disciplinary proceeding could result in the loss of good time credits and thus inevitably prolong the prison term. *Sandin*, 515 U.S. at 472–73.

116. See *Vitek v. Jones*, 445 U.S. 480 (1980) (transfer from prison to mental hospital); *Washington v. Harper*, 494 U.S. 210 (1990) (involuntary administration of psychotropic drugs). In *Sandin*, a prisoner was placed in solitary confinement as a punishment for misconduct. This restraint was within the range of confinement normally expected during long-term confinement in prison. *Sandin*, 515 U.S. at 485–86.

117. See *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785–90 (1980) (government decertified a nursing home forcing the patients to move; this action deprived the nursing home but not the patients of a property interest); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 767–68 (2005) (failure to enforce domestic restraining order against husband does not deprive wife of property as injury was indirect).

118. See *Daniels v. Williams*, 474 U.S. 327 (1986). See also *Seamons v. Snow*, 84 F.3d 1226, 1234 (10th Cir. 1996) (nondeliberate tolerance of private harassment by school officials does not constitute a "deprivation").

119. *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) (rejected application for veterans' benefits is a deprivation of property since such benefits are a matter of statutory entitlement).

120. See *Bd. of Regents v. Roth*, 408 U.S. 564, 576 (1972) (a property interest is one that a person "has already acquired"); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 58–61 (1999) (alternative holding). *American Manufacturers* concerned a workers compensation scheme that entitled claimants to payment of their reasonable and necessary medical expenses. Under the scheme, employers could contest this obligation pending an administrative review. The plurality opinion held that an employee had no property interest in such payments until his right to them was already established. This language suggests that rejection of an application for benefits (as opposed to termination of benefits) might not trigger due process. On the other hand, it may simply mean there is no due process right to receive benefits during the time that an application is being considered by the agency. The latter interpretation, obviously, is much narrower than the former.

potential deprivation suffered by the private party, (2) the fairness and reliability of existing procedures and the probable value of additional procedural safeguards, and (3) the strength of the government's interest in resisting these safeguards.<sup>121</sup> These are often referred to as the *Mathews* factors, and the analytical process is referred to as *Mathews* balancing.

In general, due process must be provided *before* the deprivation of liberty or property occurs, but there are numerous exceptions to this rule. In exigent circumstances, the government is permitted to act first and provide a meaningful hearing later, even though there is a serious risk of error. Such situations tend to occur in cases of public health or safety,<sup>122</sup> environmental harm,<sup>123</sup> or financial emergencies.<sup>124</sup>

In many situations, such as the discharge of government employees for cause, due process calls for an informal probable-cause type procedure before the employee is discharged, followed by a full trial-type hearing within a reasonable time thereafter.<sup>125</sup> The pre-discharge procedure serves as an “initial check against mistaken decisions—essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.”<sup>126</sup> Prior to discharge, employees must receive oral or written notice of the charges against them, an explanation of the employer's evidence, and an opportunity to present their side of the story—orally or in writing—to a decisionmaker who is not necessarily neutral or uninvolved in the dispute.<sup>127</sup> In case of true exigent circumstances, however, an employee can be suspended without any prior procedures.<sup>128</sup>

*Mathews* balancing is illustrated by two Supreme Court cases that determine whether a hearing must be provided before the termination of government benefits or whether a post-termination procedure is sufficient. In the case of need-based welfare benefits, the welfare recipient is entitled to a hearing before termination of benefits. Balancing the three *Mathews* factors, the recipient's need is dire, and termination of the payments would cause great financial distress. The issues are often factual and witness credibility may be critical, so that an oral hearing might contribute to

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121. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

122. *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (suspension of horse trainer for doping horses—agency must have probable cause to believe doping occurred); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599–600 (1950) (misbranded drugs seized before judicial proceedings began).

123. *Hodel v. Va. Surface Mining Ass'n*, 452 U.S. 264, 298–303 (1981) (closing hazardous mine prior to hearing).

124. *FDIC v. Mallen*, 486 U.S. 230, 239–48 (1988) (suspension of banking executive under indictment for felony involving dishonesty).

125. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542–46 (1985).

126. *Id.* at 545–46.

127. *Id.* at 546.

128. *Gilbert v. Homar*, 520 U.S. 924, 932–35 (1997) (campus policeman suspected of drug offenses). The *Gilbert* decision also held that the employer is not required to pay the employee during the suspension period (the period of time between the initial and final discharge decision).

a more accurate decision. On the other hand, the government has a strong interest in halting payments before the hearing because the ability to delay termination will cause many persons to request a hearing even when they are certain to lose; moreover, the government is unlikely to be able to recoup benefits to which the recipient is not entitled. Based on this balance, a pre-termination hearing is required in the case of need-based welfare.<sup>129</sup>

In contrast, the government is permitted to terminate federal disability payments before providing a hearing. Disability payments do not depend on income or financial need, only on whether a disability prevents the recipient from working. Balancing the three *Mathews* factors, the recipient may not have a dire need for the income since the program is not need-based; the issues are likely to be based on medical reports rather than credibility determinations, so that an oral trial-type procedure would contribute little to making the decision more accurate; and the government has a strong interest in resisting a prior hearing for the same reasons as in the welfare example.<sup>130</sup>

### 5. *What Process Is Due*

Early due process cases contain a fixed list of procedural protections required by due process:

- The hearing must be at a reasonable time and conducted in a meaningful manner.
- Timely and adequate notice must be provided.
- The private party must have an opportunity to confront adverse witnesses and to present his own arguments and evidence orally.
- There is a right to retained counsel.
- The decisionmaker's conclusion must rest solely on the legal rules and evidence adduced at the hearing.
- The decisionmaker must state the reasons for his determination and indicate the evidence he relied on.
- An impartial decisionmaker is essential.<sup>131</sup>

This approach has now been abandoned. Instead, if due process applies, the person deprived of liberty or property “must be given some kind of notice and afforded some kind of hearing.”<sup>132</sup> Due process requires an opportunity to be heard “at a meaningful time and in a meaningful manner.”<sup>133</sup> But determination of what kind of notice and what kind of hearing depends on a highly contextual *Mathews* balancing.

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129. *Goldberg v. Kelly*, 397 U.S. 254, 261–66 (1970).

130. *Mathews v. Eldridge*, 424 U.S. 319, 331–49 (1976).

131. *Goldberg*, 397 U.S. at 269–71.

132. *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

133. *Mathews*, 424 U.S. at 333.

With respect to notice, the notice must be “reasonably calculated under all the circumstances to apprise” the party of the pendency and nature of the proceedings.<sup>134</sup> Under this standard, notice sent to a prison inmate by certified mail was adequate notice of a pending forfeiture action, even though the prison failed to deliver the letter.<sup>135</sup> However, in a subsequent case, the Supreme Court determined that a notice of tax foreclosure was not sufficient when notice was sent by certified mail and returned as unclaimed. When the state was informed that its notice did not reach the intended recipient, it must take additional steps to give notice.<sup>136</sup>

With respect to the hearing, the courts employ the three-factor *Mathews* balancing test to decide whether a particular procedural protection sought by the plaintiff must be provided. This requires a case-specific assessment of the relevant factors and precludes broad generalizations.<sup>137</sup>

Thus, the Supreme Court upheld a statute that prohibited payment of attorney’s fees by applicants for veterans’ benefits. In these cases, veterans’ service organizations provide free lay representatives to the claimants. While a veteran’s interest in resisting reduction of benefits is quite substantial, the availability of lay representation is adequate to safeguard these interests in the great majority of cases. The government has an interest in keeping veterans’ benefits hearings informal and non-adversarial and in protecting veterans from claims for attorneys’ fees.<sup>138</sup>

In many situations that do not involve disputed issues of material fact, an opportunity to make a written or oral argument may satisfy due process, without an oral trial-type hearing procedure. For example, a tenured college professor was fired after refusing to turn in his grades. He was given an opportunity to argue to the dean that some sanction short of discharge would be appropriate. He was not entitled to an oral trial-type hearing because no disputed material facts were at issue.<sup>139</sup> In other

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134. *Dusenbery v. United States*, 534 U.S. 161 (2002), relying on *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *Dusenbery* holds that the *Mullane* test should be applied in determining the adequacy of notice, not *Mathews* balancing.

135. *Dusenbery*, 534 U.S. at 167–71.

136. *Jones v. Flowers*, 547 U.S. 220, 228–49 (2006).

137. For example, there is considerable dispute about the required procedures that colleges must follow in order to suspend a student for alleged sexual violence. It may be that the hearing board can dispense with cross-examination of the complainant, but there must be some method whereby the accused student can challenge the complainant’s account of what happened (such as propounding written questions to the complainant). *See, e.g.*, *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399–406 (6th Cir. 2017) (board’s reliance on absent complainant’s hearsay statement without giving accused any opportunity to challenge it violated due process).

138. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 323–24 (1985). The *Walters* case involved a statute that permitted attorneys to appear, but limited their fees to \$10. Only four justices concurred in this holding; two others indicated that there might be a “special circumstances” rule in which due process would require that lawyers be allowed to appear in cases of unusual difficulty.

139. *Wozniak v. Conry*, 236 F.3d 888, 890–91 (7th Cir. 2001) (no right to hearing if no disputed facts are at issue).

situations, such as towing illegally parked cars, procedures that involve an independent check but not a hearing are sufficient.<sup>140</sup>

In certain situations, due process may require much less than an oral trial-type hearing by a neutral decisionmaker. Instead, something in the nature of a consultation with an agency official is all that due process demands. One example of consultative due process arises when the private interest is relatively slight. In the case of a brief suspension from high school for disciplinary reasons, students must receive oral or written notice of the charges against them, and if they deny the charges, an explanation of the evidence against them and an opportunity to present their side of the story. Students have no right to call their own witnesses or retain counsel or confront adverse witnesses. The decisionmaker may be the disciplinarian who witnessed the event that triggered the suspension.<sup>141</sup>

Similarly, in cases involving the due process rights of prisoners, the Supreme Court has upheld quite meager procedures.<sup>142</sup> The same is true of the hearing required before a public utility cuts off a customer for nonpayment of contested bills.<sup>143</sup> As discussed previously, when a government employer terminates an employee for cause, it must usually provide a consultative remedy before termination (on the assumption a full hearing will be available after termination).<sup>144</sup>

In a number of situations, the Supreme Court has ruled that state tort or contract remedies provide all the process that is due; in these situations, the agency need not provide any kind of hearing. One example involves random or unauthorized deprivations of property by officials such as prison guards. In this situation, a prior hearing is obviously impossible; the Court has ruled that state court tort remedies suffice.<sup>145</sup>

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140. *Prop. Mgmt. Grp., Ltd. v. Philadelphia*, No. 17-1260, 2017 WL 2242869, at \*31–32 (E.D. Pa. May 23, 2017). That case involved a scheme whereby the owner of a parking lot with an illegally parked car had to request the police to issue a ticket before the car could be towed away.

141. *Goss v. Lopez*, 419 U.S. 565, 581–83 (1975) (involving suspension of up to ten days). In case of dismissal of a student for academic rather than disciplinary reasons, due process requires only that the school fully inform the student as to the reasons for the dismissal and that the process be careful and deliberate. In cases of academic dismissal, the private interest is quite strong, but the institution's interest in avoiding inappropriate and disruptive adversarial procedures is even stronger. Moreover, matters of academic judgment are ill-suited to adversarial inquiries. *Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89–90 (1978).

142. *Wilkinson v. Austin*, 545 U.S. 209, 220–24 (2005) (in cases of transfer to supermax prison, due process satisfied where prisoner had right to make an oral statement and receive statement of reasons but not to present witnesses); *Hewitt v. Helms*, 459 U.S. 460, 476 (1983) (notice plus opportunity to submit views in writing is sufficient prior to transfer to solitary confinement). *Hewitt* was disapproved on other grounds by *Sandin v. Conner*, 515 U.S. 475 (1995), which greatly reduced the universe of events affecting prisoners that trigger due process protection for prisoners. Obviously, the institutional needs of prisons heavily influenced these decisions.

143. *Memphis Light, Gas & Water Divs. v. Craft*, 436 U.S. 1, 16–21 (1978) (requiring the utility to provide a meeting with its representative to resolve a billing dispute and giving notice that this remedy exists).

144. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985).

145. *Hudson v. Palmer*, 468 U.S. 517, 530–36 (1984); *Parratt v. Taylor*, 451 U.S. 527, 537–43 (1981), overruled on another ground, by *Daniels v. Williams*, 474 U.S. 327 (1986).



As another example, a school need provide no prior procedure before administering corporal punishment; tort remedies for excessive force will suffice.<sup>146</sup> Similarly, the state might deprive a contractor of property when it terminates the contract for breach, but due process requires only the availability of a state court contract action.<sup>147</sup>

### 6. Neutrality of Decisionmakers

Due process ordinarily requires an unbiased decisionmaker, meaning one who has no pecuniary or political interest in the decision,<sup>148</sup> has not prejudged the disputed facts,<sup>149</sup> and has no animus for or against the private party.<sup>150</sup>

Whether due process requires separation of functions is less clear. The issue of separation of functions arises when an administrative decisionmaker was previously and personally involved in the dispute as an investigator or prosecutor. The Supreme Court declined to invalidate a state's decision to revoke a medical license, even though the agency heads had investigated the physician, recommended that he be criminally prosecuted, and then decided to revoke his license.<sup>151</sup> The Court noted that although "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, [this] does not, of course, preclude a court from

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146. *Ingraham v. Wright*, 430 U.S. 651, 676–83 (1977). The Court balanced the *Matthews* factors, placing particular emphasis on the burden that a prior hearing requirement would place on the school.

147. *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 195–99 (2001).

148. *See Tumey v. Ohio*, 273 U.S. 510, 522–35 (1927) (judge compensated by keeping a portion of the fines he collected); *Ward v. City of Monroeville*, 409 U.S. 57, 59–62 (1972) (elected mayor serving as traffic court judge where fines augmented the city's treasury); *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 882–90 (2009) (judge received disproportionate political campaign contributions from litigant in pending case).

149. *See, e.g., Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 589–92 (D.C. Cir. 1970) (agency head gave speech indicating he had prejudged facts of pending case).

150. *See, e.g., Berger v. United States*, 255 U.S. 22, 33–34 (1921) (judge's prejudice against Germans as a class); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465–66 (1971) (judge who has been target of personal vilification should not make decision to hold litigant in contempt).

151. *Withrow v. Larkin*, 421 U.S. 35, 46–59 (1975). *But see Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905–07 (2016) (holding that due process was offended when a justice on the Pennsylvania Supreme Court voted on a case in which he had been previously and significantly involved as a prosecutor). Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 *UNIV. OF MICH. J. L. REFORM* (forthcoming 2018). Vollmer argues that *Williams* requires *Withrow* to be overruled, so that due process would be violated if agency heads participate in charging decisions and later make the final decision in the same case. I disagree. Disqualifying the agency heads in *Withrow* would prevent them from making the final decision whether to revoke Larkin's license and thus violate the principle of necessity. *See Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018). The same would be true of countless federal, state, and local agencies where the heads participate in making the charging decision. If *Withrow* is overruled, agency heads would be required to remove themselves from participation in the charging decision. I believe that agency heads should be involved in that critical decision rather than leaving it entirely to the enforcement staff without agency head involvement. *Williams* seems distinguishable from *Withrow* because of the principle of necessity. Disqualifying a former prosecutor would not prevent the Pennsylvania Supreme Court from functioning.

determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.”<sup>152</sup>

### 7. *Adjudication Rather Than Quasi-Legislative Action*

Due process does not apply when agency action is characterized as quasi-legislative rather than adjudicative. In general, quasi-legislative action is applicable to a class of persons, while adjudication is targeted at specific persons.<sup>153</sup> Persons adversely affected by such action must resort to political, rather than legal, remedies. Since administrative rulemaking is considered quasi-legislative, an agency engaged in rulemaking is not constitutionally required to provide any procedure to those adversely affected by the rule.<sup>154</sup> Of course, state and federal administrative procedure statutes typically provide for advance notice and comment procedure before adoption of rules, but these procedures are required by statute, not by due process.

Courts have relied on various criteria in drawing the sometimes unclear line between general and particular action. The size of the class of persons affected is relevant, with large-size classes indicating that the action is legislative.<sup>155</sup> Nevertheless, agency action that purports to be directed at a class is rulemaking, even if that class consists only of a single party, provided that others might conceivably join the class

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152. *Withrow*, 421 U.S. at 58. *See, e.g.*, *Hess v. S. Ill. Univ.*, 839 F.3d 668, 675 (7th Cir. 2016) (due process not violated when the hearing officer in a student discipline case had investigated the case as long as there was no showing that he had prejudged the facts).

153. *United States v. Fla. East Coast Ry.*, 410 U.S. 224, 246 (1973) (“While the line dividing them may not always be a bright one, these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.”); *see also* *Atkins v. Parker*, 472 U.S. 115 (1985) (statute that decreased food stamp benefits to a class of beneficiaries does not trigger due process). Individualized ratemaking is often considered quasi-legislative for some purposes, but it appears to be adjudicative for due process purposes. *See, e.g.*, *Ohio Bell Tel. Co. v. PUC of Ohio*, 301 U.S. 292, 300 (1937).

154. Modern cases that draw the distinction between quasi-legislative and adjudicative action frequently hark back to two old cases relating to Colorado property taxation. In *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), the Court held that Denver taxpayers were not entitled to a hearing with respect to a general increase in the valuation of Denver property. The Court distinguished *Londoner v. Denver*, 210 U.S. 373 (1908), where one of the issues was the benefit that a particular taxpayer would derive from street improvements. In *Bi-Metallic*, Justice Holmes wrote: “Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. . . . In *Londoner v. Denver* . . . a relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds.” *Bi-Metallic*, 239 U.S. at 445–46 (emphasis added). For examples of modern cases relying on the *Bi-Metallic/Londoner* distinction, *see, e.g.*, *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 283–85 (1981); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 542 (1978); *Fla. East Coast Ry.*, 410 U.S. at 244–45. The generalized/particularized distinction was also relied on in applying the APA’s definitions of rulemaking and adjudication, as discussed in Chapter 1. *See* *Safari Club Int’l v. Zinke*, 878 F.3d 316, 332 (D.C. Cir. 2017), text at note 37.

155. *E.g.*, *Bi-Metallic*, 239 U.S. at 445 (action generally affecting “more than a few people” is legislative).

at a later time.<sup>156</sup> Whether the agency proceeding involves primarily “legislative facts” (meaning facts that do not concern a specific party) or “adjudicative facts” (meaning facts that concern only a specific party) also plays an important role (although this distinction is more important in deciding what kind of hearing is required than whether a hearing is required at all).<sup>157</sup> Also important is whether the action sets policy for the future as opposed to imposing legal consequences based on facts that occurred in the past.<sup>158</sup>

## **B. JUDICIAL ENFORCEMENT OF STATUTORY REQUIREMENTS OF A “HEARING” OR “OPPORTUNITY TO COMMENT”**

In Type B adjudication, a statute, regulation, or executive order requires an agency to conduct an evidentiary hearing. If an agency has failed to adopt procedural regulations that provide the elements of an evidentiary hearing, a court may enforce the legal requirement that an evidentiary hearing be provided. Similarly, in Type C adjudication, a statute or a regulation may call for some kind of non-evidentiary hearing or opportunity to comment. A reviewing court may infuse meaning into such statutes or regulations. After all, these words must mean something. A court might interpret them to require procedural protections that the court deems essential because of fairness concerns or to provide a better record for judicial review. A number of cases have made this move, but many of them are of questionable validity under the Supreme Court decisions in *Vermont Yankee* and *PBGC* which are discussed below.

The *United States Lines* decision is an example of this kind of interpretive process.<sup>159</sup> The case involved review of a Federal Maritime Commission (FMC) decision to approve amendment and extension of an agreement between competing common carriers. The decision was detrimental to the plaintiff. The statute required that a decision be made “after notice and hearing.” The court interpreted the word “hearing” to require procedural protections (such as disclosure of material in the agency’s files and prohibition on ex parte contacts) that the court deemed essential.

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156. See *Quivira Mining Co. v. NRC*, 866 F.2d 1246, 1261–62 (10th Cir. 1989) (due process inapplicable to generally stated rule involving only single regulated party); *Philly’s v. Byrne*, 732 F.2d 87, 92–93 (7th Cir. 1984) (power of voters to declare a precinct “dry” does not violate due process rights of single liquor licensee in precinct since action is general in nature). *Philly’s* was distinguished in *Club Misty, Inc. v. Laski*, 208 F.3d 615, 617–22 (7th Cir. 2000), in which the voters were empowered to revoke the license of a particular licensee rather than declare the entire precinct dry; such action is adjudication rather than rulemaking.

157. See, e.g., *Ohio Bell Tel. Co.*, 301 U.S. at 300–06 (due process violated by use of judicial notice to find facts concerning the value of specific utility’s property, based on various undisclosed indexes or other sources of information).

158. See, e.g., *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226–27 (1908) (judicial inquiry declares liability based on past facts and existing laws while legislation looks to the future and changes existing conditions by making a new rule).

159. *U.S. Lines, Inc. v. Fed. Mar. Comm’n*, 584 F.2d 519, 534–42 (D.C. Cir. 1978).

The holding in the *United States Lines* case requiring disclosure of material in the agency's file is arguably consistent with the statutory requirement that the agency provide notice and hearing. However, the prohibition on ex parte communications is questionable because the statute does not call for an evidentiary hearing with an exclusive record. Prohibition of ex parte communication is a necessary element of an evidentiary hearing. However, ex parte communications are ordinarily permitted in Type C adjudicatory proceedings which are often inquisitorial rather than adversarial in nature.

Similarly, in the *Independent U.S. Tanker Owners* case,<sup>160</sup> the Maritime Administration (Marad) decided to allow a tanker owner to repay construction subsidies and transfer the vessel from the foreign to the domestic trade. The court ruled that this Type C adjudication must be accompanied by compliance with notice and comment rulemaking procedures. The primary rationale was that such procedures were necessary to generate a proper record for judicial review.

In that case an interim regulation provided: "With respect to any such request received, the Board will publish a notice in the *Federal Register*, providing opportunity for comment by interested parties. After the Board has acted upon any such application, the Board will publish a concise written explanation for its action." The court invalidated the interim regulation because of substantive and procedural irregularities. Yet the court also relied on the regulation to bind the agency to provide the promised rulemaking-type procedures. These procedures included proper notice of the proposal to competing domestic tanker owners and disclosure of staff studies supporting the repayment/transfer decision, as well as an opportunity to comment and a statement of reasons responding to adverse comments.<sup>161</sup>

A similar decision involved the temporary suspension of a license to operate as a dealer under the Perishable Agricultural Commodities Act. The statute provided: "The Secretary may, after thirty days' notice and an opportunity for a hearing . . . suspend the license of the offender,"<sup>162</sup> but the Department of Agriculture provided no hearing. The court indicated that some sort of hearing was required and it had to be provided by an official who had no institutional stake in the outcome.<sup>163</sup> The latter requirement is questionable. An inquisitorial hearing is still a hearing. Absent due process requirements or some indication in statute or regulations, there is probably no requirement of a neutral decisionmaker.

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160. *Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 922–23 (D.C. Cir. 1982).

161. Similarly, *see* *Am. Trading Transp. Co. v. United States*, 841 F.2d 421, 425 (D.C. Cir. 1988) (failure to satisfy explanation requirement); *Izaak Walton League v. Marsh*, 655 F.2d 346, 363–64 (D.C. Cir. 1981) (enforcing requirement in Army Corps of Engineers regulation to hold a "public meeting" and requiring agency to respond to comments made at that meeting); *Nat'l Wildlife Fed'n v. Marsh*, 568 F. Supp. 985, 993–94 (D.D.C. 1983) (enforcing statute calling for "public hearings" and a regulation requiring "opportunity for meaningful comments" to invalidate a decision because decisionmaker relied on post-hearing studies).

162. 7 U.S.C. § 499m(a).

163. *Finer Foods, Inc. v. USDA*, 274 F.3d 1137, 1140 (7th Cir. 2001).

In any event, these decisions are of questionable validity. In the famous *Vermont Yankee* case,<sup>164</sup> the Supreme Court addressed a series of lower court decisions that had obligated agencies to provide procedural protections in addition to the basic notice and comment rulemaking provisions of the APA. *Vermont Yankee* disapproved those decisions because their indeterminacy would compel agencies to adopt full adjudicatory procedures in every rulemaking, thus sacrificing the efficiency of the APA's informal rulemaking process.

In the *Pension Benefit Guaranty Corp. (PBGC)*,<sup>165</sup> case, the Supreme Court applied *Vermont Yankee* to a Type C adjudicatory scheme. It determined that courts lack power to supplement whatever procedures are required by statutes (including the APA), regulations, or due process. The case involved a decision by PBGC to restore LTV's pension plans after PBGC had previously terminated the underfunded plans and assumed liability for the shortfall in pensions. PBGC believed that LTV's financial situation had improved, and it also objected to LTV's plan to adopt a new "follow-on" pension plan that took advantage of PBGC's assumption of the prior plan's liabilities. The decision involved additional pension liabilities of hundreds of millions of dollars per year.

Among LTV's objections to PBGC's restoration decision was that PBGC had failed to provide it with procedural safeguards. The lower court agreed that PBGC did not apprise LTV of the material on which it based its decisions, give LTV an adequate opportunity to offer contrary evidence, proceed in accordance with ascertainable standards, or provide LTV a statement showing its reasoning in applying those standards. It focused on PBGC's obligation to provide "fundamental fairness" to LTV.<sup>166</sup> But none of these safeguards could be derived from any source of law applicable to the PBGC's decision. Neither a statute nor a regulation required PBGC to provide any form of procedure in making restoration decisions.<sup>167</sup>

The Court agreed with PBGC that the lower court's holding conflicted with *Vermont Yankee*, in which "this Court made clear that when the due process clause is not implicated and an agency's governing statute contains no specific procedural mandates, the APA establishes the maximum procedural requirements a reviewing court may impose on agencies."<sup>168</sup>

The Court did not consider whether *Vermont Yankee* might have been distinguished instead of applied in Type C adjudication situation. *Vermont Yankee* made

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164. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 542–49 (1978).

165. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653–56 (1990).

166. LTV did not contend that due process applied to PBGC's decision, and the Court did not consider whether due process applied or what due process would have required.

167. Under the regulations, PBGC offers a Type B appeal procedure that applies to most of its decisions, but restoration disputes are not among them. As to these omitted matters, PBGC has discretion to utilize any procedure it deems appropriate. See 29 C.F.R. §§ 4003.1(b)–(c), pt. 4003, subpt. D

168. *LTV Corp.*, 496 U.S. at 653.

sense because the APA contains a set of procedures applicable to informal rulemaking—provisions that have been greatly amplified by court decisions and that provide a solid opportunity for public participation in rulemaking. But the APA provides only modest protection to private parties involved in Type C adjudication. As discussed below, APA §§ 555 and 558 do provide some limited safeguards, but these provisions fall far short of an opportunity to receive adequate notice, to have the case decided by a neutral arbiter, to present evidence and confront adverse witnesses, or to receive a statement of reasons. However, the Court passed up the opportunity to distinguish *Vermont Yankee*. And there is a good argument that it was right to do so. If the Court allowed lower courts to require procedural protection not tethered to due process or to any language in the statute, or regulations, agencies would feel compelled to provide full adjudicatory protections in every case to avoid the risk of getting reversed.

Thus, the question remains open of whether a court can infuse meaning into language in statute or regulations that requires an agency to provide a “hearing” or an “opportunity for comment.” The presence of such language could allow the court to distinguish the *PBGC* case where no such language existed.<sup>169</sup> Such language might be sufficient to create an obligation for an agency to provide adequate notice, some kind of opportunity to present evidence and argument, and a written statement of reasons for the agency’s action. However, it seems unlikely that courts can interpret such language to require an agency to provide elements of adversarial trial type hearings such as a neutral hearing officer, a prohibition of ex parte communications, or separation of functions. These are not necessary elements of an inquisitorial hearing which is still a “hearing” or an “opportunity to comment.”

### C. PROCEDURAL PROTECTIONS UNDER SECTION 555

Section 555 of the APA<sup>170</sup> provides some modest protections for parties involved in A, B, or C adjudication with government agencies. Chapter 5 suggests that the provisions of § 555 could be reframed as best practices in Type C adjudication.

Several cases have held that § 555 does not apply if the subject matter of the dispute falls within one of the APA adjudication exceptions set forth in § 554(a).<sup>171</sup> These include “the selection or tenure of an employee, except an [ALJ]” and “a matter

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169. See Dist. No. 1, Pac. Coast Dist. Marine Eng’rs Beneficial Ass’n v. Mar. Admin., 215 F.3d 37, 43 (D.C. Cir. 2000). In the *District No. 1* case, the agency (Marad) approved transfer of ship ownership to foreign owners. It engaged in ex parte communications in connection with the decision. The court held that Marad was free to do so because neither statute nor regulation prohibited it. It distinguished the cases discussed above, see text at notes 159–68, because in each case there was statutory language requiring a hearing or an opportunity for public comment.

170. Section 555 was section 6 of the APA as it was enacted in 1946. Only minor changes occurred at the time section 6 was recodified as § 555.

171. See *Bollow v. Fed. Reserve Bank*, 650 F.2d 1093, 1101–02 (9th Cir. 1981) (section 555(e) reasons statement does not apply to discharge of government employee); *Cleveland Trust Co. v. United States*, 421 F.2d 475, 482 (6th Cir. 1970) (section 555(e) inapplicable to IRS’ rejection of a settlement agreement since the issue of tax liability is subject to a trial de novo in a refund action).

subject to a subsequent trial of the law and the facts de novo in a court.<sup>172</sup> These cases are questionable, because the § 554(a) exceptions do not appear to apply to § 555.<sup>173</sup> Section 555 covers “any agency proceeding,” and the § 554(a) exceptions appear to apply only to “this section” (in other words, only to Type A adjudication as defined in § 554(a)).

### *1. Right to Counsel*

“A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.”<sup>174</sup> According to the *Attorney General’s Manual on the Administrative Procedure Act*, this provision restates existing law. It does not apply to persons who appear voluntarily or in response to a request—only to those persons whose appearance is compelled or commanded.<sup>175</sup> The most obvious application of this provision is to provide a right to counsel for persons compelled by subpoena to appear and testify before agency investigators.

Case law under § 555(b) stresses that agencies need a concrete and particularized reason to deny a person’s choice of counsel. Thus, the court invalidated a Nuclear Regulatory Commission regulation<sup>176</sup> providing that if “a reasonable basis exists to believe that the investigation or inspection will be obstructed, impeded or impaired, either directly or indirectly, by an attorney’s representation of multiple interests, the agency official may prohibit that attorney from being present during the interview.”

The NRC’s rationale was that employees who chose to be represented by the employer’s lawyer might be intimidated from giving candid testimony against the employer. The court invalidated the rule, because counsel of the witness’ choice cannot be excluded absent “concrete evidence that his presence would obstruct and impede the investigation.”

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172. APA § 554(a)(1)–(2).

173. Section 555(a) says that the section applies “except as otherwise provided by this subchapter.” According to the House Judiciary Committee, this language was intended to prevent § 555 from undercutting other provisions of the act. For example, the right of appearance in § 555(b) would not authorize an improper ex parte communication in the formal adjudication sections of the Act. LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 248, 79th CONG. 2D SESS. 263 (1944–46) (HOUSE JUDICIARY COMMITTEE R. 1980) [hereinafter S. Doc. 248].

174. APA § 555(b).

175. ATT’Y GEN.’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 61 (1947) [hereinafter AG Manual].

176. *Prof’l Reactor Operator Soc. v. NRC*, 939 F.2d 1047, 1051–52 (D.C. Cir. 1991). The court followed an earlier decision overturning an SEC rule that excluded lawyers who had previously represented other witnesses in the same investigation. *SEC v. Csapo*, 533 F.2d 7 (D.C. Cir. 1976).

In addition, § 555(b) may require the agency to allow an attorney to be accompanied by an expert to assist counsel, such as an accounting expert in a complex SEC investigatory proceeding involving accountant misconduct.<sup>177</sup>

The provision permitting persons to be represented by counsel “does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.”<sup>178</sup> The *Attorney General’s Manual* states that the question of whether non-lawyers should be able to practice before agencies is left to the agencies themselves to determine.<sup>179</sup>

The same is true of the required qualifications of lawyers. During consideration of the APA, the House rejected an amendment providing that any member of the bar in good standing shall be eligible to practice before any agency. Instead, according to the *Attorney General’s Manual*, agencies will continue to have power to control the qualifications of lawyers who practice before them. In addition, an agency can exclude persons of improper character from practice before it or exclude parties or counsel from participation in proceedings by reason of unruly conduct. Agencies also can impose reasonable time limits during which former employees may not practice before the agency.<sup>180</sup>

### 2. Right to Appear—Parties to Agency Proceedings

Under § 555(b), “A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.” The APA defines “agency proceeding” to mean agency process for adjudication, licensing, and rulemaking.<sup>181</sup>

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177. *Whitman v. SEC*, 613 F. Supp. 48 (D.D.C. 1985). The court said:

The Commission itself is well aware of the limits on a lawyer’s expertise: indeed, in the investigative proceedings here at issue, the agency’s own counsel rely heavily on the SEC accounting staff not only to provide advice and assistance but also to pose the questions to the respondents. The Commission correctly states that nothing in the APA guarantees the respondent a parity of advantage, but a witness’ established right to his counsel’s representation and advice (not merely presence) at agency proceedings, see 5 U.S.C. § 555(b), calls for some means of narrowing the gap between his counsel’s and the questioner’s technical expertise. Granting permission to the witness’ attorney to bring an expert of his own choosing to the agency proceedings as an extension of himself (as an assistant) is a simple and expedient way to give veritable meaning to the witness’ right to counsel. Certainly, it is less disruptive and more reasonable than the Commission’s current practice of allowing counsel to interrupt proceedings to consult with experts posted (with the agency’s permission) just outside the door.

*Id.* at 50. See also *Laccetti v. SEC*, 885 F.3d 724 (D.C. Cir. 2018) (same result under Public Company Accounting Oversight Board Rule 5109(b) which provides for a right to counsel in PCOAB investigatory interviews).

178. APA § 555(b) (last sentence).

179. The issue of lay representation is discussed in text at notes 315-21.

180. AG Manual, *supra* note 175, at 65-66.

181. APA § 551(12).



Arguably, this provision means that a party<sup>182</sup> is entitled to appear physically and present oral argument in any adjudicatory proceeding, even though the agency wishes to conduct an all-written proceeding. According to the *Attorney General's Manual*,<sup>183</sup> the identity of parties in the case of adjudication or licensing is usually clear, which suggests that the right to appear applies to all adjudication and licensing proceedings. The *Attorney General's Manual* points out that identification of parties in informal rulemaking proceedings may not be clear. In the case of rulemaking, an agency might decide not to hold an oral hearing, in which case nobody has the right to appear physically before the agency. But this again suggests that § 555(b) might be interpreted to establish a right to make a personal appearance in any federal government adjudicatory proceeding.

### 3. Right to Appear—Interested Persons

The APA confers a second right to appear. “So far as the orderly conduct of public business permits, any interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise in connection with an agency function.”<sup>184</sup> Notice that, unlike the right of parties to appear, this provision is not limited to “agency proceedings” (that is, adjudication, rulemaking, or licensing), but it applies to all agency functions.<sup>185</sup>

According to the *Attorney General's Manual*,<sup>186</sup> “any person should be given an opportunity to confer or discuss with responsible officers or employees of the agency matters in which he is properly interested.”<sup>187</sup> A responsible officer or employee is “one who can decide the matter or whose function is to make recommendations on such matters—rather than officers or employees whose duties are merely mechanical or formal.”<sup>188</sup> The term “interested person” means one whose interests are or will be affected by the agency action which may result from the proceeding.<sup>189</sup>

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182. A “party” includes a person or agency named or admitted a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes.” APA § 551(3).

183. AG Manual, *supra* note 175, at 62.

184. APA § 555(b) (third sentence). These two right-to-appear provisions give greater appearance rights to a “party” than to a “person.” A “party” is entitled to appear in an agency proceeding, but an “interested person” “may appear” only “so far as the orderly conduct of public business permits.” Under the APA, a “party” includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes.” APA § 551(3). In contrast, the word “person” essentially includes any individual or entity (but not an agency). APA § 551(2).

185. AG Manual, *supra* note 175, at 64.

186. *Id.* at 65.

187. *Id.* at 63.

188. *Id.*

189. *Id.* at 70.

This provision would seem to confer a rather broad right on members of the public whose interests would be affected by an agency action to compel relatively high-level agency employees to meet with them. For example, according to the *Attorney General's Manual*, "upon request any person should be allowed, where this is feasible, to present his reasons as to why a particular loan or benefit should be made or granted to him."<sup>190</sup> Such applicants "should have an opportunity to confer with an official of such status that he knows the agency's policy, and is able to bring unusual or meritorious cases to the attention of the officials who shape the policy or make final decisions." Or an interested person "can present his reasons as to why a particular controversy should be settled informally rather than in formal proceedings with attendant publicity."<sup>191</sup> However, this provision of § 555 does not create a right for an interested person to compel the agency to institute a hearing or take other action.<sup>192</sup>

On the other hand, the Act "does not require that every interested person be permitted to follow the chain of command to the head of the agency. It was not intended to require the directors of the Reconstruction Finance Corporation, for example, to confer personally with every applicant for a loan."<sup>193</sup>

In any event, the *Attorney General's Manual* cautions that the right of interested persons to meet with agency officials is limited by the language "so far as the orderly conduct of public business permits." The right to confer and the limitation to orderly conduct of public business should be construed to achieve practical and fair results.<sup>194</sup>

The opportunity to appear applies to "interlocutory" and "summary" proceedings. This language refers to situations in which "an agency takes significant action without prior formal proceedings."<sup>195</sup> The persons affected by such actions should, if feasible, be allowed to appear and present their views on the proposed action. However, this right to confer is not intended to interfere with the objective of assuring air safety. "To the extent that the timely execution of the Administrator's duties, i.e. 'the orderly conduct of public business,' precludes discussion and negotiation, he need not hold such discussion."<sup>196</sup>

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190. *Id.* at 64.

191. *Id.*

192. *Block v. SEC*, 50 F.3d 1078, 1085 (D.C. Cir. 1995). In *Block*, shareholders of a mutual fund requested the SEC to institute a proceeding to disqualify directors of the fund. The court held that § 555(b) does not empower the shareholders to compel the agency to take action that the agency does not wish to take.

193. AG Manual, *supra* note 175, at 63.

194. *Id.* The House Judiciary Committee Report on the APA construes this language rather narrowly. The "orderly conduct of public business" provision should "preclude numerous petty appearances by or for the same party in the same case; but they do not confer upon agencies a right to preclude interested persons from presenting fully before any responsible officer or employee their case or proposals in full." S. Doc. 248, *supra* note 173, at 264.

195. AG Manual, *supra* note 175, at 64. The *Attorney General's Manual* gives as an example the emergency suspension of an airworthiness or airman's certificate without notice or hearing.

196. *Id.*

#### 4. Conclusion of Matter in Reasonable Time

“With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.”<sup>197</sup> This provision must be construed together with another APA provision which authorizes a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed.”<sup>198</sup>

There is a large body of case law on the subject of whether courts should remedy egregious examples of agency delay, including delays in responding to petitions or applications. For obvious reasons, courts are reluctant to issue orders requiring agencies to take action on a particular matter before the agency is prepared to do so. Agencies frequently confront significant backlogs of work, yet they are chronically underfunded. Courts must respect the agencies’ need to set priorities as to how to use scarce resources as well as avoid giving one person waiting in a queue an advantage over others in the same queue.<sup>199</sup>

Courts often refer to what are called the TRAC factors (named after a decision of the U.S. Court of Appeals for the D.C. Circuit) in deciding whether to compel agencies to prioritize a particular matter.<sup>200</sup> The six TRAC factors are:

1. The time agencies take to make decisions must be governed by a “rule of reason;”
2. Where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
3. Delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
4. The court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
5. The court should also take into account the nature and extent of the interests prejudiced by delay; and
6. The court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

The *Pesticide Action Network North America* case is a good example of the use of the TRAC factors to issue a speed-up order through a writ of mandamus (although it

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197. APA § 555(b). The *Attorney General’s Manual* minimizes the importance of this provision which “merely restates a principle of good administration.” AG Manual, *supra* note 175, at 65.

198. APA § 706(1).

199. *See Heckler v. Day*, 467 U.S. 104 (1984), holding (by a 5-4 vote) that the lower court erred in setting deadlines for consideration of Social Security cases in Vermont. Such deadlines might jeopardize the quality and uniformity of decisions. It makes no sense to impose tight deadlines in Vermont but not in other states, since Social Security might simply shift decisional resources from other states to Vermont.

200. *See Telecomms. Research & Action Ctr. (TRAC) v. FCC*, 750 F.2d 70 (D.C. Cir. 1984).

involves a rulemaking petition rather than an adjudicatory proceeding).<sup>201</sup> The decision involved a petition by environmental groups that the EPA consider the safety of the pesticide chlorpyrifos. The petition was filed in 2007 and was followed by a long trail of missed deadlines and vague promises. In August 2015, the court ordered the EPA to adopt a proposed or final rule by October 31, 2015, or to issue a full and final response to the petition by that date.

A more typical response occurred in a challenge to the long delays by the Bureau of Indian Affairs (BIA) in resolving the issue of whether an Indian tribe should be federally recognized.<sup>202</sup> A particular tribe (the Mashpee) was placed on the “ready” list in 1996, but no decision had been made by 2001 when the district court ordered the Bureau to resolve the Mashpee’s claim within one year. At that point, several petitions remained ahead of the Mashpee in the queue. The process of federal recognition is complex, and the Bureau is drastically understaffed. The trial court’s order would necessarily come at the expense of tribes ahead of the Mashpee in the queue. The appellate court reversed the trial court decision for a fresh evaluation of whether the delay had been “unreasonable” in light of the TRAC factors, but noted that the district court could retain jurisdiction over the case in order to monitor the agency’s assurance that it was proceeding as diligently as possible with the resources available to it.

#### 5. *Legal Authorization for Investigations*

Under APA § 555(c), “Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law.” This provision requires that various investigatory actions taken by agencies (such as reports or physical investigations), with which regulated parties are required

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201. *In re Pesticide Action Network N. Am. v. EPA*, 798 F.3d 809 (9th Cir. 2015). Similarly, *In re A Community Voice*, 878 F.3d 779 (9th Cir. 2017), grants a writ of mandamus to compel EPA to begin and complete a rulemaking process relating to amendment of the outdated standards for remedying lead-based paint. It relied on the TRAC factors. EPA had granted a rulemaking petition in 2009 but stated that it might issue a proposed rule in 2021 and a final rule by 2023. The court ordered EPA to issue a proposed rule within 90 days and a final rule within one year after issuing the proposed rule.

202. *Mashpee Wampanoag Tribal Council v. Norton*, 336 F.3d 1094, 1099–102 (D.C. Cir. 2003). Similarly, see *Calderon-Ramirez v. McCament*, 877 F.3d 272, 276 (7th Cir. 2017) (improper to order US Citizenship and Immigration Services to take up applicant’s U-visa application ahead of thousands of persons ahead of him in line).

to comply, must be authorized by statute. The provision seems to add nothing to existing law.<sup>203</sup>

#### 6. Copy of Transcript

Under § 555(c), “[a] person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a non-public investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.”

The *Attorney General’s Manual* observes that this provision is limited to data or evidence submitted by a particular witness. It does not entitle the submitter to copies or transcripts of data or evidence submitted by other persons. And it extends only to persons compelled to testify or submit data, not to those who were merely requested to do so or who did so voluntarily.<sup>204</sup>

The “except” clause, referring to “non-public investigatory proceedings” refers to cases in which prosecutions may be brought later, and it is “obviously detrimental to the due execution of the laws to permit copies to be circulated.”<sup>205</sup> The phrase “non-public investigatory proceedings” covers “all confidential phases of investigations, formal or informal, conducted by agencies to determine whether there have been violations of law”<sup>206</sup>

#### 7. Subpoenas<sup>207</sup>

Under § 555(d), “[a]gency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought.” The purpose of this provision was to make agency subpoenas available to private parties to the same extent as to agency representatives. It covers both subpoenas to testify and subpoenas

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203. The *Attorney General’s Manual* treats it as a “restatement of existing law.” AG Manual, *supra* note 175, at 66. However, the House Judiciary Committee Report gave it a much broader meaning—although not one supported by the language of the provision.

This section is designed to preclude ‘fishing expeditions’ and investigations beyond jurisdiction or authority. It applies to any demand, whether or not a formal subpoena is actually issued. It includes demands or requests to inspect or for the submission of reports. All investigations must be substantially and demonstrably necessary to agency operations, conducted through authorized and official representatives, and confined to the legal and factual sphere of the agency as provided by law. Investigations may not disturb or disrupt personal privacy, or unreasonably interfere with private occupation or enterprise. They should be conducted so as to interfere in the least degree compatible with adequate law enforcement.

S. Doc. 248, *supra* note 173, at 265.

204. AG Manual, *supra* note 175, at 66.

205. *Id.* at 66–67.

206. *Id.* at 67.

207. Although the APA spells this word “subpena,” I use the more conventional spelling “subpoena” in this book.

to produce documents and is limited to “parties” to agency proceedings (meaning adjudication, rulemaking, or licensing). The provision does not grant power to issue subpoenas to agencies that are not so empowered by other statutes.<sup>208</sup>

According to the *Attorney General’s Manual*, § 555(d) means that agency subpoenas must be issued on request of private parties; subpoenas can be limited by standards of relevance and reasonable scope only if agency procedural rules so provide. But the *Attorney General’s Manual* also states that agencies can refuse to issue subpoenas that appear to be so irrelevant or unreasonable that a court would refuse to enforce them. Moreover, such rules can also provide for payment of fees to witnesses subpoenaed by private parties.<sup>209</sup>

Section 555(d) continues: “On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.”

The *Attorney General’s Manual* states that this provision restates existing law and does not narrow the extremely broad standards for subpoenas that had been articulated by courts prior to 1946.<sup>210</sup>

#### 8. Reasons for Denial of Applications

Under APA § 555(e), “Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person<sup>211</sup> made in connection with any agency proceeding.<sup>212</sup> Except in affirming a prior denial

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208. AG Manual, *supra* note 175, at 68–69.

209. *Id.* at 68.

210. *Id.* at 68–69, citing such cases as *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943), and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). The House Judiciary Committee report reflects considerably more skepticism toward subpoenas than does the *Attorney General’s Manual*. It states: “[This section] will also prevent the issuance of improvident subpoenas or action by the agency requiring a detailed, unnecessary, and burdensome showing of what evidence is sought.” S. Doc. 248, *supra* note 173, at 265.

211. The term “an interested person” means one whose interests are or will be affected by the agency action which may result from the proceeding. In the case of formal adjudication, the only interested persons are those who are parties to such proceedings. AG Manual, *supra* note 175, at 70.

212. The *Attorney General’s Manual* points out that § 555(e) is limited to agency “proceedings,” meaning adjudication, licensing, or rulemaking, whether they are formal or informal. *Id.* at 70.

or when the denial is self-explanatory,<sup>213</sup> the notice shall be accompanied by a brief statement of the grounds for denial.”<sup>214</sup>

This provision imposes a requirement that an agency explain its reasons for a denial of a written application, petition, or other request. The statement of grounds for denial, “while simple in nature, must be sufficient to advise the party of the general basis of the denial.”<sup>215</sup> This reason-giving requirement has broad application and may be the most significant portion of § 555.<sup>216</sup>

Section 555(e) means that a decisionmaker engaged in any form of adjudication must state the reasons for a decision that rejects an application, petition or other request.<sup>217</sup> Thus, the Parole Board must state its reasons for denying an application for parole.<sup>218</sup> The Comptroller of the Currency must state its reasons for rejecting a request for a public hearing on a bank merger.<sup>219</sup> An official in the Interior Department must explain why he summarily rejected a County’s objection to its earlier conclusion (still under review in the Department) that an Indian tribe had a historical connection to land on which the tribe proposed to build a casino.<sup>220</sup> The Drug Enforcement Administration must explain why it rejected an application to proceed in forma pauperis (in order to avoid the \$5,000 bond-posting requirement

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213. According to the House Judiciary Committee report, “Prior denial would satisfy this requirement only where the grounds previously stated remain the actual grounds and sufficiently notify the party. Self-explanatory denial must meet the same test; that is, the request must be in such form that its mere denial fully informs the party of all he would otherwise be entitled to have stated.” S. Doc. 248, *supra* note 173, at 268.

214. The originally enacted version used the term “simple statement of procedural or other grounds.” AG Manual, *supra* note 175, at 69–70. The present version requires a “brief statement of the grounds for denial.”

215. *Id.* at 70.

216. According to the House Judiciary Committee report, the statement of the grounds of denial should apprise the person not only of the basis for the denial but also “of any other or further administrative remedies or recourse he may have.” S. Doc. 248, *supra* note 173, at 265. Although informing a party of his remedies seems desirable as a matter of policy, it does not appear to be required by the language of § 555(e).

217. Not every communication to an agency is “an application, petition, or other request.” Thus, a critical comment on an existing enforcement policy filed by an association of wrestling coaches, in response to an agency’s request for comment on a proposed clarification of the policy, cannot be considered a “petition” for rulemaking and therefore the § 555(e) reason-giving requirement did not apply. *Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*, 366 F.3d 930, 948 (D.C. Cir. 2004).

218. *King v. United States*, 492 F.2d 1337, 1343 (7th Cir. 1974).

219. *Washington v. OCC*, 856 F.2d 1507,1513 (11th Cir. 1988) (record indicates that OCC’s rejection of the hearing was rational but agency has to state its reasons).

220. *Butte Cty. v. Hogen*, 613 F.3d 190, 193-95 (D.C. Cir. 2010). The official’s bland response that “we are not inclined to revisit this decision now . . . had all the explanatory power of the reply of Bartleby the Scrivener to his employer ‘I would prefer not to.’” *Id.* at 195 (quoting HERMAN MELVILLE, *BARTLEBY THE SCRIVENER: A STORY OF WALL STREET* (1853)).

to challenge a forfeiture).<sup>221</sup> The Transportation Safety Administration must give reasons for rejecting an air carrier's request to use alternative procedures to those in an air safety directive<sup>222</sup> and must explain why it rejected requests that it modify its bin advertising program.<sup>223</sup>

In the *Roelofs* decision, the D.C. Circuit held that the Discharge Review Board and the Board for Correction of Military Records must state reasons for rejecting an application to upgrade a military discharge from general to honorable.<sup>224</sup> It linked this requirement to fundamental rights of procedural justice. Quoting an earlier case, the *Roelofs* court stated that § 555(e) embodies “the simple but fundamental requirement that an agency or official set forth its reasons, a requirement that is essential to the integrity of the administrative process, for it tends to require the agency to focus on the values served by its decision, hence releasing the clutch of unconscious preference and irrelevant prejudice.”<sup>225</sup>

The connection between the reason-giving requirement of § 555(e) and the reason-giving requirement for judicial review is not entirely clear. For judicial review purposes, if an agency action is unexplained, the court cannot review it under the arbitrary and capricious test of the APA.<sup>226</sup> In such cases, the matter should be remanded to the agency to state its reasons.<sup>227</sup> To that extent, the § 555(e) requirement and the judicial review requirement are probably the same. However, for judicial review purposes, an agency statement of reasons must be sufficient to allow a reviewing court to determine whether the decision was rational, meaning that the decision is supported by the administrative record before the agency, the agency considered the correct factors in exercising discretion, and the decision was not a clear error of

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221. *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001). In *Tourus Records*, the court treated § 555(e) as codifying the fundamental requirement of administrative law that an agency set forth its reasons for decision; an agency's failure to do so constitutes arbitrary and capricious agency action. “This requirement [§ 555(e)] not only ensures the agency's careful consideration of such requests, but also gives parties the opportunity to apprise the agency of any errors it may have made and, if the agency persists in its decision, facilitates judicial review.”

222. *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1349–50 (D.C. Cir. 2014) (“At bottom, an agency must explain why it chose to do what it did. . . . And to this end, conclusory statements will not do; an agency's statement must be one of reasoning.”) (citations and internal quotation marks eliminated; emphasis in original).

223. *SecurityPoint Holdings v. TSA*, 769 F.3d 1184, 1187–88 (D.C. Cir. 2014).

224. *Roelofs v. Sec'y of the Air Force*, 628 F.2d 594 (D.C. Cir. 1980); *see also* *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852, 857–61 (D.C. Cir. 1978) (requiring military agencies to state reasons for discharging homosexual service member); *Remmie v. Mabus*, 898 F. Supp. 108, 119–21 (E.D.N.Y. 1995) (failure by Board for Correction of Military Records to state anything more than bare conclusion).

225. *Roelofs*, 628 F.2d at 599–600.

226. APA § 706(2)(A).

227. *See, e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Camp v. Pitts*, 411 U.S. 138, 143 (1973).



judgment.<sup>228</sup> Several cases appear to equate the reason-giving requirement of §555(e) with the judicial review reason-giving requirement.<sup>229</sup>

However, it seems unlikely that the two requirements are really identical.<sup>230</sup> If they are, courts will have to require much more than just a “brief statement of the grounds for denial.”<sup>231</sup> As already noted, the judicial review requirement requires disclosure of the agency’s reasoning process. This would seem to go far beyond the “brief statement of the grounds for denial” required by § 555.

Other cases link the reasons-giving requirement in § 555(e) to judicial review in a different way. If the merits of the agency action in question are not subject to judicial review (because review is precluded or because the action is committed to agency discretion),<sup>232</sup> these decisions state that § 555(e) does not apply.<sup>233</sup> This seems right—if courts could set aside an agency decision because of a failure to follow the procedural requirements of § 555, that would frustrate the Congressional decision to make the actions unreviewable.

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228. *Motor Vehicle Mfgs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). This standard applies even to the review of an agency’s rejection of a rulemaking petition—the domain of § 555(e). *Flyers Rights Educ. Fund v. FAA*, 864 F.3d 738, 743–47 (D.C. Cir. 2017) (lack of reasoned decision for rejection of rulemaking petition and reliance on undisclosed report). The agency’s explanation in the *Flyers Rights* case probably would have satisfied § 555(e) but did not satisfy the judicial review requirement.

229. *See City of Gillette v. FERC*, 737 F.2d 883, 886–87 (10th Cir. 1984). In *City of Gillette*, the court ruled that an agency’s denial of a waiver from a filing deadline lacked an adequate statement of reasons. It stated that § 555(e) requires a sufficient statement of reasons so that the court could apply the arbitrary and capricious review standard, including determination of whether the agency considered relevant factors and made a reasoned decision. *See also Friends of the Bow v. Thompson*, 124 F.3d 1210, 1219–20 (10th Cir. 1997) (holding that the Forest Service’s explanation satisfied § 555(e) because it was sufficient for the court to apply the arbitrary and capricious standard).

230. The Supreme Court has suggested that the two requirements are not identical. *Dunlop v. Bachowski*, 421 U.S. 560, 573–74 (1975). In *Dunlop*, the Court stated:

Thus, the Secretary’s letter of November 7, 1973, may have sufficed as a ‘brief statement of the grounds for denial’ for the purposes of [§ 555(e)] but plainly it did not suffice as a statement of reasons required by the LMRDA. A statement of reasons must be adequate to enable the court to determine whether the Secretary’s decision was reached for an impermissible reason or for no reason at all. For this essential purpose, although detailed findings of fact are not required, “the statement of reasons should inform the court and the complaining union member of both the grounds of decision and the essential facts upon which the Secretary’s inferences are based.”

231. AG Manual, *supra* note 175, at 70. The requirement was described as “minimal.” *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010). And the D. C. Circuit said that it “probably does not add to, and may even diminish, the burden put on an agency by the APA’s provision for judicial review.” *Roelofs v. Sec’y of the Air Force*, 628 F.2d 594, 601 (D.C. Cir. 1980).

232. *See* APA § 701(a).

233. *See Bollow v. Fed. Res. Bank*, 650 F.2d 1093, 1101–02 (9th Cir. 1981) (because discretionary discharge of employee is unreviewably committed to agency discretion, § 555(e) does not apply to the discharge); *High Country Citizens All. v. Clarke*, 454 F.2d 1177, 1192 (10th Cir. 2006) (because judicial review of mining claim dispute by non-owners is precluded, the reason-giving provision of § 555(e) does not apply to agency’s rejection of their petition).

Several cases arising under § 555(e) have considered the role of pre-decisional agency documents that disclose the agency's reasons for rejecting an application, even though the decision furnished to the applicant did not disclose them. Despite the apparent violation of § 555(e), the courts have upheld unexplained agency decisions under these circumstances, on the theory that remand for further explanation would be a waste of time—the agency would simply rewrite its decision incorporating the reasoning contained in the pre-decisional documents.<sup>234</sup> This strategy of withholding explanatory materials until the rejected applicant seeks judicial review undercuts some of the primary rationales for § 555(e)—helping rejected applicants decide whether to seek reconsideration of the agency's decision or judicial review.<sup>235</sup> Moreover, it would probably lead the court to overturn the decision because the agency decision would be considered arbitrary and capricious for failure to state the agency's reasoning process.<sup>236</sup>

## D. PROCEDURAL PROTECTIONS IN AGENCY LICENSING— SECTION 558

In addition to the procedural protections set forth in APA § 555, APA § 558 contains protections for private parties engaged in licensing disputes with federal agencies, whether or not those disputes fall within the categories of Type A or B adjudication.<sup>237</sup> Thus, like the provisions of § 555, the licensee protections of § 558 can be incorporated in creating a list of best practices for Type C adjudication.<sup>238</sup>

APA § 558(c) contains provisions providing modest protections in cases involving the federal licensing function. The section has three distinct components, involving licensing applications, withdrawals, and renewals.

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234. *Olivares v. TSA*, 819 F.3d 454, 462–65 (D.C. Cir. 2016); *Tourus Records, Inc. v. DEA*, 259 F.3d 731 (D.C. Cir. 2001).

235. In one such decision, the court said:

[W]e add a word of caution. In the future, agencies will be well advised to obey the explicit command of § 555(e), rather than counting on being able to salvage their actions later, after the losing party has been forced to seek redress in court. Persistent scofflaw behavior might cause the courts to insist that the contemporaneous explanation actually be expressed to the complaining party, as the statute requires, on pain of vacatur and remand. Or the courts might insist on progressively more compelling indications that the reasons offered were in fact the reasons governing the decision when it was made. The offending agency action in this case was mitigated somewhat because the internal materials and the Vara Declaration were included in the parties' Joint Appendix, and Petitioner had an opportunity to review these materials before briefing and oral argument. This may not be sufficient in future cases involving agency defiance of 555(e).

*Olivares*, 819 F.3d at 464–65.

236. See note 221.

237. Section 558(b) provides: "A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." This provision restates existing law. AG Manual, *supra* 175, at 88.

238. See Chapter 5.

The term “license” is broadly defined by the APA. “‘License’ includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.”<sup>239</sup>

Thus, the provisions of § 558(c) apply to any form of legally required federal permission. Section 558(c) probably applies to federal permits or approvals that, if denied or withdrawn, have a substantial *indirect* financial impact on the applicant, even though the lack of the permit does not prevent the applicant from doing anything.<sup>240</sup> However, § 558(c) does not apply to subsidy programs, even though the subsidy has various conditions that an applicant must satisfy.<sup>241</sup>

### 1. License Applications

Section 558(c) provides:

When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision.<sup>242</sup>

As enacted in 1946, the APA required that license application proceedings be completed with “reasonable dispatch.” The *Attorney General’s Manual* stated that this requirement is merely a statement of “fair administrative procedure.”<sup>243</sup> The term “reasonable dispatch” was converted to “reasonable time” when the APA was recodified, but apparently with no intended change in meaning.

The *Attorney General’s Manual* explains that a rejected version of the APA provided that applications would be deemed granted unless the agency made a decision

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239. APA § 551(8).

240. See *Ursack, Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 961–63 (9th Cir. 2011). The plaintiff made a bear-safe food storage container called the Ursack. The federal Park Service withdrew approval of the Ursack for use by campers in Yosemite and several other parks. As a result, various retail stores stopped selling the Ursack. The withdrawal did not prevent the plaintiff from making or selling the Ursack, but the withdrawal obviously had a detrimental financial effect on it. The *Ursack* decision assumed (without deciding) that the approval process was a “license” for § 558 purposes, because it involved a federal permit (even though the permit applied to campers rather than to the manufacturer). *Ursack* relied on an earlier case involving revocation of approval for a clinic to perform medical exams on persons seeking permanent residence status. *N.Y. Pathological & X-Ray Lab., Inc. v. INS*, 523 F.2d 79, 82 (2d Cir. 1975). As in *Ursack*, the case involved a federal permit, but the revocation had only an indirect impact on the plaintiff.

241. *Horn Farms v. Johanns*, 397 F.3d 472, 478–79 (7th Cir. 2005). The *Horn Farms* decision upheld the withdrawal of farm subsidy payments under the “swampbuster” provision because the owner converted wetland to farming. The fact that a subsidy can be denied or withdrawn for described behavior does not mean that a federal license is involved, any more than the federal child care tax credit provision program (which require the taxpayer to have a child) involves licensing.

242. APA § 558(c).

243. AG Manual, *supra* note 175, at 90.

or set the matter for hearing within 60 days. However, Congress decided not to set any hard deadline for completing action on license applications. A deadline would be infeasible, because the time required to grant licenses varies with the complexity of the issue. The *Attorney General's Manual* contrasts time-consuming proceedings to issue a certificate of public convenience and necessity with much simpler proceedings to issue a warehouseman's license. Similarly, variations in the agency's workload may result in unavoidable temporary backlogs.<sup>244</sup>

## 2. License Withdrawal

Section 558(c) contains protections to licensees when an agency seeks to withdraw a license. However, § 558(c) does not provide for a right to a hearing (formal or informal) in the case of a license withdrawal.<sup>245</sup> It merely requires written notice of the problem and an opportunity for a “second chance” by demonstrating compliance.<sup>246</sup> It does require that the notice letter specifically list the facts or conduct that may warrant the action, as opposed to a bland statement that “permit action is warranted.”<sup>247</sup> And it requires that the licensee have an opportunity to demonstrate or achieve compliance with the defects identified in the warning letter.

Section 558(c) does not apply if the dispute between plaintiff and the government concerns the validity of the licensing criteria (as opposed to whether plaintiff failed to satisfy those criteria).<sup>248</sup> This makes sense since a warning letter would be useless in cases in which the dispute turns on the proper criteria to be considered in revoking a license. Section 558(c) also does not require a third or fourth chance; repeated similar violations of the permit can trigger revocation without sending additional warning letters.<sup>249</sup> While § 558(c) applies to a temporary as well as a permanent permit, it does not apply to a permit that expires by its own terms, again because a warning letter would be useless.<sup>250</sup>

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244. *Id.*

245. See *Empresa Cubana Exportadora de Alimentos y Productos Varios v. Dep't of Treasury*, 638 F.3d 794, 802 (D.C. Cir. 2011) (section 558(c) does not require formal adjudication in connection with agency refusal to renew a license); *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1073–76 (7th Cir. 1982) (disapproving earlier cases that indicated that § 558(c) requires a hearing—agency satisfied statute by providing warning and opportunity to comply).

246. If the violation is not corrected before a second inspection, the agency can institute withdrawal without further warning. *Moore v. Madigan*, 990 F.2d 375, 379 (8th Cir. 1993).

247. *Anchustegui v. USDA*, 257 F.3d 1124, 1129 (9th Cir. 2001); *Blackwell Coll. of Bus., v. Att'y Gen.*, 454 F.2d 928, 936 (D.C. Cir. 1971). The *Blackwell* decision points out that the notice “should specify in reasonable detail the particular instances of failure to report upon which the INS relies.” However, the notice letter need not state precisely what action the agency will take if the defects are not corrected. *Lawrence v. CFTC*, 759 F.2d 767, 773 n.13 (9th Cir. 1985).

248. *Ursack, Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 963 (9th Cir. 2011). In this case, the license was withdrawn because plaintiff's product flunked the agency's tests; plaintiff disputed whether the agency used an appropriate test, but not whether its product failed the test.

249. *Buckingham v. Sec'y of the USDA*, 603 F.3d 1073, 1084–87 (9th Cir. 2010).

250. *Atl. Richfield Co. v. United States*, 774 F.2d 1193, 1200–01 (D.C. Cir. 1985); see AG Manual, *supra* note 175, at 91.

One issue in applying § 558(c) is whether the “notice of the facts and conduct which may warrant the action” needs to be given close in time to the decision to withdraw the license. In the *Air North America* case,<sup>251</sup> an agency provided a dormant air carrier with a written notice that its certificate of authority to provide air transportation would be cancelled if it remained dormant for more than one year. That notice (adopted at the time a new regulation on dormant certificates was adopted) was sufficient under § 558(c) to justify revocation of the certificate 18 months later because the revocation was not an “unfair surprise.” The court distinguished an earlier case in which warnings were given 18 years before revocation, a time gap that violated § 558(c).<sup>252</sup>

The *Attorney General’s Manual* explains that in the case of willful conduct, a license may be revoked immediately without “another chance.” Nor is a second chance needed if the public health, interest, or safety requires otherwise.<sup>253</sup> This phrase refers to a situation in which immediate cancellation of a license is necessary in the public interest irrespective of the equities or injuries to the licensee, as in the case of immediate suspension of a pilot’s license after an accident.<sup>254</sup>

In order to establish that violations were willful (so that the second chance provision does not apply), the agency must have made a finding of willfulness that is supported by substantial evidence.<sup>255</sup> Case law contains numerous definitions of the term “willful.” One line of cases defines willfulness “by repeated violations, intentional wrongdoing, or gross neglect of a known duty, but not by simple negligence.”<sup>256</sup> Another line states that a party acted willfully if the party 1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements.<sup>257</sup> A third group defines the term as “an intentional disregard of, or plain indifference to the statutory requirements.”<sup>258</sup>

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251. *Air N. Am. v. DOT*, 937 F.2d 1427, 1437–38 (9th Cir. 1991).

252. *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990).

253. AG Manual, *supra* note 175, at 91.

254. *Id.*, giving the example of a suspension of a pilot’s license pending investigation of a crash. *See Tucson Rod and Gun Club v. McGee*, 25 F. Supp. 1025, 1030 (D. Ariz. 1998) (bullets, shot, and arrows leaving containment area of shooting range pose public safety risk—no warning needed).

255. *See Hutto Stockyard*, 903 F.2d at 304–05 (ALJ found violations were not willful; judicial officer’s finding they were willful was not supported by substantial evidence); *Lawrence v. CFTC*, 759 F.2d 767, 772 (9th Cir. 1985) (failure to pay previously assessed penalty was clearly willful); *Halvonik v. Dudas*, 398 F. Supp. 2d 115, 125 (D.D.C. 2005) (PTO’s failure to use the word “willful” in proceeding to suspend a patent lawyer does not invalidate the decision where PTO found that the elements of willful conduct were present).

256. *Hutto Stockyard*, 903 F.2d at 304; *Capitol Produce Co. v. United States*, 930 F.2d 1077, 1079 (10th Cir. 1991).

257. *Lawrence*, 759 F.2d at 773; *Potato Sales Co. v. USDA*, 90 F.3d 800, 805–06 (9th Cir. 1996).

258. *Luna Tech, Inc. v. ATF*, 183 F. App’x. 863, 866 (11th Cir. 2006).

### 3. Licensing Renewals

When a licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.<sup>259</sup>

The *Attorney General's Manual* states that this provision reflects the best existing law and practice.

It is only fair where a licensee has filed his application for a renewal or a new license in ample time prior to the expiration of his license, and where the application itself is sufficient, that his license should not expire until his application shall have been determined by the agency. In such a case, the licensee has done everything that is within his power to do and he should not suffer if the agency has failed, for one reason or another, to consider his application prior to the lapse of his license. Agencies, of course, may make reasonable rules requiring sufficient advance application.<sup>260</sup>

The leading case on the license renewal provision is *Pan Atlantic Steamship Corp. v. Atlantic Coast Line Railroad*.<sup>261</sup> That case involved a provision in the Interstate Commerce Act (enacted before the APA) providing that the ICC could issue a temporary license to permit water carriers to provide service in emergency situations which “shall be valid for such time as the Commission shall specify, but not for more than an aggregate of one hundred and eighty days.” Pan-Atlantic received such a temporary license and applied for a permanent license, but the ICC had not completed processing of the latter application when the 180-day period expired. The ICC granted a temporary extension of the temporary license until it decided the application for a permanent license. Competing railroads challenged this decision. The Supreme Court held that the later-enacted APA provision enabled the ICC’s action. “We see no reason why the provisions of this later Act may not be invoked to protect a person with a license from the damage he would suffer by being compelled to discontinue a business of a continuing nature, only to start it anew after the administrative hearing is concluded.”<sup>262</sup>

The provision against expiration of a license while a renewal application is pending applies only to “a license with reference to an activity of a continuing nature.” Therefore,

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259. APA § 558(c) (last sentence).

260. AG Manual, *supra* note 175, at 91–92.

261. 353 U.S. 436 (1957).

262. The decision in *Pan-Atlantic* was 6-3. The dissenters argued that the APA provision should not apply to a temporary, emergency license issued without the normal elaborate hearing requirements for granting such licenses.

the section does not require the extension of the expiration date of a construction permit because construction is not an activity of a continuing nature.<sup>263</sup>

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263. *Miami MDS Co. v. FCC*, 14 F.3d 658, 659–60 (D.C. Cir. 1994); *see also Bankers Life & Cas. Co. v. Callaway*, 530 F.2d 625, 634 (5th Cir. 1976) (section 558(c) does not apply to extend the expiration date in a dredging permit issued by the Corps of Engineers where permittee was unable to proceed because of local opposition to the project).





# CHAPTER 4

## BEST PRACTICES IN TYPE B ADJUDICATION

### A. BEST PRACTICES AND CAUTION

This chapter summarizes proposals for best practices that should be spelled out in the procedural regulations of agencies engaged in Type B adjudication. These practices might be most useful when Congress creates a new scheme of Type B adjudication and the agency responsible for implementing it must adopt procedural regulations. The best practices should also be useful when existing agencies decide to re-examine and update their procedural regulations.

Appendix A to this book contains a dozen detailed studies of particular Type B adjudication systems. Most of these agencies have already adopted most of the proposed best practices in their procedural regulations, manuals, or adjudicatory decisions. Table 3 at the end of the chapter indicates whether a particular agency has set forth some version of the recommended best practices in its regulations, manuals, or case law. Of course, it is possible that a best practice might be observed in practice by an agency but has not been codified in published sources of law.

The project of compiling “best practices” begs the question of how one should determine that a particular practice is “best.” Necessarily this is a judgmental decision, not one easily reducible to precise and measurable elements. A traditional method of analyzing whether a particular procedure should be required is to balance the factors of accuracy, efficiency, and acceptability to private parties.<sup>264</sup> “Accuracy” refers to correct determination of the facts, law, or agency policy; “efficiency” refers to minimizing cost and delay; and “acceptability to private parties” measures the “fairness” of the procedure. Of course, these factors often run in different directions, and a rather subjective balancing process is required. Tradeoffs are inevitable. Precise information about costs and benefits is lacking. Whether a particular solution is “optimal” in the sense of producing the greatest net benefit is obviously difficult to determine.<sup>265</sup>

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264. See Roger C. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591–93 (1972) (balancing accuracy, efficiency, and acceptability); Verkuil, *supra* note 40, at 740 (balancing fairness, efficiency, and party satisfaction).

265. See Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 692–94 (2015).

While I have not spelled out this calculus for each of the best practices proposed in this book, I have attempted to balance the three factors in deciding whether to recommend a particular practice. I believe these proposals are efficient, in that they should not be costly to implement or cause confusion or delay. They will increase the acceptability of the agency's adjudication practices, while improving (or at least not causing a decline in) the accuracy of decisions. Indeed, as Table 3 shows, most Type B adjudicating agencies already have adopted most of these practices.<sup>266</sup>

Many of the best practices are drawn from the adjudicatory provisions contained in the APA. After all, like Type A adjudication, Type B adjudication involves legally required evidentiary hearings. While the decisionmaker in Type B adjudication is an administrative judge (AJ), rather than an administrative law judge (ALJ), my judgment is that procedures in Type B adjudication should resemble those in Type A adjudication unless there is a good reason for the contrary conclusion. The adjudicatory procedures for evidentiary hearings that have developed over generations, before and after enactment of the APA, should generally apply whether or not the evidentiary hearing in question falls under Type A or B.<sup>267</sup>

Here I suggest an obvious caution: the world of Type B adjudication is wildly diverse. The types of matters considered are all over the map—alien removal, civil penalties, government contracts, hospital Medicare claims, veterans' benefits, intellectual property disputes, employment disputes with the federal government, agriculture, and environmental permitting, just to mention those covered in Appendix A. Some of these involve disputes between the federal government and a private party; others involve disputes between two private parties. Some of the Type B agencies have the classic combined function structure—they investigate, prosecute, and adjudicate. Others are adjudicatory tribunals, meaning they perform no function other than adjudication.

Type B evidentiary hearings vary enormously. Some are trial-type hearings that are at least as formal and private-party protective as those called for by the APA (except that the presiding officer is not an ALJ). Others are quite informal, and some are purely in writing. Some programs are in the mass justice category with heavy caseloads

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266. Professor Robbins criticizes the use of best practice methodology in legal education. Ira P. Robbins, *Best Practices on "Best Practices": Legal Education and Beyond*, 16 CLINICAL L. REV. 269 (2009). Robbins criticizes best practice proposals for legal education since there are no commonly shared goals for legal education, no objective standards for measuring what is "best," a lack of supportive research, and no methodology for putting such proposals into practice. I believe the present proposal for best practices in Type B adjudication is defensible because there are commonly shared goals and a relatively objective standard for measuring whether any given proposal is "best" in achieving that goal (that is, the three-factor balance discussed in the text). Hopefully, the proposals are supported by adequate research and can be implemented through amendment of procedural regulations.

267. ABA Resolution 114, *supra* note 44, called on Congress to apply many of the adjudication provisions of the APA to Type B adjudication, except for the requirement that ALJs preside. *See* Asimow, *supra* note 45. The best practices discussed here follow that approach, but they also recommend a number of practices that are not specified in the APA.

and rushed proceedings. Others have much lower caseloads and call for leisurely and thorough consideration. Some have huge backlogs and long delays; others are relatively current. Some proceedings are highly adversarial; others are inquisitorial. The structures for internal appeal also vary. Thus, the heterogeneity of Type B adjudication makes it challenging to prescribe a set of best practices that would fit all of it.

Not every best practice in the list that follows applies to every Type B scheme, nor should every provision in procedural regulations that implements a best practice take the same form. The presumption is rebuttable. If a persuasive case can be made that a particular practice is inappropriate for a particular adjudicatory system, then the agency should not be encouraged to adopt it. For example, there is no need for a provision for internal separation of adversarial from adjudicatory functions in the case of a tribunal, because an agency that engages only in adjudicatory functions has no staff engaged in investigation or prosecution. Whether a particular procedural device should be employed (and the precise form in which it is provided) always requires a careful balance of the conflicting variables involved in choosing optimal procedures—accuracy, efficiency, and acceptability to the parties.

In 1993, ACUS's Model Adjudication Rules Working Group proposed a set of model rules intended for both Type A and Type B adjudication.<sup>268</sup> The rules were not presented to the Assembly for consideration. ACUS has initiated a new Model Adjudication Working Group to revise and update the model rules.<sup>269</sup> The new model rules apply to “trial-type proceedings . . . that offer an . . . opportunity for fact-finding before an adjudicator.”<sup>270</sup> I have not sought to draft precise language to be incorporated into procedural regulations implementing the best practices itemized below, given the diversity of the adjudicatory schemes to which they would apply. Still, drafters of procedural regulations implementing these best practice recommendations should consult the most current version of the *Model Adjudication Rules* (MARs) and may wish to borrow language from the rules and consider the alternatives addressed in its reporter's notes. In the discussion of best practices that follows, I reference the appropriate sections of MARs.

Clearly the best practices for Type B adjudication cannot be applied to the even more diverse world of Type C adjudication—individualized decisionmaking where no evidentiary hearing is legally required. This is true informal adjudication. In Chapter 5, I suggest some barebones best practices for Type C adjudication, realizing that even these may not work for some Class C schemes.

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268. Michael Cox, *The Model Adjudication Rules (MARs)*, 11 T.M. COOLEY L. REV. 75 (1994).

269. See Admin. Conf. of the U.S., *Model Adjudication Rules Working Group*, <https://www.acus.gov/research-projects/office-chairman-model-adjudication-rules-working-group>, (last visited July 2, 2018).

270. ADMIN. CONF. OF THE U.S., OFFICE OF THE CHAIRMAN, MODEL ADJUDICATION RULES, at iv (2018) [hereinafter MARs].

## B. PROCEDURAL LEGITIMACY

As mentioned above, the criteria for finding that a practice is “best” involves a rather subjective balancing of the criteria of accuracy, efficiency, and acceptability to the parties. The latter criterion of acceptability to the parties is based on the idea of procedural justice. Social science research holds that people find an administrative process acceptable if they believe they have been dealt with fairly, *even though they disagree with the outcome*.<sup>271</sup> If people believe they have been dealt with fairly, they are more likely to accept the legitimacy of the overall scheme of regulation and to obey the law without being compelled to do so.

Being dealt with fairly incorporates such variables as an impartial decisionmaker, fair and adequate notice of what action the agency proposes to take, whether the decisionmaker and the support staff were polite and respectful, whether the person’s views and evidence were listened to and taken into account in making the decision, whether the person had an opportunity to hear and rebut the opponent’s evidence, whether decisionmaker made a good faith effort to reach the right result, and whether that result was consistent with outcomes in other cases. The best practices proposed here are guided by that conception of procedural justice.

## C. BEST PRACTICES FOR TYPE B ADJUDICATION

The list of best practices that follows is broken into four larger categories:

1. Integrity of the Decisionmaking Process,
2. Prehearing Practices,
3. Hearing Practices, and
4. Post-Hearing Processes

These best practices recommendations are closely similar to those in ACUS Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*.<sup>272</sup> In the discussion that follows, I reference the applicable paragraphs of Recommendation 2016-4. In some cases, however, the best practices recommended in this chapter go beyond Recommendation 2016-4.

I frequently give examples found in the statutes, regulations, or manuals of the Type B schemes agencies described in Appendix A. It would be tedious to list each of the regulations that implement these best practices in particular Type B systems, and I have not sought to do so.

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271. The literature is vast but a good place to start is TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

272. See discussion in text at notes 10–12. ACUS Recommendation 2016-4 is reproduced at Appendix B. It was based on my ACUS study. Asimow, *supra* note 9.

## 1. Integrity of the Process

### a. Exclusivity of the Record<sup>273</sup>

Type B adjudication means that the decision resulting from a legally required evidentiary hearing must be based on an exclusive record.<sup>274</sup> Procedural regulations should spell out this requirement.<sup>275</sup> The APA imposes the exclusive record requirement for Type A adjudication.<sup>276</sup>

The exclusive record requirement means that a decisionmaker (either an AJ or reviewing authority) is limited to considering information about facts that was presented in testimony or documents received by the decisionmaker before, at, or after the hearing to which all parties had access. The decision can also be based on matters officially noticed (the official notice procedure entails a rebuttal opportunity).<sup>277</sup> The exclusive record concept means, for example, that the decisionmaker cannot receive ex parte submissions of factual information or rely on his or her personal knowledge of the facts about the parties (without giving the parties a chance to rebut it), or base a judgment on a personal inspection or test without allowing the parties a rebuttal opportunity.

A decisionmaker does not violate the exclusive record requirement by making use of his or her experience and expertise in evaluating the information that was introduced into evidence (or officially noticed) or in making predictions and forecasts based on that information. Concededly there is sometimes a fine line between the improper use by the fact finder of his or her personal knowledge about facts in issue and the decisionmaker's proper use of expertise to evaluate the information submitted into evidence by the parties.

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273. See MARs 100(C); Recommendation 2016-4, *supra* note 10, § 1.

274. See text at notes 159-69.

275. For example, the exclusive record principle is set forth in a statute relating to EOIR: (the abbreviations used in footnotes in this chapter are listed in Chapter 1, Part I and Chapter 2, Part C). “The determination of the immigration judge shall be based only on the evidence produced at the hearing.” 8 U.S.C. § 1229a(c)(1)(A). This statutory provision does not seem to be discussed and explained in EOIR's procedural regulations or its practice manual. However, the ethics code for Immigration Judges (IJs) implements the exclusive record principle. It provides that IJs can consult with Immigration Court staff or officials whose function is to aid the IJs, provided that the IJ “makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility to personally decide the matter.” DEP'T OF JUSTICE, ETHICS AND PROFESSIONALISM GUIDE FOR IMMIGRATION JUDGES, Rule XXXII, <http://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf>.

276. “The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title . . . .” APA § 557(e). See ABA Guide, *supra* note 43, ¶ 7.08.

277. Under the APA, “When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.” APA § 556(e). In addition, it is proper for adjudicators to do their own research to determine legislative facts (that is, facts that do not concern the parties), but the parties should have an opportunity to rebut such legislative fact findings. See *Rowe v. Gibson*, 798 F.3d 622 (7th Cir. 2015) (court of appeals judge determined facts about a pharmaceutical product from reputable internet sources where litigant was a pro se prisoner claiming inadequate medical care).

*b. Separation of Functions*<sup>278</sup>

Separation of functions means that the agency must internally separate its adversary and decisional personnel. For this purpose, an “adversary” is a staff member who took an active part in investigating, prosecuting, or advocating in the same case (but not in a different case). Best practices for Type B adjudication include provision for internal separation of functions.<sup>279</sup>

The separation of functions principle precludes an adversary from serving as a decisionmaker (either an AJ or member of the reconsidering authority) in the same case in which the decisionmaker served an adversary function. The principle also precludes an adversary from furnishing *ex parte* advice to a decisionmaker or decisional adviser.<sup>280</sup>

Separation of functions is a fundamental principle of adjudication that is fair and perceived to be fair—the prosecutor should not turn around and serve as a judge in the same case. A staff adversary often develops a mindset opposed to the private party in the case and thus should not serve as an adjudicatory decisionmaker. Nor should a staff adversary furnish *ex parte* advice to decisionmakers (as discussed in practice c.ii. below).

The recommendation concerning separation of functions applies to agencies that have combined functions of prosecution, investigation, and adjudication. However, agencies that function as adjudicatory tribunals (without prosecuting or investigating functions) need not adopt such provisions.<sup>281</sup> Many of the regulations of

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278. See MARs 121; Recommendation 2016-4, *supra* note 10, § 3; Kuehn, *supra* note 14, at 992–96.

279. Separation of functions is also required in some instances by due process. See discussion in Chapter 3, text accompanying notes 151–52. The ACUS study by Barnett et. al. similarly recommends that non-APA adjudicating agencies adopt internal separation of functions. Barnett et al., *supra* note 49.

280. The APA requires separation of functions. See APA § 554(d); ABA Guide, *supra* note 43, ¶ 7.06. The APA separation of functions rule does not apply to determining applications for initial licenses; to proceedings involving rates, facilities, or practices of public utilities or carriers; or to the agency or a member or member of the body comprising the agency. APA § 554(d)(A)–(C). The first two of these exceptions may not be needed in most Type B agencies and seem generally undesirable. The third exception (relating to agency heads) is generally understood to permit agency heads to participate in the decision to green-light a prosecution or approve issuance of a complaint recommended by agency staff. Best practices would not prohibit agency heads from taking part in this prosecuting function. In addition, the APA contains a command-influence rule. An ALJ shall not “be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.” APA § 554(d)(2). While a command influence provision is desirable, it may not be feasible in smaller agencies, and I have not included it in the list of best practices.

281. For example, CCAB, EEOC, MSPB, PRRB, and PTAB and TTAB (in their trial function) serve as tribunals. However, PTAB and TTAB also consider appeals by applicants for patent or trademark protection; in the appeal function, they combine investigatory and adjudicatory roles and should implement separation of functions.

combined-function Type B adjudicating agencies I studied contain separation of functions provisions,<sup>282</sup> but others do not.<sup>283</sup>

It is also desirable if the agency can employ AJs to work as full-time decision-makers, so that the same person does not serve as prosecutor or investigator in other similar cases.<sup>284</sup> It may be difficult for a person who spends most days investigating and prosecuting violations to adopt a neutral stance when he or she serves as a decisionmaker. However, this form of separation of functions is not possible unless the agency has a substantial enough adjudicatory case-load to keep the decisionmakers employed full time in those roles.<sup>285</sup>

*c. Ex Parte Communications to Decisionmakers*

*i. Outsider Ex Parte Contacts*<sup>286</sup>

Best practices include a provision prohibiting ex parte communication relevant to the merits of the case between outsiders and adjudicatory decisionmakers.<sup>287</sup> The provision should also prohibit ex parte communication between outsiders and staff decisional advisers. For this purpose, the term “outsiders” includes parties to the case, third parties with an interest in the proceedings greater than that of the general public, or government officials outside the agency. Submissions by outsiders (whether concerning facts, law, discretion, or policy) to agency decisionmakers or their staff

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282. Several provisions of EPA’s regulations implement the separation of functions principle. “At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss ex parte the merits of the proceeding with . . . any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person.” 40 C.F.R. § 22.8. A member of the EAB shall not be employed in any office associated with matters that could come before the EAB and shall recuse him or herself from deciding a particular case if in previous employment the member was personally involved in the case. 40 C.F.R. § 1.25(c)(3). In addition, in EPA Class I civil penalty cases, “A Regional Judicial Officer [RJO] shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as an [RJO]. [An RJO] shall not knowingly preside over a case involving any party concerning whom the [RJO] performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. [An RJO] shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel.” 40 C.F.R. § 22.4(b).

283. For example, there are no provisions for separation of functions in the regulations relating to USDA PACA hearings or BVA cases.

284. See Barnett et al., *supra* note 49, at 48–49, 64–66. It also recommends that agencies physically separate AJs and their support staff from other agency personnel.

285. This recommendation (suggested to me by Bill Funk) was not part of ACUS Recommendation 2016-4.

286. See MARs 120; Recommendation 2016-4, *supra* note 10, § 2; Kuehn, *supra* note 14, at 996–1002.

287. APA § 557(d) prohibits outsider ex parte communication. See also ABA Guide, *supra* note 43, ¶ 7.04. The Barnett study similarly recommends that adjudicating agencies prohibit outsider ex parte communications. Barnett et al., *supra* note 49, at 45–48.

decisional advisers should occur only on the record.<sup>288</sup> If oral or written ex parte communications occur, they should be immediately placed on the record.

Outsider ex parte communications offend basic notions of adjudicatory fairness because they may influence the decisional process through off-record communication of arguments that opposing parties have no opportunity to rebut. Moreover, such communications of a factual nature can undermine the exclusive record concept. For those reasons, most Type B agencies I studied spell out the ex parte concept,<sup>289</sup> but some do not do so.<sup>290</sup>

*ii. Staff Advice to Decisionmakers*<sup>291</sup>

Ex parte advice to decisionmakers by *non-adversarial* agency staff members<sup>292</sup> is customary and appropriate, so long as it does not violate the exclusive record principle by introducing new factual material. In technically difficult or complex cases, such advice is essential to making the best possible adjudicatory decisions, particularly by the authority that reviews the initial decision (such as the agency head or heads or other designated review authority).

For example, in cases involving conflicts in expert testimony about scientific or economic issues, decisionmakers may need assistance from staff experts in understanding the testimony. Decisionmakers may also need help in locating and evaluating the agency's prior precedents or in exercising discretion to make wise policy. Decisionmakers need candid staff advice when they render important adjudicatory decisions, but the advice is likely to be less than candid if it must be disclosed to the parties and to the general public.

Agencies should consider what types of non-adversarial ex parte staff advice are necessary and appropriate in their adjudicatory decisionmaking. For example, ex parte staff advice may not be necessary or appropriate in many situations, such as mass justice adjudications or adjudications turning largely on credibility determinations or those with no impact on the general public.

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288. Ex parte communications from staff members to decisionmakers present different considerations from outsider ex parte communications and are discussed below under "separation of functions" and "staff advice."

289. Thus, the EAB as well as the EPA's regional judicial officers are precluded engaging in ex parte communication. Under 40 C.F.R. § 22.8:

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss ex parte the merits of the proceeding with any interested person outside the Agency . . . .

290. For example, there are no provisions precluding ex parte communication relating to the BVA. In the case of PTAB, ex parte communications are prohibited in trial cases but apparently not in appeals cases.

291. See Recommendation 2016-4, *supra* note 10, § 4.

292. Meaning staff members who have not served as prosecutors, investigators, or advocates in the same case (or a factually related case).



Procedural regulations should spell out which non-adversarial staff members can give ex parte advice and which agency decisionmakers can receive such advice. The regulations should clearly screen staff adversaries in a case from giving ex parte advice in the same case and should prohibit advisers from introducing factual material not in evidence into their advisory communications. Generally, regulations on separation of functions acknowledge that adjudicators can consult ex parte with non-adversarial decisional advisers, but furnish no detail as to who those advisers might be.<sup>293</sup> The regulations governing procedure for the Environmental Appeals Board recognize that adjudicators can be advised by non-adversarial staff members, but do not explain which staff members can furnish such advice.<sup>294</sup>

*d. Bias*<sup>295</sup>

A Type B decisionmaker (either the AJ or the reconsidering authority) should not be biased for or against any party. An impartial decisionmaker is an essential element of an evidentiary hearing.<sup>296</sup> Impartiality is required both by the APA<sup>297</sup> and by due process.<sup>298</sup>

For this purpose, the term “bias” includes three different types of disqualifying mindsets:<sup>299</sup>

- a financial or other personal conflict of interest in the decision;

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293. *The Ethics and Professionalism Guide for Immigration Judges* provides: “An Immigration Judge may consult with court staff and court officials, including supervisors, whose functions are to aid the Immigration Judge in carrying out the Immigration Judge’s adjudicative responsibilities, or with other Immigration Judges, provided the Immigration Judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility to personally decide the matter.” DEP’T OF JUSTICE, *supra* note 275, Rule XXXII.

294. “At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person *who is likely to advise these officials on any decision in the proceeding*, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person.” 40 C.F.R. § 22.8 (emphasis added). For a detailed breakdown of staff that can and cannot engage in ex parte communication with decisionmakers, see procedural regulations of the California Public Utility Commission, CAL. CODE REGS. tit. 20 § 8.1.

295. See MARs 112; Recommendation 2016-4, *supra* note 10, § 5.

296. The existing sources of law include both federal criminal conflict of interest provisions and Office of Governmental Ethics regulations. 18 U.S.C. § 208; 5 C.F.R. §§ 2635.501–.503. See Barnett et al., *supra* note 49, at 49–50, 66.

297. See APA § 556(b): “The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.”

298. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970). See discussion of bias in text at notes 148-50.

299. See Kuehn, *supra* note 14, at 971–92; ABA Guide, *supra* note 43, ¶ 7.02. Both references discuss the different types of mindsets that might disqualify adjudicatory decisionmakers.

- personal animus against the private party or the group to which that party belongs, or against an agency or its attorney; or
- prejudice of the adjudicative facts at issue in the proceeding (meaning facts specific to the parties).

Procedural regulations and manuals should spell out the bias standard and explain how and when parties should raise bias claims and seek disqualification of adjudicators. Some Part B procedural regulations do not contain explicit provisions concerning bias or explain how and when bias claims should be raised.<sup>300</sup> I found none that describe comprehensively the different types of disqualifying bias.

MSPB regulations provide that an AJ can be disqualified for “personal bias.” The Judges’ Handbook defines “personal bias” to include: “a. A party, witness, or representative is a friend or relative of, or has had a close professional relationship with the AJ; or b. personal bias or prejudice of the AJ.”<sup>301</sup>

Some agencies have dealt with the issue of bias by providing parties the option of making one peremptory challenge against an AJ, meaning that a party can disqualify a particular AJ without establishing that the AJ fails to meet the criteria for impartiality. However, a peremptory challenge procedure could be costly for agencies to implement (especially a mass justice agency), and I do not propose it as a best practice.

*e. Complete Statement of Important Procedures*<sup>302</sup>

Best practice is that agencies should set forth all important procedures and practices that affect persons outside the agency in procedural regulations that are published in the *Federal Register* and the Code of Federal Regulations. This is required by the APA.<sup>303</sup> Important practices relating to the decisional process should not be buried in practice manuals or guides for AJs.

Nevertheless, such practice manuals are quite useful to staff, AJs, and private litigants. The manuals should spell out smaller details of procedures that are already set forth in the regulations or in agency appellate decisions. Manuals should be as user-friendly as possible and contain examples, illustrations, model forms, and checklists.

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300. For example, I found no provisions concerning bias in the procedural regulations for EOIR, USPTO, or VA. The regulations relating to PACA contain a disqualification provision that covers only financial or family relationship, but not other types of bias. Similarly, the EAB regulations refer only to financial interest or personal relationships. 8 C.F.R. § 47.11(a)–(b).

301. 5 C.F.R. § 1201.42(b); MERIT SYS. PROT. BD., JUDGES HANDBOOK, ch. 3, ¶ 2 (2017) [hereinafter MSPB Judges Handbook].

302. See Recommendation 2016-4, *supra* note 10, § 28.

303. APA § 552(a)(1)(C). Section 552(a)(1) provides, in language following (E), “except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.”

Manuals should be freely available to the public and conveniently accessible on the agency's website.<sup>304</sup>

In addition, agencies should periodically seek feedback from interested persons on their procedures and re-examine and update their procedural regulations as well as their practice manuals and guidelines.

## 2. Pre-Hearing Practices

### a. Notice<sup>305</sup>

Basic fairness to litigants requires that they receive proper and timely notice of the issues in the case. The notice must be provided far enough in advance and contain sufficient detail to allow parties to prepare for their hearings (or for settlement negotiations).<sup>306</sup> In his study of optimum informal adjudication procedures, Verkuil identified proper notice as one of the essential and irreducible elements of administrative procedure (along with the ability to make written or oral comments and to receive a statement of reasons).<sup>307</sup>

Thus, the procedural regulations for Type B adjudication should contain a provision calling for notice that is tailored to the specific circumstances of the particular adjudicatory scheme. The agency's notice documents should furnish information about the agency's position as to factual issues in dispute and remedies the agency seeks. This information should be specific enough to enable the party to prepare for the legally required evidentiary hearing.<sup>308</sup>

The notice should contain a copy of the agency's procedural regulations and procedural manuals or a citation to the internet address where such materials are located.

The notice should also furnish necessary procedural information such as the following items:

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304. At the time this book was published, ACUS planned to begin a project that will provide guidance on procedural manuals and discuss their accessibility. See Admin. Conf. of the U.S., *Public Availability of Adjudication Rules*, <https://www.acus.gov/research-projects/public-availability-adjudication-rules> (last visited July 16, 2018).

305. See MARs 200, 300; Recommendation 2016-4, *supra* note 10, § 6.

306. The APA requires that persons entitled to notice shall be timely informed of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing is to be held; and the matters of fact and law asserted. APA § 554(b). See ABA Guide, *supra* note 43, ¶ 4.02.

307. Verkuil, *supra* note 40, at 748–49.

308. The EPA's regulation (40 C.F.R. § 22.14) relating to civil penalty disputes provides:

Each complaint shall include:

- (1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;
- (2) Specific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated;
- (3) A concise statement of the factual basis for each violation alleged;
- (4) A description of all relief sought . . . ;
- (5) Notice of respondent's right to request a hearing on any material fact alleged in the complaint, or on the appropriateness of any proposed penalty, compliance or corrective action order, or Permit Action . . . .

- How a party can request a hearing;
- Discovery options;
- Who the administrative judge will be or how the judge will be selected as well as opportunities for peremptory challenge, if any;
- Representation at the hearing, including self-representation and lay representation if that is permitted and about any legal assistance options offered by the agency;
- Procedural choices open to the private party (such as the choice between written and oral hearings or ADR opportunities);
- Deadlines for filing pleadings and documents;
- Subpoena practices;
- Whether the agency offers an opportunity for reconsideration of the initial decision at a higher agency level; and
- Availability of judicial review.

*b. Self-Representation and Lay Representation*<sup>309</sup>

*i. Self-Represented Parties*

In many cases, private parties involved in agency adjudication cannot afford lawyers and must represent themselves.<sup>310</sup> In some instances, they are assisted only by non-expert family or friends, which amounts to self-representation. Self-represented parties are often at a considerable disadvantage in confronting the agency adjudication process.<sup>311</sup> In addition, the presence of unrepresented litigants causes many problems for agency adjudicators whose procedures were designed for represented parties.<sup>312</sup> Most agency procedural regulations make no explicit provision for assisting self-represented parties.<sup>313</sup>

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309. See MARs 140; Recommendation 2016-4, *supra* note 10, §§ 13–17.

310. Depending on how proceedings are classified, between 37% and 55% of respondents appearing before the Immigration Court in removal proceedings are represented by counsel. See note 725. Although most Social Security disability applicants are represented by lawyers, about 20% are self-represented. Additional numbers of applicants have representation for only a portion of the disability hearing process. About 75% of litigants before the USDA National Appeals Division represent themselves or are assisted by a family member or friend. Connie Vogelmann, *Self-Represented Parties in Administrative Hearings* (Oct. 28, 2016) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/self-represented-parties-administrative-hearings-final-report>.

311. Self-represented litigants may trigger a bias against the validity of their legal claims. This bias may explain why they fare poorly in the litigation process when other factors are held constant. See Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, *The Signaling Effect of Pro Se Status*, 42 *LAW & Soc. INQUIRY* 1091 (2017).

312. See generally Vogelmann, *supra* note 310.

313. The MSPB Judges Handbook requires special efforts to assist pro se appellants such as an early status conference to explain what is required. Filings by pro se appellants should not be rejected on technical grounds, and they should be allowed great latitude in questioning witnesses. The statutes and regulations concerning VA benefit claims at the VARO level are very solicitous of self-represented parties, requiring the VA to develop any issues raised in the documents or testimony even if not flagged by the veteran.

Best practices include provisions that are designed to assist self-represented parties. ACUS Recommendation 2016-6 (which is included in this book as Appendix D)<sup>314</sup> spells out the steps agencies should take to assist self-represented parties. These steps include mechanisms to direct self-represented parties to appropriate resources and provision of services to them, particularly on-line. Agencies should provide training for AJs to deal with self-represented parties, particularly those with limited literacy or disabilities. Agencies also need to collect data on self-representation and attempt to simplify their processes as far as possible.

## ii. Lay Representation

Best practices should also enable private litigants to be represented by non-lawyers in agency proceedings.<sup>315</sup> For parties who cannot afford or cannot obtain a lawyer, having the assistance of a knowledgeable lay representative is far better than self-representation.<sup>316</sup> In Recommendation 86-1, ACUS urged agencies that dispense mass justice to recognize lay representation explicitly. It concluded: “Federal agency experience and statistics indicate that qualified persons who are not lawyers generally are capable of providing effective assistance to individuals in mass justice agency proceedings.”<sup>317</sup>

Agencies should be permitted to license lay representatives (including requirements of an examination and experience), require them to be insured, make them subject to ethical conduct codes, and require the agency to protect the confidentiality of client-lay representative communications. A major advantage of adopting procedural regulations that recognize a right to lay representation is to preempt state unauthorized practice laws that may prohibit or otherwise regulate lay representation in civil and criminal cases.<sup>318</sup> Obviously, lay representation may be inappropriate in cases in which the subject matter of the dispute is highly technical and requires specialized knowledge.<sup>319</sup>

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314. Admin. Conf. of the U.S., Recommendation 2016-6, *Self-Represented Parties in Administrative Proceedings*, 81 Fed. Reg. 94,312, 94,319 (Dec. 14, 2016).

315. The APA authorizes (but does not require) adjudicating agencies (whether Type A, B, or C) to permit parties to be represented by a “qualified representative.” APA § 555(b), discussed in text at notes 176-77.

316. See DEBORAH L. RHODE, ACCESS TO JUSTICE 90–91 (2004); Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429 (2016); Paul R. Tremblay, *Surrogate Lawyering: Legal Guidance, sans Lawyers*, 31 GEO. J. LEGAL ETHICS (forthcoming 2018); Anne E. Carpenter, Alyx Mark & Colleen F. Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 J. OF LAW & SOC. INQUIRY 1023 (2017).

317. Admin. Conf. of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 51 Fed. Reg. 25,641 (July 16, 1986).

318. See *Benninghoff v. Superior Ct.*, 38 Cal. Rptr. 3d 759, 768–69 (Ct. App. 2006) (holding that federal agency regulations permitting lay representation trump state unauthorized practice laws).

319. TTAB permits representation only by lawyers. PTAB but not TTAB allows representation by registered non-lawyer patent agents. See Appendix A-10. CBCA permits self-representation but not lay representation. These agencies have concluded that the complexity of the subject matter of the cases before them precludes participation of lay representatives.

The procedural regulations of many agencies permit representation by authorized agents who are not lawyers, as well as by law students in supervised clinical programs.<sup>320</sup> The VA is notable for its heavy reliance on representation by employees of veterans' service organizations at both the Veterans Affairs Regional Office (VARO) and BVA levels.<sup>321</sup>

*c. Alternative Dispute Resolution*<sup>322</sup>

The Administrative Dispute Resolution Act (ADRA) applies to both Type A and B adjudication. ADRA broadly validates and encourages adjudicating agencies to use all available ADR tools, including mediation and arbitration.<sup>323</sup> ACUS has consistently sought to promote ADR by federal agencies.<sup>324</sup> Properly used, ADR techniques can make the adjudicatory process less adversarial and can facilitate settlements, thus avoiding contentious and costly hearings.

Best practices of Type B adjudication agencies encourage and facilitate ADR, particularly mediation in its various forms. The regulations should provide a system whereby neutral mediators can be selected by agreement of the parties. The regulations should assure confidentiality of communications occurring during the mediation process and they should spell out who pays for mediation services provided outside the agency.

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320. Thus, EOIR allows representation by law students, law graduates not yet admitted to the Bar, reputable individuals with a pre-existing relationship to the person represented, accredited representatives, and accredited officials of a foreign government. However, it does not allow representation by non-lawyer immigration specialists, visa consultants, and notaries.

321. See text at notes 948–51. The statute prohibits compensation of attorneys at the VARO level but permits it at the BVA level.

322. See MARs 240; Recommendation 2016-4, *supra* note 10, § 12.

323. 5 U.S.C. §§ 571–583. In particular, ADRA amended APA § 556(c)(6), which authorizes presiding officers to hold conferences for settlement or simplification of the issues or to utilize ADR techniques.

324. See Admin. Conf. of the U.S., Recommendation 2014-1, *Resolving FOIA Disputes Through Targeted ADR Strategies*, 79 Fed. Reg. 35,988, 35,988 (June 25, 2014) (resolving FOIA disputes through targeted ADR strategies); Admin. Conf. of U.S., Recommendation 95-7, *Use of Mediation under the Americans with Disabilities Act*, 60 Fed. Reg. 43,115 (Aug. 18, 1995) (relating to ADR and the Americans with Disabilities Act); Admin. Conf. of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, 53 Fed. Reg. 26,030 (July 11, 1988) (use of settlement judges); Admin. Conf. of the U.S., Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 51 Fed. Reg. 25,643 (July 16, 1986) (urging agencies to use all forms of ADR).

EEOC,<sup>325</sup> MSPB, CBCA, PRRB,<sup>326</sup> and USDA-PACA have well developed provisions for mediation. Note that each of these schemes with well-developed ADR practice is a tribunal in which the adjudicating agency is not a party to the dispute; mediation may be more acceptable to the parties in tribunal situations than in combined function situations. In addition, DOE provides for mediation in its security clearance and whistleblower cases, though DOE is not a tribunal.

Thus, MSPB AJs can initiate settlement activity at any time.<sup>327</sup> The AJ will suspend a pending hearing for 30 days in order to allow the parties to seek mediation through MSPB's Mediation Appeals Program (MAP).<sup>328</sup> MAP offers the services of certified mediators as an alternative to the formal appeals processes set forth in the agency's regulations. Participation in MAP is free and confidential. The MAP website states that, since the program's inception in FY 2005, approximately 60% of all mediated cases have settled by the conclusion of the MAP process.

#### *d. Prehearing Conferences*<sup>329</sup>

Prehearing conferences are a common feature of modern litigation because they can shorten and simplify the hearing and promote settlement discussions. Prehearing conferences should play a role in administrative litigation as well. Thus, best practices should include the ability of an AJ to require the parties to participate in a pretrial conference (in person or by telephone or videoconference), if the AJ believes that such a conference would simplify the hearing or promote settlement.<sup>330</sup> Parties should be required to exchange witness lists and expert reports before the prehearing conference. The AJ should be able to require that both sides be represented at the pretrial conference by persons with authority to agree to a settlement.

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325. EEOC emphasizes ADR at all stages of its adjudicatory process relating to discrimination against federal employees. Complaining employees must first consult an EEO counselor within the employing agency. The counselors offer mediation as an option. ADR continues to be available during the time the employing agency considers the complaint. When the dispute comes before EEOC, the employing agency can make an offer of resolution, and if the ultimate result is less favorable than the offer, the complainant can be denied attorney fees. *See* Appendix A-6; EQUAL EMP'T OPPORTUNITY COMM'N, MANAGEMENT DIRECTIVE ch. 3, <http://www.eeoc.gov/federal/directives/md110.cfm>.

326. PRRB decides complex accounting disputes arising out of hospital and other provider claims against Medicare. It has no AJs, and its hearings are before the full five-member board. It has a well-developed mediation practice, and 90-95% of all cases are settled. *See* Appendix A-11.

327. 5 C.F.R. § 1201.41(c). *See* MSPB Judges Handbook, *supra* note 301, at ch. 11.

328. 5 C.F.R. § 1201.28(d). *See* Merit Sys. Prot. Bd., *The Mediation Appeals Program*, <http://www.mspb.gov/appeals/mediationappeals.htm> (last visited July 2, 2018).

329. *See* MARs 220; Recommendation 2016-4, *supra* note 10, § 8.

330. *See* APA § 556(c)(6). ACUS recommended that Type A agencies conduct pre-hearing conferences and suggested that such conferences would be appropriate in many areas of adjudication outside the APA. Admin. Conf. of the U.S., Recommendation 70-4, *Discovery in Agency Adjudication*, 38 Fed. Reg. 19,786 (July 23, 1973); *see also* Edward A. Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89, 95-103.

Many agencies I studied include provisions for pretrial conferences in procedural regulations. For example, in DOE security clearance cases, “At least 7 calendar days prior to the date scheduled for the hearing, the Administrative Judge will convene a prehearing conference for the purpose of discussing stipulations and exhibits, identifying witnesses, and disposing of other appropriate matters. The conference will usually be conducted by telephone.”<sup>331</sup>

*e. Electronic Document Filing*<sup>332</sup>

Best practices should include provisions that allow parties to file documents with the agency and the AJ electronically, as is now broadly permitted in the court system.<sup>333</sup> Electronic filing has significant efficiency benefits for both the agency and outside parties. Most agencies now permit or require electronic document filing. MSPB and CBCA have detailed regulations governing electronic filing that could serve as models. For example, MSPB regulations allow e-filing for any of the following:

1. File any pleading, including a new appeal, in any matter within the MSPB’s appellate jurisdiction;
2. File any pleading in any matter within the MSPB’s original jurisdiction;
3. File a petition for enforcement of a final MSPB decision;
4. File a motion for an attorney fee award as a prevailing party;
5. File a motion for compensatory or consequential damages;
6. Designate a representative, revoke such a designation, or change such a designation; or
7. Notify the MSPB of a change in contact information such as address (geographic or electronic mail) or telephone number.<sup>334</sup>

Under the CBCA’s regulations:

Filings submitted by electronic mail (e-mail) are permitted, with the exception of appeal files[.] . . . classified documents, and filings submitted in camera or under protective order . . . Filings by e-mail shall be submitted to: [cbca.efile@cbca.gov](mailto:cbca.efile@cbca.gov). Filings must be in PDF format and may not exceed 18 megabytes (MB) total. Filings that are not in PDF format or over 18 MB

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331. 10 C.F.R. § 710.25(f).

332. See MARs 151(B)(3). Recommendation 2016-4 does not contain a recommendation concerning electronic document filing.

333. ACUS approved a recommendation at its June 2018 plenary session that deals with electronic case management systems (eCMS) for administrative adjudication. See Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,683, 30,686 (June 29, 2018). ECMS goes beyond electronic document filing and considers whether agencies should replace paper case files with electronic files. Under eCMS, many functions now on paper would be moved online. The recommendation observes that there are substantial costs and benefits associated with eCMS. ECMS may make more sense for high-volume adjudicatory systems than for low-volume systems. It would be premature at this time to declare that eCMS should be included in a list of best practices for Type B adjudication.

334. 5 C.F.R. § 1201.14 (cross-references omitted).



will not be accepted. The filing of a document by e-mail occurs upon receipt by the Board on a working day . . . All e-mail filings received by 4:30 p.m., Eastern Time, on a working day will be considered to be filed on that day. E-mail filings received after that time will be considered to be filed on the next working day.<sup>335</sup>

*f. Discovery*<sup>336</sup>

Pre-trial discovery is commonplace in the world of court litigation, and it should be considered in administrative litigation as well.<sup>337</sup> The regulations should explain what unprivileged information in the agency's case files is subject to disclosure obligations or to inspection by outside parties. In addition, AJs should be empowered to order discovery through depositions, interrogatories, and the other methods of discovery used in civil trials, upon a showing that discovery is needed (such as cases involving conflicting expert reports or in which a witness will not be available to testify at the hearing).<sup>338</sup> Requiring AJ permission for discovery should avoid the problem of costly excess discovery (including unnecessary depositions or detailed interrogatories) that plagues the court system.<sup>339</sup> Discovery provisions are probably not appropriate in mass adjudication situations because of caseload pressures on AJs, but may have a useful role in Type B adjudication that involves larger disputes and lengthier hearings.

PTAB and TTAB conduct their trial proceedings (that is, disputes between patentees and challengers) entirely through discovery or affidavits.<sup>340</sup> Evidence, including witness statements, is received in deposition form, and the depositions are then introduced at the hearing. No additional testimony is permitted at the hearings. This is an interesting model that may work for other agencies in which cases seldom involve credibility disputes.<sup>341</sup>

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335. 48 C.F.R. § 6101.1(b)(5)(iii).

336. See MARs 230–239; Recommendation 2016-4, *supra* note 10, §§ 9–10.

337. ACUS recommended that Type A agencies adopt discovery practices modeled on the Federal Rules of Civil Procedure and suggested that discovery would be appropriate in many areas of adjudication outside the APA. As to depositions, ACUS recommended that depositions occur only after a prehearing conference and only in the discretion of the presiding officer. Depositions of agency staff members should be permitted only where there is a showing of need for doing so. Recommendation 70-4, *supra* note 330; see also Tomlinson, *supra* note 330, at 103–09.

338. Both EEOC and DOE allow discovery by agreement of the parties or in the AJ's discretion. 10 C.F.R. § 708.28(b)(1)–(2); 29 C.F.R. § 1614.109(d).

339. For example, CBCA provides for depositions, interrogatories, and other methods of discovery but requires board judge permission for their use.

340. See text at notes 824–45.

341. Depositions can be used as evidence in civil proceedings where the deponent is not available to testify as a witness. See FED. R. CIV. P. 32(a)(4).

*g. Subpoena Power*<sup>342</sup>

Best practices for Type B adjudication include providing parties with subpoena power.<sup>343</sup> Subpoenas enable the agency and private parties to compel the production of documents and the appearance of witnesses at the hearing. Most Type B agencies have subpoena power. However, the agency cannot give itself subpoena power; it must be provided by a statute.<sup>344</sup> Procedural regulations should explain an agency's subpoena practice in detail. The regulations of the Civilian Contract Appeals Board (CCAB) provide an example of such regulations:<sup>345</sup>

(a) Voluntary cooperation in lieu of subpoena. Each party is expected to:

(1) Cooperate by making available witnesses and evidence under its control, when requested by another party, without issuance of a subpoena; and

(2) Secure the cooperation of third-party witnesses and production of evidence by third parties, when practicable, without issuance of a subpoena.

(b) General. Upon the written request of any party filed with the Office of the Clerk of the Board, or upon the initiative of a judge, a subpoena may be issued that commands the person to whom it is directed to:

(1) Attend and give testimony at a deposition in a city or county where that person resides or is employed or transacts business in person, or at another location convenient to that person that is specifically determined by the Board;

(2) Attend and give testimony at a hearing; and

(3) Produce the books, papers, documents, electronically stored information, and other tangible and intangible things designated in the subpoena.

(c) Request for subpoena. A request for a subpoena shall contain the name of the assigned judge, the name of the case, and the docket number of the case. It shall state the reasonable scope and general relevance to the case of the testimony and of any evidence sought. A request for a subpoena shall be filed at least 15 calendar days before the testimony of a witness or evidence is to be provided. The Board may, in its discretion, honor requests for subpoenas not made within this time limitation.

(d) Form . . .

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342. See MARs 171; Recommendation 2016-4, *supra* note 10, § 11. See also Admin. Conf. of the U.S. Recommendation 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendation*, § 3, 55 Fed. Reg. 34,213 (Aug. 22, 1990) (subpoena power in Social Security disability adjudication).

343. See ABA Guide, *supra* note 43, ¶ 4.04.

344. APA § 555(c)-(d). EEOC lacks power to subpoena non-party witnesses.

345. 48 C.F.R. § 6101.16.

- (e) Service . . .
- (f) Proof of service . . .
- (g) Motion to quash or to modify . . .
- (h) Contumacy or refusal to obey a subpoena. In a case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the Board shall apply to the court through the Attorney General of the United States for an order requiring the person to appear before the Board to give testimony, produce evidence, or both.

### 3. Hearing Practices

#### a. Open Hearings<sup>346</sup>

Type B adjudicating agencies should open their hearings to the public.<sup>347</sup> Some of the procedural regulations I studied provide for open hearings, but others are silent on the issue. Allowing members of the public (including the media) to be present is an important accountability mechanism and part of the American tradition of open trials.<sup>348</sup> However, agencies should have the ability to close a hearing in particular cases due to concerns about protection of law enforcement or national security<sup>349</sup> or to protect confidentiality of business documents or the privacy of parties to the hearing.<sup>350</sup>

EOIR's regulations provide an example of a provision relating to open hearings:<sup>351</sup>

All hearings, other than exclusion hearings, shall be open to the public except that:

- (a) Depending upon physical facilities, the Immigration Judge may place reasonable limitations upon the number in attendance at any one time with priority being given to the press over the general public;
- (b) For the purpose of protecting witnesses, parties, or the public interest, the Immigration Judge may limit attendance or hold a closed hearing.

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346. See MAR 300(A); Recommendation 2016-4, *supra* note 10, § 18.

347. See ABA Guide, *supra* note 43, ¶ 5.03.

348. See *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286 (2d Cir. 2012) (establishing First Amendment right to attend administrative hearings concerning penalties for violation of transit rules); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (First Amendment requires open deportation hearings involving persons suspected of terrorist involvement unless agency establishes compelling interest for closing the hearing). *Contra* *N. Jersey Media Grp. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002). These cases are based on *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny, holding that the public has a First Amendment right to attend trials in adversarial proceedings (administrative or judicial) absent compelling interests for closing the proceedings.

349. DOE closes its hearings in security clearance cases, which, by definition, involve security issues not appropriate for public hearings. 10 C.F.R. § 710.26(c).

350. Thus, the EEOC closes its hearings in employee discrimination cases in order to protect the privacy of the complainant. 29 C.F.R. § 1614.109(e).

351. 8 C.F.R. § 1003.27.

(c) In any proceeding before an Immigration Judge concerning an abused alien spouse, the hearing and the Record of Proceeding shall be closed to the public unless the abused spouse agrees that the hearing and the Record of Proceeding shall be open to the public. In any proceeding before an Immigration Judge concerning an abused alien child, the hearing and the Record of Proceeding shall be closed to the public.

(d) Proceedings before an Immigration Judge shall be closed to the public if information subject to a protective order [meaning that disclosure of information would harm US national security or law enforcement interest] ... may be considered.

*b. Use of Administrative Judges*<sup>352</sup>

Agencies conducting Type B adjudication should make use of AJs to conduct hearings and provide an initial decision if they have a substantial caseload. As discussed below,<sup>353</sup> the initial AJ decision is usually subject to review by upper-level decisionmakers such as the agency heads.

Of the agencies studied, only HHS-DAB and PRRB did not utilize AJs to conduct hearings and make initial decisions. The five-member PRRB board conducts its hearings en banc. PRRB has a large inventory of pending cases. The use of en banc hearings by the PRRB seems to be an inefficient use of resources and drastically reduces the number of hearings that can be provided.

*c. Types of Hearings*

*i. Video Conferencing and Telephone Hearings*<sup>354</sup>

Agencies can achieve substantial economies by making use of video conference technology in conducting adjudicatory hearings (or parts of the hearings). Video allows the agency to avoid spending time and money to bring AJs, witnesses, and other staff members to locations away from their offices. It also promotes the convenience of parties and witnesses, especially those living in remote locations, who need not travel long distances to participate in hearings; obviously, however, at least with existing technology, the parties and witnesses must still travel to an agency office that has video facilities. ACUS recently studied the video conference procedure and suggested best practices.<sup>355</sup>

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352. See MARs 100(B); Recommendation 2016-4, *supra* note 10, § 19.

353. Text at notes 383–96.

354. See MARs 301; Recommendation 2016-4, *supra* note 10, § 20.

355. Admin. Conf. of the U.S., Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, 79 Fed. Reg. 74,114, 75,119 (Dec. 17, 2014); Admin Conf. of the U.S., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,789, 48,795 (Aug. 9, 2011).

Nevertheless, video conference is controversial, and it is not always appropriate.<sup>356</sup> The efficiency savings possible through the use of video must be balanced against the possible dissatisfaction of private parties and their advocates. When video is used, the agency should make every effort to structure the experience to maximize participant satisfaction, as discussed in ACUS Recommendation 2014-7. Obviously, a key point is that the video equipment and facilities must be of sufficiently good quality to insure that the participants can see and hear each other clearly.

Best practices for Type B adjudication include the ability to hold hearings through video conference. DOE, EOIR, USDA-PACA, and BVA<sup>357</sup> are among the agencies that hold a substantial portion of their Type B hearings through video conference.

Video conference is obviously superior to the use of the telephone, since video allows the AJ and the parties and their representatives to see as well as hear the witnesses and to see documents.<sup>358</sup> Nevertheless, agencies with substantial caseloads consisting of cases involving smaller stakes, or cases that do not present credibility issues, should have the ability to make use of telephone hearings, with or without the consent of the parties.

The USDA resolves PACA disputes with damages over \$30,000 by oral hearings, most of which are conducted by video conference. The regulations permit both personal attendance and phone hearings in some circumstances. Cost to the government is explicitly taken into account. USDA's regulations<sup>359</sup> provide:

- (3) The hearing shall be conducted by audio-visual telecommunication unless the examiner determines that conducting the hearing by personal attendance of any individual expected to attend the hearing:
  - (i) Is necessary to prevent prejudice to a party;
  - (ii) Is necessary because of a disability of any individual expected to participate in the hearing; or
  - (iii) Would cost less than conducting the hearing by audio-visual telecommunication. If the examiner determines that a hearing conducted by audio-visual telecommunication would measurably increase [USDA's] cost of conducting the hearing, the hearing shall be conducted by personal attendance of any individual who is expected to participate in the hearing or by telephone.

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356. Video is extensively used in EOIR proceedings, particularly for persons held in remote detention facilities. This use of video is controversial, because advocates for respondents believe it disadvantages their clients.

357. See Appendix A-12. Most BVA cases are written only. In cases in which hearings occur, 54% are by video conference.

358. See *EF Int'l Language Sch., Inc. v. NLRB*, 673 F. App'x. 1 (D.C. Cir. 2017) (affirming NLRB's use of videoconference equipment and distinguishing case that disapproved telephonic hearings).

359. 7 C.F.R. § 47.15(c)(3).

(4) The examiner may, in his or her sole discretion or in response to a motion by a party to the proceeding, conduct the hearing by telephone if the examiner finds that a hearing conducted by telephone:

(i) Would provide a full and fair evidentiary hearing;

(ii) Would not prejudice any party; and

(iii) Would cost less than conducting the hearing by audio-visual telecommunication or personal attendance of any individual who is expected to participate in the hearing.

*ii. Written-Only Hearings*<sup>360</sup>

Best practices for Type B adjudication include the use of written-only hearings in appropriate cases. Most agencies confront budget and caseload pressures, and the use of written hearings can yield substantial efficiencies for both sides.<sup>361</sup> Numerous agencies employ a written summary judgment practice when affidavits reveal there is no disputed issue of material fact.<sup>362</sup> Normally, best practice is to allow oral argument in connection with a written-only hearing or a summary-judgment motion, but the agency should have discretion to dispense with oral argument if it appears to be of little utility in a given case.

Hearings conducted through exchange of evidentiary documents are appropriate in cases that do not involve resolution of credibility conflicts. Such cases may involve disputes concerning the interpretation of statutes or regulations or may involve only the question of how to exercise discretion or may involve disputes concerning legislative facts (that is, factual disputes that do not involve the conduct or motivations of the parties to the case) in which experts offer conflicting views. Oral hearings (including oral testimony and cross-examination) are of questionable utility in such cases.

CBCA regulations offer a useful model. The regulations permit either party to opt for a written-only hearing in which the case is submitted on the written record. If one party (A) wants an oral hearing and the other (B) wants to submit the case on the record, A receives an oral hearing, and B receives a written-only hearing; however, B is permitted to cross-examine A's witnesses.<sup>363</sup>

EPA permit cases are handled through a two-stage process that does not include an oral evidentiary hearing. The initial decision stage is a written notice and comment type proceeding, often with a public non-evidentiary hearing. The appellate stage

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360. See Recommendation 2016-4, *supra* note 10, §§ 21–22.

361. The APA explicitly permits written-only hearings in certain circumstances. “In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.” APA § 556(d).

362. See *Bettor Racing v. Nat’l Indian Gaming Comm’n*, 812 F.3d 648, 653 (8th Cir. 2016) (upholding summary judgment procedure where there are no disputed fact issues).

363. See Appendix A-2.

before the EAB involves a written hearing with clearly-erroneous review of the fact findings made at the initial decision stage.<sup>364</sup>

In cases involving disputes of adjudicative fact but relatively small stakes, it should be possible to substitute written for oral testimony, as occurs in USDA-PACA adjudication.<sup>365</sup> Even when the stakes are large, some agencies offer a quicker decision if the parties agree to a written-only consideration of their case.<sup>366</sup> PTAB and TTAB use an innovative approach in which oral testimony of parties and experts is taken exclusively through depositions and affidavits; the AJ then decides the case on these materials plus oral argument.<sup>367</sup>

#### *d. Evidentiary Rules*<sup>368</sup>

Best practice requires that an agency's procedural regulations prescribe the evidentiary rules that the AJ will apply. Many Type B agencies follow the APA evidence provisions. Under the APA, the ALJ should exclude irrelevant, immaterial, or unduly repetitious evidence, but otherwise should admit any oral or documentary evidence.<sup>369</sup> The Federal Rules of Evidence (FRE) are not applicable; hearsay evidence is admissible. The advantage of the APA approach is that it avoids disputes about esoteric rules of evidence, such as the many exceptions to the hearsay rule. Some AJs may not be competent to resolve disputes about the rules of evidence, and self-represented parties (or parties assisted by lay representatives) are certainly not competent to deal with them.

One variation of the general rule is that the FRE can be consulted but not necessarily followed. In DOE security clearance cases, the regulations provide that formal rules of evidence do not apply but the FRE may be used as a guide to assure production of the most probative evidence available; hearsay evidence "may in the AJ's discretion and for good cause be admitted without strict adherence to technical rules of admissibility and shall be accorded such weight as the circumstances warrant."<sup>370</sup> In my view,

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364. See Appendix A-7.

365. See Appendix A-1; 7 C.F.R. § 47.15(a) (documentary rather than oral hearings in cases in which claimed damages do not exceed \$30,000).

366. BVA backlogs are quite long. Most parties appealing to BVA agree to a written-only hearing in order to receive a quicker decision. See Appendix A-12.

367. Appendix A-10.

368. See MARs 320; Recommendation 2016-4, *supra* note 10, § 23.

369. "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." APA § 556(d).

370. 10 C.F.R. § 710.26(h). Similarly, in DOE whistleblower cases, OHA is not bound by the formal rules of evidence but can use the FRE as a guide. 10 C.F.R. § 708.28(a)(4). In EEOC hearings, "the rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence." 29 C.F.R. § 1614.109(e).

this type of unclear formulation is likely to cause confusion and time-consuming evidentiary disputes about whether specific FRE rules should be applied.<sup>371</sup>

There are situations in which agencies should follow the FRE. PTAB and TTAB provide examples of this situation. Administrative patent judges (APJs) and administrative trademark judges (ATJs) apply the FRE (along with all of the discovery rules) in trial cases.<sup>372</sup> The apparent rationale is that such private-party patent disputes could be tried either in federal district court or the PTAB or TTAB; therefore, the evidence rules should not differ between the two fora. However, the FRE are not applicable in appeal proceedings before PTAB and TTAB (that is, cases involving disputes between the patent examiner and the applicant or patentee). In appeal proceedings, the judges admit any evidence that tends to prove or disprove alleged facts.<sup>373</sup>

*e. Opportunity for Rebuttal*<sup>374</sup>

Best practice for evidentiary hearings includes an opportunity for rebuttal. In cases presenting credibility issues, the right to rebuttal normally entails cross-examination of an adverse witness. However, best practice permits the abridgement of cross-examination in appropriate circumstances.<sup>375</sup>

In agency proceedings involving disputes about legislative facts where the evidence consists of conflicting expert testimony, the costs of cross-examination may outweigh its benefits. Similarly, cross may often be unnecessary if credibility is not in issue or the only issue is how an AJ should exercise his or her discretion. The agency should be able to limit or preclude cross examination in such cases. The right of rebuttal of such evidence takes the form of additional written evidence and oral argument.

Agencies appropriately limit or preclude cross examination if cross might jeopardize national security or might reveal the identity of confidential informants. For example, in DOE security clearance cases, the AJ can dispense with cross if a witness is a confidential informant, or if cross-examination would jeopardize restricted data or national security.<sup>376</sup> Instead, the employee receives a summary or description of the information. The AJ should give appropriate consideration to the lack of opportunity

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371. See Admin. Conf. of the U.S., Recommendation 86-2, *Use of Federal Rules of Evidence in Federal Agency Adjudications*, 51 Fed. Reg. 25,642 (July 16, 1986), urging agencies not to apply the FRE, with or without the qualification “so far as practicable.” The recommendation covered both *Types A and B adjudication*. See generally Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1 (1987).

372. 37 C.F.R. §§ 2.122(a), 42.62.

373. 37 C.F.R. § 41.30.

374. See MARs 320; Recommendation 2016-4, *supra* note 10, § 24.

375. Under the APA, a party is entitled only “to conduct such cross-examination as may be required for a full and true disclosure of the facts.” APA § 556(d). See ABA Guide, *supra* note 43, ¶ 5.09.

376. 10 C.F.R. § 710.26(l).



to cross examine.<sup>377</sup> Similarly, in EOIR hearings, the IJ must permit a reasonable opportunity for cross-examination,<sup>378</sup> but the respondent cannot examine national security information that the government introduces in opposition to admission or discretionary relief.<sup>379</sup>

#### 4. Post-Hearing Practices

##### a. Written Decisions<sup>380</sup>

Best practices require Type B decisionmakers to furnish a written or transcribable opinion. The decision should set forth findings of fact and an explanation of how the AJ resolved credibility conflicts. The opinion should also furnish conclusions of law and an explanation of the AJ's legal interpretations of statutes or regulations. Finally, the opinion should state the AJ's reasons for discretionary choices.<sup>381</sup> In some mass justice situations, the requirement of a written opinion can be satisfied by an oral decision delivered from the bench that is transcribed in the record of the hearing.

A requirement of written findings and reasons improves the quality of agency decisionmaking and assists parties in determining whether to seek judicial review. The presence of written findings and reasons also improves the quality of administrative reconsideration and judicial review.

Type B procedural regulations frequently prescribe the content of written AJ opinions. For example, the regulations relating to DOE security clearance cases provide:

The Administrative Judge shall make specific findings based upon the record as to the validity of each of the allegations contained in the notification letter and the significance which the Administrative Judge attaches to such valid allegations. These findings shall be supported fully by a statement of reasons which constitute the basis for such findings.<sup>382</sup>

In some agencies, such as EOIR, the regulations and manuals require a written decision but do not prescribe its contents. Best practice should specify the contents of the written decision.

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377. 10 C.F.R. § 710.26(m).

378. EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL § 4.16(d) (2017).

379. 8 U.S.C. § 1229a(b)(4).

380. See MARs 360; Recommendation 2016-4, *supra* note 10, § 25.

381. The APA requires that all decisions (including initial, recommended, and tentative decisions) include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.

§ 557(c)(A). See ABA Guide, *supra* note 43, ¶ 6.02.

382. 10 C.F.R. § 710.27(c).

*b. Higher-Level Review*<sup>383</sup>

Best practice is that agencies should furnish an opportunity for a higher-level review of an initial adjudicatory decision.<sup>384</sup> The ability to obtain administrative review of an adverse decision is useful to correct the inevitable errors made by AJs, to enhance consistency of AJ decisions,<sup>385</sup> and to cause private parties to believe that their case has been dealt with fairly and impartially. To facilitate such review, the AJ decision should be disclosed to the parties, and they should have an opportunity to make arguments to the reviewing authority. The reviewing body should be entitled to summarily affirm the lower-level decision without being required to write a new opinion. The intra-agency appellate structures vary greatly and provide a variety of models from which regulation drafters can choose. Any of these models would provide a satisfactory opportunity for review of the initial decision.

Some structures provide for review of AJ decisions as a matter of right. Reconsideration is normally based on written briefs with or without oral argument. For example, EOIR provides for an initial Type B decision by an IJ followed by an appellate procedure at the BIA level.<sup>386</sup> Similarly, EEOC cases involve an initial decision by an AJ followed by an appellate-level decision by the Office of Federal Operations (OFO).<sup>387</sup>

Other agencies use different review models. In environmental permitting cases, the initial decision is based on a notice and comment procedure that includes a public hearing; the EAB functions as a review body and provides a Type B written procedure.

Similarly, in VA benefit cases, the only type B hearing occurs at the review level. The Board of Veterans Appeals (BVA) reviews a regional office decision denying benefits. The regional office decision is made by a ratings specialist and was reviewed by a Decision Review Officer (DRO). Both the regional office and DRO proceedings should probably be classified as Type C adjudication as they are inquisitorial in nature.

PTAB and TTAB do not provide for higher-level review of decisions by APJs or ATJs.<sup>388</sup> The same is true of CBCA Board Judge decisions, but the regulations allow full Board reconsideration to secure uniformity of decisions or because of a case's exceptional importance.

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383. See MARs 410, 420, 430, 440; Recommendation 2016-4, *supra* note 10, § 26.

384. See generally ABA Guide, *supra* note 43, ¶ 6.03.

385. See David Hausman, Consistency and Administrative Review (July 31, 2016) (unpublished manuscript), <https://ssrn.com/abstract=2816538>.

386. See text at notes 712–55.

387. See text at notes 635–47.

388. See Walker & Wasserman, *supra* note 65, at 34–48, which strongly criticizes the failure to provide for higher-level reconsideration of APJ decisions, thus insuring inconsistent case law. The lack of agency head review is a particular problem because PTAB lacks substantive rulemaking authority. The Patent Office director can order a rehearing before an expanded APJ panel, but this procedure has been questioned as a possible due process violation. *Id.* at 43–48.

Best practices also include regulations that allow and encourage the reviewing body to designate its important decisions as precedential.<sup>389</sup> Precedent decisions must be followed in subsequent cases unless they have been formally overruled. BIA,<sup>390</sup> MSPB,<sup>391</sup> and PTAB<sup>392</sup> are among the agencies that designate precedent decisions. The use of a system of precedent decisions makes the decisional process more transparent to outsiders and makes it much easier for the outsiders to research the agency's decisional law. Most importantly, a system of precedent decisions can improve the consistency of lower level decisions by staff or AJs.<sup>393</sup>

Best practices also include compliance with the FOIA provision that requires agencies to make available in electronic form final adjudicatory decisions and orders as well as an index of such decisions.<sup>394</sup> Under ACUS Recommendation 89-8,<sup>395</sup> this obligation should extend to final decisions of the agency reviewing authority, whether or not the decisions have been designated as precedential. ACUS also urged that agencies create a subject-matter index to these adjudicatory decisions. Recommendation 2017-1<sup>396</sup> similarly urges agencies to maintain easily accessible and searchable websites consisting of their significant adjudicatory decisions, while appropriately protecting privacy. In case of agencies deciding large volumes of cases with recurring fact patterns, agencies should consider disclosing a representative sampling of actual cases.

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389. See Recommendation 2016-4, *supra* note 10, § 27. The California APA encourages agencies to designate adjudicatory opinions as precedential and many of them do. See MICHAEL ASIMOW ET AL., CALIFORNIA PRACTICE GUIDE—ADMINISTRATIVE LAW ¶¶ 6.441–6.482 (2018 and current supp.).

390. Regulations provide for adoption of binding precedent decisions by the BIA. A majority of the 17 BIA judges must approve the designation as precedential. 8 C.F.R. § 1003.1(d), (g), (i).

391. The Merit Systems Protection Board designates some of the Board decisions as precedential. See Merit Sys. Prot. Bd., *Decisions of the United States Merit Systems Protection Board*, <https://www.mspb.gov/decisions/precdec.htm> (last visited July 2, 2018).

392. PTAB practice seems unduly cumbersome since a majority of all of the 300 or so active APJs as well as the Director must approve the designation. PTAB also allows the Chief Judge to designate an opinion as “informative” without the approval of other judges, but an informative decision is not treated as a precedent. See PATENT TRIAL & APPEAL BD., STANDARD OPERATING PROCEDURE 2 (Rev. 9), <https://www.uspto.gov/sites/default/files/documents/sop2-revision-9-dated-9-22-2014.pdf>. See Walker & Waserman, *supra* note 65, at 52–54; *Aqua Prods. v. Matal*, 872 F.3d 1291, 1331 (Fed. Cir. 2017).

393. See, e.g., Medicare Program: Changes to the Medicare Claims and Entitlement, Medicare Advantage Organization Determination, and Medicare Prescription Drug Coverage Determination Appeals Procedures, 81 Fed. Reg. 43,789 (proposed July 5, 2016), creating a precedent decision system in the OMHA Medicare Appeals program. OMHA conducts a severely backlogged Type A adjudicatory scheme and the provision for precedent decisions may reduce the burden on ALJs.

394. 5 U.S.C. § 552(a)(2).

395. Admin. Conf. of the U.S., Recommendation 89-8, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*, 54 Fed. Reg. 53,495 (Dec. 29, 1989).

396. Recommendation 2017-1, *supra* note 15.

**TABLE 3: BEST PRACTICES REFLECTED IN AGENCY PROCEDURAL REGULATIONS**

<b>TYPE B SCHEMES →</b>	<b>USDA-PACA</b>	<b>CBCA</b>	<b>Debarment &amp; Suspension<sup>1</sup></b>	<b>DOE</b>	<b>EPA-EAB</b>	<b>EEOC</b>
<b>RECOMMENDATIONS ↓</b>						
Exclusive record	N	Y	Y	Y	Y	Y
Separation of functions	N	NA	N	*2	Y	NA
Ex parte communications	N	Y	N	Y	Y	N
Bias	Y	N	N	N	Y	Y
Complete Statement	Y	Y	N	Y	Y	Y
Notice	Y	Y	Y	Y	Y	Y
Lay representation	Y	N	Y	Y	Y	Y
ADR	Y	Y	N	Y	Y	Y
Pretrial conference	N	Y	Y	Y	Y	N
Electronic filing	N	Y	N	Y	Y	N
Discovery	Y	Y	N	Y	Y	Y
Subpoena power	Y	Y	N	Y	Y	N
Open hearings	N	Y	N	N	Y	N
Video or phone	Y	N	N	N	Y	N
Written only	Y	Y	Y	Y	Y	N
Evidence rules	N	Y	Y	Y	Y	Y
Opportunity for rebuttal	Y	Y	Y	Y	Y	Y
Written opinion	Y	Y	Y	Y	Y	Y
Reconsideration opportunity	Y	N	N	Y	Y	Y
<b>Number of Y's</b>	<b>12</b>	<b>16</b>	<b>8</b>	<b>13</b>	<b>19</b>	<b>12</b>

**Table 3 Footnotes**

1. Department of Defense FAR regulations
2. Unclear in case of security clearance cases; separation of functions is required in whistleblower cases.

TYPE B SCHEMES →	EOIR	HHS-DAB	MSPB	PRRB	PTAB	TTAB	BVA
RECOMMENDATIONS ↓							
Exclusive record	Y	Y	Y	Y	Y	Y	N
Separation of functions <sup>3</sup>	Y	NA	NA	NA	N Appeals; NA Trials	N Appeals; NA Trials	N
Ex parte communications	Y	Y	Y	Y	Y trials; N appeals	Y trials; N appeals	N
Bias	Y	Y	Y	Y	N	N	N
Complete Statement	N	Y	Y	Y	N	Y	Y
Notice	Y	Y	Y	Y	Y	Y	Y
Lay representation	Y	Y	Y	Y	N	N	Y
ADR	N	Y	Y	Y	N	N	N
Pretrial conference	Y	Y	Y	Y	Y	Y	Y
Electronic filing	N	Y	Y	Y	Y	Y	N
Discovery	Y	Y	Y	Y	Y	Y	N
Subpoena power	Y	N	Y	Y	Y	Y	N
Open hearings	Y	Y	Y	N	Y	Y	N
Video or phone	Y	Y	Y	Y	Y	Y	Y
Written only	N	Y	Y	Y	Y	Y	Y
Evidence rules	N	Y	Y	Y	Y	Y	N
Opportunity for rebuttal	Y	Y	Y	Y	Y	Y	Y
Written opinion	Y	Y	Y	Y	Y	Y	Y
Reconsideration opportunity	Y	N	Y	N	N	N	N
<b>Number of Y's</b>	<b>14</b>	<b>16</b>	<b>18</b>	<b>16</b>	<b>12.5</b>	<b>13.5</b>	<b>12</b>

3. Adjudicatory tribunals that have no prosecuting or investigating staff members have no need for a provision on separation of functions.



# CHAPTER 5

## TYPE C ADJUDICATION

### A. THE WORLD OF TYPE C ADJUDICATION

Type C adjudication allows the decisionmaker to resolve an adjudicatory dispute between a private party and the federal government without conducting an evidentiary hearing.<sup>397</sup> Type C proceedings are properly referred to as “informal adjudication.” There are obviously vast numbers of federal Type C adjudications, but it is not possible to itemize or count them. Werner Gardner, formerly chair of the ACUS Informal Adjudication Committee, estimated that 90% of the federal government’s work is conducted outside the boundaries of the APA.<sup>398</sup>

To furnish the reader with a sense of the variety of Type C adjudication, Part A of this chapter discusses a number of more or less typical instances, roughly sorted into broad areas of federal government operation. Many of these examples emerge from decided cases.<sup>399</sup> Chapter 3 sketches the modest legal protections imposed by §§ 555 and 558 of the APA; Part B of this chapter extracts from §§ 555 and 558 some tentative best practices for the disparate world of C adjudication.

Type C adjudication occurs in numerous areas. Among them are:

1. Grants, benefits, loans, and subsidies;
2. Licensing and accrediting;
3. Foreign policy and national security determinations;
4. Inspections, tests, and safety;
5. De novo review;
6. Orders relating to tax and tariff collection; and
7. Indian affairs

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397. See Chapter 2, Part B. For discussion of the meaning of “adjudication,” “decisions,” and “policy implementation,” see Chapter 1, Part G.

398. Gardner, *supra* note 46. Gardner probably included Type B as well as Type C adjudication in this guesstimate.

399. Some material in this chapter is drawn from ABA Guide, *supra* note 43, at ch. 9.

## 1. Grants, Benefits, Loans and Subsidies

- *Insurer Decisions under the Affordable Care Act (ACA)*: The ACA regulations provide for a “review of adverse benefit determinations by health insurers or group health plans.”<sup>400</sup> The first step is an internal review at the insurer or group plan level, followed by an external review at the state level. If no state external review procedure exists that meets the requirements of the regulation, a federal review procedure is provided. The federal review is conducted by a private “independent review organization” (IRO) rather than by federal officials. The IRO is permitted to consider non-record evidence such as the report of its own clinical reviewer as well as practice guidelines developed by the federal government or by professional medical societies as well as clinical review criteria used by the plan.<sup>401</sup> Consequently, it appears that the IRO review is Type C adjudication.
- *Compromising Agricultural Loans*: The Farmers Home Administration uses a so-called “15d procedure”<sup>402</sup> to decide whether to compromise or forgive a farmer’s home loan. The procedure is investigatory, and the borrower has no right to submit evidence or cross-examine others. “The proceedings resemble what may be called executive procedure, that is, unilateral decision by an official on the basis of whatever information he deemed it appropriate to take into account.”<sup>403</sup>
- *Ranking Applicants for Loan Guarantees*: The Department of Energy (DOE) administers a loan guarantee program for the development of new technologies designed to reduce or sequester greenhouse gasses.<sup>404</sup> The regulations indicate that each application is ranked competitively against all others. The regulations indicate the factors that DOE considers when it ranks the applications. They state that a rejection of an application is final and not appealable.

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400. 45 C.F.R. § 147.136, implementing 42 U.S.C. § 300gg-19 (calling for “effective external review” at the federal level if no effective state external review program exists).

401. 45 C.F.R. § 147.136(d)(5). A different appeals process, relating to rejection of applicants by health insurance companies regulated by state exchanges, provides for evidentiary hearings by a state appeal entity with a backup provision for an HHS appeal entity. 45 C.F.R. §§ 155.500–.555. Because it calls for evidentiary hearings, this backup provision might well be Type B adjudication.

402. 7 C.F.R. pt. 15d; U.S. DEP’T OF AGRIC., PROCEDURES FOR PROCESSING DISCRIMINATION COMPLAINTS AND CONDUCTING RIGHTS COMPLIANCE REVIEWS IN USDA CONDUCTED PROGRAMS AND ACTIVITIES ch. 4, <https://www.ocio.usda.gov/sites/default/files/docs/2012/DM4330-001%5B1%5D.htm>.

403. *Johnson v. Vilsack*, 833 F.3d 948, 953–58 (8th Cir. 2016) (internal quotation marks and citation eliminated) (15d decision denying relief to black farmer is not judicial, so is not preclusive of later action in court under the Equal Credit Opportunity Act).

404. See Energy Policy Act of 2005, 42 U.S.C. §§ 16511–16516.



There are no provisions designed to insure a fair application process, such as rules against bias or ex parte communication.<sup>405</sup>

- *National Science Foundation Grants*:<sup>406</sup> NSF provides Type C remedies for disappointed grant applicants. NSF furnishes a written explanation and supplies redacted peer reviews. The applicant may discuss these reasons with an NSF grants officer. If the applicant remains dissatisfied, it can submit a request for review to the Division Director within 30 days after the notice of declination. The request should include a full statement of the applicant's position, but it cannot supply new information. A designated reviewing official (who was not involved in the decision to decline the application) considers the matter and reports to the Division Director within 30 days. The Division Director will prepare a final written decision within 15 days which is final.
- *National Science Foundation Termination of Grants*: NSF also maintains a Type C all-written adjudication system for resolving disputes arising out of suspension or termination of grants or accounting issues.<sup>407</sup> The Division Director designates a reviewing official who is at least at the level of the official who made the disputed decision but was not involved with monitoring the project. The reviewing official completes a report within 30 days, and the Division Director makes a final and non-appealable decision.

## 2. Licensing and Accrediting

- *Licensing of National Banks*: The statute and regulations describe an inquisitorial notice-and-comment-type process for determination of whether the Office of the Comptroller of the Currency should grant an application for a banking license. The decision is based on whatever information the Office discovers in its investigation, public comments, a hearing held if the Comp-

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405. 10 C.F.R. §§ 609.5–.6. According to DOE's FAQs, lobbyists on behalf of an applicant cannot contact program officers, but I found no other provisions restricting communications with decisionmakers.

406. See NAT'L SCI. FOUND., PROPOSAL AND AWARD POLICIES AND PROCEDURES GUIDE chs. III, IV (Jan. 30, 2017) [hereinafter NSF Guide]. See generally Thomas O. McGarity, Peer Review in Awarding Discretionary Grants in the Arts and Sciences (May 1993) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/project-report-recommendation-93-3>); Admin. Conf. of the U.S., Recommendation 82-2, *Resolving Disputes under Federal Grant Programs*, 47 Fed. Reg. 30,704 (July 15, 1982); Admin. Conf. of the U.S., Recommendation 71-4, *Minimum Procedures for Agencies Administering Discretionary Grant Programs*, 38 Fed. Reg. 19,789 (July 23, 1973).

407. See NSF Guide, *supra* note 406, at ch. XII.

troller determines there is need for one, or any other source of information, including that supplied in meetings of interested parties.<sup>408</sup>

- *Portability of Phone Numbers*: A statute requires the FCC to assure portability of phone numbers, meaning that users can keep the same phone number if they switch local service providers. The statute requires the FCC to appoint a private Local Number Portability Administrator (LNPA).<sup>409</sup> In one case involving this process, the FCC decided to select Telcordia to replace Neustar as an LNPA after utilizing an informal adjudication process.<sup>410</sup> No statute or regulation required the FCC to conduct an evidentiary hearing, so the process was Type C adjudication. The issue was whether the FCC was required to employ notice-and-comment rulemaking procedure to make the selection. The court decided that the FCC correctly used informal adjudication, because the decision was an “order,” not a “rule.” Adjudication is more appropriate to make this fact-intensive case-by-case determination.
- *Use of National Forests*: The Forest Service can grant “special use authorization” that permits private uses of national forest land. The regulations provide for an informal adjudication procedure in such cases.<sup>411</sup>
- *Importing Trophies*: The Fish and Wildlife Service (FWS) of the Interior Department operates a permitting system relating to the protection of wild birds and animals, including permits for the import of wild animal trophies.<sup>412</sup> The regulations set forth FWS procedure for permit applications, renewals, amendments, suspensions, and revocations. These regulations provide for an all-written procedure for initial decision and reconsideration.<sup>413</sup> There are no provisions for neutrality of the decisional official, restrictions on ex parte communication, or separation of functions. Decisional officials are instructed to use any relevant available information, so that there is no exclu-

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408. 12 U.S.C. §§ 26–27; 12 C.F.R. §§ 5.7–.13. *See* *Camp v. Pitts*, 411 U.S. 138 (1973). In *Camp*, the Supreme Court noted that the statutes and regulations for consideration of bank charter applications do not require any sort of formal hearings and a reviewing court is limited to the record made before the agency. If the agency’s explanation is inadequate, the remedy is to remand to the agency to supply an adequate one.

409. 47 U.S.C. § 251(e)(1).

410. *Neustar, Inc. v. FCC*, 857 F.3d 886, 895 (D.C. Cir. 2017).

411. 36 C.F.R. § 251.50. *See* *Everett v. United States*, 158 F.3d 1364, 1368 (D.C. Cir. 1998) (Forest Service denial of application for special use authorization was upheld).

412. *See* 50 C.F.R. §§ 13.11–.12 for a list of the various conservation programs requiring permits; *Marcum v. Salazar*, 694 F.3d 123 (D.C. Cir. 2012) (action by rejected permit applicant is not ripe for judicial review as administrative appeal was pending).

413. 50 C.F.R. §§ 13.15–.28.

sive record.<sup>414</sup> The regulations provide for an appeal to the Regional Director; the Director can permit oral argument if necessary to clarify the record.<sup>415</sup>

- *Approval of Land Used to Produce Bio-Fuels*: EPA must approve a particular plan filed by a foreign applicant to supply bio-fuel material to assure that the material is grown on land that had already been used for agricultural purposes prior to 2007.<sup>416</sup> An informal adjudication process is used to make this determination rather than a rulemaking procedure. The process involved repeated written submissions and modifications of the plan by the applicant.<sup>417</sup>

### 3. Foreign Policy and National Security Determinations

Many regulatory schemes in the area of foreign policy and national security employ Type C adjudication.

- *Foreign Asset Control*: The Treasury Department's Office of Foreign Asset Control (OFAC) regulates in the area of embargoes, prohibited transactions with foreign entities, blocked assets, designation of foreign persons for sanctions, and the like. It issues licenses for transactions that are permitted despite general prohibitions against them. The regulations prescribe no specific procedures for making individualized determinations arising under these schemes. Consequently, such decisionmaking should be considered Type C, in that OFAC must use some sort of procedure to make the decisions, but it does not entail evidentiary hearings. For example, in the case of licensing, the regulations describe the procedure for applying for licenses; these regulations contain no procedural protections for persons that are denied such licenses or for the

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414. 50 C.F.R. § 13.21(d).

415. 50 C.F.R. § 13.29(f).

416. See 40 C.F.R. § 80.1454.

417. See *Nat'l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1017–18 (D.C. Cir. 2016). In that case, EPA approved the proposal submitted by an Argentine trade association. Numerous modifications occurred to the proposal during the adjudication process before EPA approved it. Competing U.S. producers contended that EPA had to use rulemaking to approve the proposal, but the court held that informal adjudication was acceptable.

revocation of such licenses.<sup>418</sup> Similarly, persons can apply for unblocking of funds, but the regulations contain no specific procedural protections.<sup>419</sup>

- *Flight Training*: There are no procedural protections when TSA refuses to grant permission to a foreign national to obtain flight training.<sup>420</sup>
- *Iran Embargo*: Finally, when OFAC wishes to impose a civil money penalty for violation of the Iran embargo, the only prescribed procedures are issuance of a pre-penalty notice, an opportunity to respond in writing, and issuance of a final penalty notice “after consideration of the written response to the pre-penalty notice and any relevant facts.”<sup>421</sup>

#### 4. *Inspections, Tests, and Safety*

- *Fish Inspections*: A voluntary fish inspection program by the Department of Commerce depends entirely on inspections. If a manufacturer disagrees with the report of the original inspector, it is entitled to an appeal in the form of a re-inspection by a different inspector or inspectors.<sup>422</sup>
- *Medical Approvals*: An airman seeking a first-class pilot certificate, who is ineligible if he or she has diabetes, can apply for a special medical certificate. This decision is made by an Aviation Medical Examiner from available records. The examiner can order additional flight or medical tests. If an application for the certificate is denied, the applicant can seek reconsideration from the Federal Flight Surgeon. No further procedures are provided.<sup>423</sup>
- *Aircraft Security*: Aircraft operators must comply with TSA security directives and file their own security programs that follow TSA

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418. 31 C.F.R. § 501.801(b)(4) allows an applicant to request explanation of the reasons for a denial of a license application, but otherwise it provides no details concerning the procedure used to consider such requests.

419. 31 C.F.R. § 501.806(f). A Specially Designated Person may submit arguments or evidence in support of the removal of the designation, and these submissions will be reviewed. The person may request a meeting to discuss the application, but whether to grant the meeting is discretionary. 31 C.F.R. § 807(a)–(c). See *Empresa Cubana Exportadora de Alimentos y Productos Varios v. Dep’t of Treasury*, 606 F. Supp. 2d 59, 70 (D.D.C. 2009), aff’d 638 F.3d 794 (D.C. Cir. 2011) (no hearing required; reliance on State Department letter is proper).

420. See 49 U.S.C. § 44939(a); *Olivares v. TSA*, 819 F.3d 454 (D.C. Cir. 2016) (TSA met requirements of § 555(e) by providing staff analysis of reasons for denial of application); 49 C.F.R. § 1552.3.

421. 31 C.F.R. §§ 560.703–.704. See *Epsilon Elecs., Inc. v. Dep’t of Treasury*, 857 F.3d 913 (D.C. Cir. 2017).

422. 50 C.F.R. §§ 260.36, .40. See Verkuil, *supra* note 40, at 770.

423. See 14 C.F.R. §§ 67.401, .407, .409.

directives.<sup>424</sup> TSA can disapprove their programs or can reject modifications or amendments to these programs. Operators can petition the administrator to reconsider and submit written views and arguments. After considering all relevant material, the designated official adopts or rescinds the notice. No procedural protections are provided.

- *Adulterated Food*: The system of regulation of imported food that is adulterated or unfit for human consumption is primarily based on inspections. The statute requires that the Department of Health and Human Services must provide notice and an opportunity to appear before a designee of the Secretary and introduce testimony.<sup>425</sup> The resulting hearing does not include testimony by government officials and is primarily based on inspection results but not an exclusive record.<sup>426</sup> However, there must be proper notice in order that the opportunity to appear and introduce testimony will be meaningful.<sup>427</sup>

### 5. Orders Subject to De Novo Review

An agency adjudication process that is subject to de novo judicial review is often Type C adjudication. There is little need for a more formal adjudication process at the agency level when a court will ultimately retry the case.

- *Vendor Disqualification under SNAP*: The Food and Nutrition Service (FNS) of the Department of Agriculture (USDA) operates a series of federal-state programs that supply food to the poor, including SNAP (formerly known as food stamps). FNS adjudicates cases involving local vendors authorized to sell food to SNAP recipients. The vendors can be disqualified from the program for various offenses. The statute does not call for hearings but authorizes USDA to adopt regulations providing for administrative review.<sup>428</sup> The vendor may file a written request to submit information in support of its position to a reviewer (who considers the submitted information along with other available information and makes a final determination). The sanctions are subject to de novo judicial review.<sup>429</sup> The reviewers are Administrative Review Officers in the Administrative Review Branch of FNS. The review proceedings are entirely in writing. SNAP's adjudicatory scheme is Type C

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424. See 49 C.F.R. § 1544.105; *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343 (D.C. Cir. 2014).

425. 21 U.S.C. § 381(a); 21 C.F.R. § 1.94(a).

426. *Sugarman v. Forbragt*, 267 F. Supp. 817 (N.D. Cal. 1967), *aff'd*, 405 F.2d 1189, 1190 n.3 (9th Cir. 1968).

427. *L&M Indus. v. Kenter*, 458 F.2d 968, 970 (2d Cir. 1972).

428. 7 U.S.C. § 2023(a); 7 C.F.R. pt. 279, subpt. A.

429. See, e.g., *Irobe v. USDA*, 890 F.3d 371 (1st Cir. 2018) (claimant has burden of proof in district court proceedings).

adjudication because the exclusive record requirement does not appear to apply to the review procedure.<sup>430</sup>

- *FOIA Requests*: An agency is required to determine whether to release documents requested under the Freedom of Information Act. A person who receives an adverse determination must exhaust administrative remedies by filing an appeal before going to court to seek de novo review.<sup>431</sup> Some agencies provide for informal hearings in cases in which the agency rejects a FOIA request.<sup>432</sup>
- *Naturalization*: The U.S. Citizenship and Immigration Service (USCIS) provides a two-level procedure to resolve disputes about whether a person qualifies for citizenship through the naturalization process.<sup>433</sup> The first level is called an examination, and the second level is referred to as a hearing. Both are investigatory and informal and are not based on an exclusive record.<sup>434</sup> The applicant is entitled to de novo judicial review if the administrative process produces an adverse result.<sup>435</sup>

## 6. Orders Relating to Tax Collection

- *Tariff Classification Rulings*: An importer can file a written request for a tariff classification ruling (TCR) on a prospective import transaction.<sup>436</sup> Such rulings are issued by the Customs and Border Protection Service (CBP). Rulings are generally issued by the local field office (approximately 10,000 each year) but can also be issued by CBP headquarters if requested by field office staff or by an importer.<sup>437</sup> TCRs are binding on CBP with respect to the proposed

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430. 7 C.F.R. § 279.5(a).

431. 5 U.S.C. § 552(a)(6)(A) provides for the right of a person, whose request has been denied, to appeal an adverse decision to the head of the agency. *See* *Hidalgo v. FBI*, 344 F.3d 1256 (D.C. Cir. 2003) (party must exhaust remedies by raising all issues through agency appellate process before seeking judicial review).

432. *See* Appendix A-4 (Department of Energy); 28 C.F.R. § 16.8 (Department of Justice). Agencies also make adjudicatory decisions to release documents in response to a FOIA request against the objection of persons who submitted that material to the agency—so-called “reverse-FOIA” cases. These are also treated as informal adjudication, but courts do not provide de novo review of agency decisions. *See* *Jurewicz v. USDA*, 741 F.3d 1326, 1334–35 (D.C. Cir. 2014) (agency not required to provide response opportunity in reverse-FOIA case).

433. *See* 8 U.S.C. §§ 1446–1447; 8 C.F.R. pts. 335 & 336.

434. *See* 8 C.F.R. § 336.2(b) (hearing officer is allowed to consult USCIS files and reports).

435. 8 C.F.R. § 336.9(c).

436. *See* 19 C.F.R. §§ 177.0–.13.

437. The Supreme Court denied *Chevron* deference to a TCR issued at the headquarters level. However, such rulings qualify for *Skidmore* deference. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

import and all identical future imports until modified or revoked, but are not binding on the applicant.<sup>438</sup>

The Type C procedure applicable to TCRs consists of an oral “discussion” of the issues. This procedure provides an opportunity “to freely and openly discuss the matters set forth in the ruling request.” The oral discussion will be granted if customs personnel think it would be helpful or if they propose to deny the classification requested by the applicant. At the conference, the applicant can be accompanied by counsel “or other representative.” The applicant can present additional documents, arguments, and exhibits at the conference. Either the local field office or the importer can request that the matter be considered by CBP headquarters. No other procedural protections exist. Applicants can ignore unfavorable TCRs and challenge them through a *de novo* action in court.

- *Collection Due Process (CDP)*: The IRS is required by statute to provide a hearing to taxpayers at the time it imposes a tax lien or initiates a tax collection action. The hearing is provided by an IRS Appeals Officer (AO) who has no previous involvement in the dispute. A statute prohibits *ex parte* communications from other IRS officials to the AO to the extent such communications “appear to compromise the independence” of the AO.<sup>439</sup> CDP hearings are informal and inquisitorial; they often consist of one or more phone calls. There is no provision for cross-examination of adverse witnesses and no subpoena power. The hearing requirement seems to entail a conference, little different from the normal function of AOs in settling disputes about the amount of tax due. The AO’s decision is reviewed by a team manager who makes the final IRS decision. The regulations at least suggest that the decision in a CDP case is not limited to information that the AO receives at the CDP hearing.<sup>440</sup> Because of the various procedural protections, CDP hearings are on the borderline between B and C adjudication, but probably should be classified as Type C because of the lack of an exclusive record requirement.

### 7. Indian Affairs

A variety of regulatory decisions concerning Indians are made through Type C adjudication. For example:

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438. If CBP wishes to modify or revoke an interpretive ruling that has been in effect for more than 60 days, it must follow a public notice and comment procedure. 19 C.F.R. § 177.12(b). The regulations protect the reliance interest of third parties on TCRs that are modified or revoked. 19 C.F.R. § 177.12(c)–(e).

439. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1001(a)(4), 112 Stat. 685, 689. This section was not codified in the Internal Revenue Code.

440. The IRS’ determination in a CDP case can be appealed to the Tax Court. The record before the Tax Court includes “any other documents or materials relied on by the Appeals officer . . . in making the determination . . . .” Treas. Reg. § 301.6320-1(A-F4), which indicates that there is no exclusive record requirement.

- *Gambling Casinos*: Applications by tribes to build gambling casinos trigger numerous factual determinations including whether the tribe is entitled to benefits under Indian Gaming Regulatory Act and whether the benefits of a particular casino outweigh its detriments. Determinations are made through a notice and comment process, rather than through evidentiary hearings.<sup>441</sup>

## B. BEST PRACTICES FOR TYPE C ADJUDICATION

As discussed previously, Type C systems are wildly disparate and have almost nothing in common except that they produce binding adjudicatory decisions involving disputes between government and private parties. Many of them involve inquisitorial schemes in which investigators serve as decisionmakers, there is nothing resembling an oral hearing (or any orality at all), *ex parte* communications are welcome, and no exclusive record principle operates. Some of them have monumental stakes, as in the *PBGC* case, which involved hundreds of millions of dollars in pension liabilities.<sup>442</sup> Others are as trivial as the decision of a forest ranger to allocate the last available campsite to me rather than to you or a postal clerk's decision about how much it will cost to mail a package.

Although Type B adjudications schemes are also disparate, they have in common a legally required evidentiary hearing. It is therefore feasible to suggest best practices for Type B adjudication that can be implemented through procedural regulations. These recommendations were sketched in Chapter 4 and ACUS Recommendation 2016-4, although with the warning that not every recommended practice would work in every Type B scheme.

Lacking the common core of a legally required evidentiary hearing, however, the unruly world of Type C adjudication resists any attempt to impose procedural uniformity. Warner Gardner's highly tentative proposal for a statute entitled "The Informal Procedure Act of 1980" gained no traction.<sup>443</sup> However, the obvious problems that beset a statutory solution can be avoided through the approach of suggesting best practices implemented by agency-specific procedural regulations. Under that approach, it is not necessary to draw precise lines defining the class of adjudicatory schemes to which the proposal would apply. That would be a daunting project, which would have to include some practicable way to exempt trivial decisions such as campsite allocations. The best practice approach does not require the drawing of bright lines and can be more flexible than a statute could be. This subchapter takes that leap by proposing best practices for Type C adjudication. Hopefully, others will expand on and refine these suggestions.

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441. See 25 C.F.R. §§ 292.16–21. The administrative process for approvals is highly informal. See *Stand Up for Cal. v. DOI*, 879 F.3d 1177, 1179 (D.C. Cir. 2018) (seven-year administrative process); *Butte Cty. v. Hogen*, 613 F.3d 190, 194–95 (D.C. Cir. 2010) (overturning decision because of lack of a reasons statement).

442. See text at notes 165–69.

443. Gardner, *supra* note 46, at 158–66.



The premise of these proposals is that §§ 555 and 558 already set forth a modest and undemanding set of required practices for certain Type C adjudications. These seem to have drawn little scholarly attention but have worked without much controversy. Due process cases also set forth abbreviated procedures in numerous situations.<sup>444</sup> I therefore suggest that the protections already embodied in APA §§ 555 and 558 and the due process informal procedure cases could be generalized and broadened in order to form the basis for a set of relatively simple and general best practices for Type C adjudication. In addition, APA § 553 sets forth a broadly accepted procedural format for rulemaking—appropriate notice, opportunity for written comment, and a statement of reasons. Some Type C adjudication essentially uses rulemaking procedure, and these principles can also be generalized into best practices.<sup>445</sup>

Because these are best practice recommendations for agency-specific procedural regulations rather than statutory proposals, this book does not state them with precision or suggest exact language.<sup>446</sup> As with Type B best practices,<sup>447</sup> some of them may not be applicable to every Type C scheme. In each case, the designers of the institutional architecture for making Type C adjudication decisions should balance the conflicting goals of accuracy, efficiency, and procedural acceptability.<sup>448</sup> Obviously, agencies should use common sense by not adopting procedures when the action is too trivial to merit them or for some other reason they would be useless or inefficient.

### *1. Notice*

Appropriate notice is the foundation of every procedural scheme.<sup>449</sup> Agencies should furnish notice to persons whose rights they will adjudicate in sufficient time and in sufficient detail to enable these persons to decide whether to challenge the agency decision and, if so, to prepare for whatever Type C adjudicatory procedure the agency makes available.<sup>450</sup>

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444. See text at notes 131–47.

445. See Verkuil, *supra* note 40, at 781.

446. This avoids the hurdles aptly sketched by Gardner in his highly tentative suggestions for the Informal Procedure Act of 1980. Gardner, *supra* note 46.

447. See Chapter 4.

448. See text at notes 264–65.

449. See Gardner, *supra* note 46, at 163–64; Henry Friendly, “*Some Kind of Hearing*”, 123 U. PA. L. REV. 1267, 1279–92 (1975). In addition, public notice is critical in the rulemaking process. The notice of proposed rulemaking must give sufficient warning of what the final rule will contain so that people can properly comment on it.

450. In the case of a rejected application to the agency for some benefit or status, if an administrative process exists whereby the rejection can be challenged, the rejection communication should provide sufficient explanation to facilitate the challenge. See APA § 555(e), requiring an explanation of grounds for denial of an application (discussed in text at notes 211–36).

Section 558(c)<sup>451</sup> already requires, in cases of withdrawal, suspension, revocation, or annulment of a license, “notice by the agency in writing of the facts or conduct which may warrant the action.” The notice provision does not apply to “cases of willfulness or those in which public health, interest, or safety requires otherwise.” This best practice recommendation generalizes the § 558(c) notice requirement from licensing disputes to all cases of Type C agency adjudication. Moreover, if due process is applicable to the agency proceeding, the agency is bound by a constitutional requirement of giving adequate notice.<sup>452</sup> The recommendation generalizes the due process requirement to disputes that are not covered by due process.

Thus, an agency’s procedural regulations and manuals governing particular schemes of Type C adjudication should spell out the details of the prior notice the agency must provide before conducting a Type C adjudication such as rejection of an application for a benefit or a permission or imposing a regulatory outcome such as a sanction. The regulations should explain the contents of that notice and the manner of delivery. The notice should explain the private party’s procedural rights and options.

The required detail of the notice and the amount of time that the notice should precede further agency action obviously depend greatly on such factors as the seriousness of the stakes involved in the dispute and the complexity of the issues. Thus, the type and detail of the notice should be quite different in the *PBGC* situation (involving hundreds of millions of dollars in pension liabilities),<sup>453</sup> the student disciplinary suspension involved in *Goss*,<sup>454</sup> and the forest ranger situation (where it would be sufficient for rangers to briefly explain their decisions and inform the disappointed camper whether there is any form of reconsideration available).

Of course, at times an agency is confronted by an emergency situation that requires it to act first and ask questions later; in such situations prior notice may be very brief or non-existent. This limitation is recognized in § 558(c) which does not require notice if the public health, interest, or safety requires otherwise.

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451. See text at notes 204–06.

452. See *Goss v. Lopez*, 419 U.S. 565 (1975). *Goss* is the leading case involving due process protection in situations involving relatively small stakes and a need for informal action. The Court stated:

At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing . . . . Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

419 U.S. at 579–81.

453. See text at notes 165–69.

454. See note 138.

## 2. Opportunity to Submit Evidence and Argument

Agencies should adopt procedural regulations applicable to Type C adjudication that provide private parties an opportunity to submit evidence and argument in support of their position. The regulations should allow the party to furnish agency decisionmakers with written or oral submissions setting forth the party's position and an opportunity to rebut adverse information in the agency's files. Some version of the right to tell your story to the person who decides your fate is foundational in every scheme of fair procedure.<sup>455</sup> The opportunity might take the form of a written or electronic submission, an informal conference, or some kind of informal hearing, but it should exist. Obviously, once again, the parameters of the opportunity to submit evidence and argument vary with the private stakes involved, the caseload, the complexity of the issues, and similar constraints.

The right to offer evidence and argument can be inferred from the second sentence of APA § 555(b), which provides: "A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding."<sup>456</sup> Since § 555 already gives a person a legally enforceable right to "appear" in any agency proceeding, the regulations should spell out what that opportunity entails. These regulations should cover all Type C adjudicatory decisions, whether or not § 555 applies to them.<sup>457</sup> Similarly, the right to comment on a proposed rule and to respond to comments filed by others is key to the broadly accepted rulemaking process and should be equally applicable to adjudication.

## 3. Right of Representation

The best practices for Type C adjudication include a right for private parties to be represented or assisted by another person, whether a lawyer, friend or family member, or lay advocate. As noted in Recommendation 2, APA § 555(b) already guarantees this right, in connection with the right to "appear."<sup>458</sup> Although § 555(b) takes no position on whether there is a right to lay representation,<sup>459</sup> lay representation is a practical necessity in most cases of Type C adjudication where the relatively low monetary stakes and the party's likely inability to pay preclude hiring a lawyer.<sup>460</sup>

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455. See Gardner, *supra* note 46, at 164 and the quoted material from *Goss v. Lopez* in note 452. Even in situations with small stakes, such as a short suspension from school, a student has the right "to present his side of the story."

456. See discussion in text accompanying notes 174–83.

457. As discussed above, text at notes 171–72, § 555 has been held to be inapplicable if the dispute falls under exceptions to § 554(a) (such as the selection or tenure of an employee) or to disputes in situations that are not subject to judicial review under § 701(a)(1) or (2).

458. See text at notes 174–83.

459. See text at note 179.

460. See discussion in text at notes 315–21.

#### 4. *Statement of Reasons*

An agency conducting Type C adjudication should provide a brief oral or written statement of the facts and reasons on which its decision is based. This reasons statements should explain why the private party's arguments (see Recommendation 2 above) were rejected and why the agency made discretionary choices.

Section 555(e) already requires that an agency that denies an application, petition, or other request furnish a notice that "shall be accompanied by a brief statement of the grounds for denial."<sup>461</sup> This recommendation broadens § 555(e) beyond the area of applications, petitions, or other requests, to cover all adjudicatory decisions, including those imposing a sanction or other regulatory outcome. It applies whether or not the decision is subject to judicial review.<sup>462</sup> Similarly, the broadly accepted rulemaking process requires a "concise general statement of [the] basis and purpose" of the final rule and that the agency respond to material comments filed by members of the public.<sup>463</sup> Obviously, as in the case of notice, the detail and formality required of an agency's reasons statement depends on the context, such as the stakes involved in the decision, complexity of issues, and caseload issues.

#### 5. *Right of Administrative Review*

A common pattern of almost all adjudication schemes is the right to a second look from a different decisionmaker.<sup>464</sup> Normally this right of review resides in the decisionmaker's supervisor or someone else superior to the initial decisionmaker in the agency hierarchy. Therefore, drafters of procedural regulations for Type C adjudication should consider whether it is practicable to institutionalize the right of review by providing details and deadlines. Of course, there are many situations in which an opportunity for reconsideration is impracticable because of caseload, low stakes, or time constraints. Thus, it may not be practical to allow a disappointed applicant for a campsite to appeal to a higher level official, given the late hour and the likelihood that the deciding ranger's superior is not located on site.

#### 6. *Procedural Regulations*

Agencies should adopt procedural regulations that furnish the details of each scheme of Type C adjudication. Such regulations should include details relating to the best practices already mentioned—notice, opportunity to submit evidence and argu-

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461. See text at notes 211–36.

462. As discussed above, see text at notes 226–36, courts often impose a reason statement requirement for judicial review purposes that seems more extensive than the "brief statement" required by § 555(e). If judicial review is more than a remote possibility, the reason statement should satisfy the more exacting judicial review standard for reasons statements.

463. APA § 553(c); *Rodway v. USDA*, 514 F.2d 809, 817 (D.C. Cir. 1975).

464. See Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 3, 6 (2015). See also Recommendation 4.b. in Chapter 4.

ment, representation, statement of reasons, and administrative review. Other essential details are the selection of decisionmakers, forms, and deadlines.

It should go without saying that people should have convenient access to the details of the adjudicatory procedures that affect them. And, of course, agencies are obligated to follow their procedural regulations, even if the regulations provide protections that the agency was not legally required to adopt.<sup>465</sup> This requirement that an agency must follow its own regulations is an important protection for the public. In addition, agencies should adopt manuals and other user-friendly and internet-accessible summaries of the necessary procedures. But such manuals are no substitute for adopting the procedures in the form of regulations.<sup>466</sup>

Again, this recommendation is founded on existing law. The APA already requires that agencies publish in the *Federal Register* for the guidance of the public “statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available.”<sup>467</sup> In addition, the APA requires that the agency publish “rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations.”<sup>468</sup> Thus, Recommendation 6 breaks no new ground, but is in the nature of a proposal that agencies make it a priority to follow the law by spelling out their procedures for Type C adjudication in regulations.

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465. *Service v. Dulles*, 354 U.S. 363, 388 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

466. See discussion in text at notes 302–04.

467. APA § 552(a)(1)(B).

468. APA § 552(a)(1)(C).



# APPENDICES

## APPENDIX A

Type B Adjudication Schemes

## APPENDIX B

ACUS Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*

## APPENDIX C

ACUS Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*

## APPENDIX D

ACUS Recommendation 2016-6, *Self-Represented Parties in Administrative Proceedings*

## APPENDIX E

ACUS Recommendation 2014-7, *Best Practices for Using Video Conferencing for Hearings*

## APPENDIX F

ACUS Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*

## APPENDIX G

ACUS Recommendation 86-2, *Use of Federal Rules of Evidence in Federal Agency Adjudications*

## APPENDIX H

ACUS Recommendation 86-1, *Non-lawyer Assistance and Representation*

## APPENDIX I

ACUS Recommendation 70-4, *Discovery in Agency Adjudication*





# APPENDIX A

## **TYPE B ADJUDICATION SCHEMES**

These appendices contain detailed memoranda on twelve of the most important Type B adjudication schemes. This list is not complete. Federal agencies operate numerous other Type B schemes that I have not studied and are not discussed in these appendices or in the book.

*List of appendices:*

1. Department of Agriculture
2. Civilian Board of Contract Appeals
3. Debarment and Suspension
4. Department of Energy
5. Health and Human Services
6. Equal Employment Opportunities Commission
7. Environmental Protection Agency
8. Executive Office of Immigration Review
9. Merit Systems Protection Board
10. United States Patent and Trademark Office
11. Provider Reimbursement Review Board
12. Veterans Administration



# APPENDIX A-1

## DEPARTMENT OF AGRICULTURE

### A. Type A USDA Schemes

Many USDA adjudicatory programs fall into the category of Type A adjudication.<sup>469</sup> The regulations provide for Type A hearings before ALJs; USDA's judicial officer decides appeals from the ALJ decisions.

Many of the statutes covered by these regulations call for a "hearing on the record" and thus trigger Type A adjudication. However, some statutes do not call for a hearing "on the record," but USDA nevertheless includes these programs in its list of Type A adjudication. For example, licensing provisions of the Animal Welfare Act call only for "notice and an opportunity for hearing."<sup>470</sup> The same is true of licensing provisions in the Perishable Agricultural Commodities Act. (PACA).<sup>471</sup>

The National Appeals Division (NAD) is an independent unit within USDA that conducts evidentiary hearings arising from adverse decisions by agencies engaged in USDA's credit, soil conservation, and insurance functions.<sup>472</sup> NAD is headed by a Director who appoints its hearing officers.<sup>473</sup> The hearing officers have no duties other than adjudicating.<sup>474</sup> In *Lane v. USDA*,<sup>475</sup> the 8th Circuit held that NAD hearings are covered by the APA's adjudication provisions; consequently they are subject to fee recovery under the Equal Access to Justice Act. The *Lane* decision was followed by

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469. See 7 C.F.R. §§ 1.130–.151. Section 1.131 lists the USDA regulatory programs subject to these regulations. These hearings are USDAOALJ0001 in the ACUS database.

470. 7 U.S.C. § 2149(a) (license suspension or revocation) and (b) (civil penalties).

471. See, e.g., 7 U.S.C. § 499h(b).

472. Agencies covered are the Consolidated Farm Service Agency, Commodity Credit Corporation, Farmers Home Administration, Federal Crop Insurance Corporation, Rural Development Administration, Natural Resources Conservation Service, and certain state and local committees. 7 U.S.C. § 6991(2); 7 C.F.R. § 11.1. NAD does not provide review of statutes or regulations, only of individualized decisions. 7 C.F.R. § 11.3(b). For a summary of NAD procedures, see Vogelmann, *supra* note 310. NAD hearings are covered at USDANADO0002 in the ACUS database.

473. The Director serves for a 6-year term and is not subject to removal during that term except for cause. 7 U.S.C. § 6992(b)(2).

474. 7 U.S.C. § 6992.

475. 120 F.3d 106 (8th Cir. 1997).

cases from two other circuits.<sup>476</sup> USDA has acquiesced in the *Lane* decision, and the regulations now provide that the APA and EAJA apply to NAD hearings.<sup>477</sup> Unlike most Type A proceedings, however, NAD administrative judges appointed by its Director, rather than ALJs, conduct NAD hearings.<sup>478</sup>

## B. PACA

PACA (originally enacted in 1930) includes provisions for reparation orders.<sup>479</sup> It is administered by the Agricultural Marketing Service (AMS).<sup>480</sup> PACA provides for dispute resolution between private participants in the fresh or frozen fruit and vegetable markets. The producers of fruits and vegetables are on one side; commission merchants, brokers, and dealers in such products (who must hold licenses) are on the other side. PACA authorizes USDA to adjudicate damage claims by producers against licensees for non-payment or other delinquencies (such as unfair, deceptive, unreasonable, or discriminatory practices, including unreasonable rejection of produce).<sup>481</sup> It appears that PACA gives rise to relatively few cases. In 2016, Volume 75 of Agricultural Decisions lists only 24 cases (the sum of “miscellaneous orders and dismissals,” consent decisions, default decisions, and actual opinions). In 2015, Volume 74 lists only 10 such decisions. Of course, there were probably a considerable number of cases that were settled during the informal complaint stage and would not show up in these statistics.

USDA decisions in PACA reparation cases are reviewable in federal district court. Review can occur either in a proceeding by a petitioner to enforce a reparation order or by either party to review a reparation order. The cases are tried *de novo*, but USDA’s

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476. *Five Points Road Joint Venture v. Johanns*, 542 F.3d 1121 (7th Cir. 2008); *Aageson Grain & Cattle v. USDA*, 500 F.3d 1038 (9th Cir. 2007). This line of cases is questionable, however. Prevailing law gives *Chevron* deference to an agency’s interpretation of whether its governing statute triggers the APA. *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006), discussed in Chapter 2, text at notes 59–62. The *Lane* decision gave no deference to USDA’s interpretation.

477. 7 C.F.R. § 11.4(a). *See* Applicability of Equal Access to Justice Act and Administrative Procedure Act, 74 Fed. Reg. 57,401 (Nov. 6, 2009) (USDA’s acquiescence in *Lane*).

478. The APA allows a statute to supersede the APA requirement that hearings be conducted by ALJs. APA § 556(b).

479. *See* 7 U.S.C. ch. 20A. PACA reparation hearings are not included in the USDA’s list of Type A adjudications. *See* 7 C.F.R. § 1.131(a).

480. *See* U.S. Dep’t of Agric., *Perishable Agricultural Commodities Act*, <https://www.ams.usda.gov/rules-regulations/paca> (last visited Apr. 16, 2018).

481. *See* 7 U.S.C. § 499b. PACA also treats the proceeds of sale of produce as being held in trust for producers as well as giving the producers a floating lien over the licensee’s assets. These provisions greatly improve the position of the producers as creditors if a licensee files for bankruptcy. *See* 7 U.S.C. § 499e(c). PACA procedure is discussed in Verkuil, *supra* note 40, at 764–65. *See also* U.S. Dep’t of Agric., *FAQs for PACA Proceedings* (May 2016) <https://www.ams.usda.gov/sites/default/files/media/FAQ%20for%20PACA%20Petitions%2C%20Appeals%20%26%20Oral%20Hearings.pdf>.

findings and conclusions are treated as prima facie correct.<sup>482</sup> In addition, producers who are victims of breach of contract can go directly to court and bypass the USDA reparation procedure entirely.<sup>483</sup> These unusual review provisions reflect the fact that the USDA reparation proceedings might otherwise be treated as an unconstitutional delegation of adjudicative power or a denial of the right to a jury trial.

Under the regulations,<sup>484</sup> the examiners in PACA hearings are attorneys employed in the Office of the USDA General Counsel.<sup>485</sup> Examiners can be disqualified for bias, but the regulations define bias rather narrowly to cover only a pecuniary interest or a blood or marital relationship to one of the parties.<sup>486</sup> There are no provisions prohibiting ex parte communications to the examiner or involvement by USDA investigators in the proceedings. Examiners are given various powers including subpoena power, power to order depositions, and power to conduct hearings by telephone or audio-visual equipment.<sup>487</sup>

Parties seeking PACA reparations trigger the process by filing an “informal complaint.” Staff members of the Deputy Administrator investigate the complaint, and a copy of the investigational report is provided to the parties.<sup>488</sup> During this period, the parties may settle the dispute.<sup>489</sup> The PACA branch also provides mediation services at this stage.<sup>490</sup> If the case does not settle, the petitioner files a “formal complaint” which is served on the respondent.<sup>491</sup>

The regulations provide for an oral hearing if the amount of the claimed damages exceeds \$30,000. If the damages do not exceed \$30,000, a documentary rather than

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482. 7 U.S.C. § 499g(b)–(c). This means that either party can introduce additional evidence in court. *Smith v. White*, 48 F. Supp. 554 (E.D. Mo. 1942). The Secretary’s findings are rebuttably presumed to be correct. The presumption is rebutted if a party introduces sufficient evidence to overcome them. *Spano v. W. Fruit Growers, Inc.*, 83 F.2d 150 (10th Cir. 1936).

483. *See* 7 U.S.C. § 499e(b), which establishes that victims can recover damages either through the USDA administrative process or by suing in any court of competent jurisdiction.

484. 7 C.F.R. §§ 47.1–.22.

485. 7 C.F.R. § 47.2(i). In documentary reparation proceedings, the term “examiner” means “any other employee of the PACA Branch whose work is reviewed by an attorney employed in the Office of the General Counsel.”

486. 7 C.F.R. § 47.11(a). The regulations also provide for “disqualification” of the examiner. It is not clear if the grounds for disqualification go beyond a pecuniary or family relationship to the parties. § 47.11(b).

487. 7 C.F.R. § 47.11(c).

488. 7 C.F.R. § 47.7.

489. “The Deputy Administrator, in an effort to effect an amicable or informal adjustment of the matter, shall give written notice to the person complained against of the facts of conduct . . . and shall afford such person an opportunity, within a reasonable time fixed by the Deputy Administrator, to demonstrate or achieve compliance . . . .” 7 C.F.R. § 47.3(a)–(b).

490. U.S. Dep’t of Agric., *PACA Mediation Services*, <https://www.ams.usda.gov/resources/paca-mediation-services> (last visited July 11, 2018).

491. 7 C.F.R. § 47.6(a).

an oral hearing is provided (unless the examiner finds that peculiar circumstances make an oral hearing necessary).<sup>492</sup>

Oral hearings can be conducted by an in-person proceeding or by telephone or by video conference. The default is video conference unless the examiner determines that an in-person hearing is necessary to prevent prejudice to a party, is necessary because of a disability of any individual expected to participate in the hearing, or “would cost less than conducting the hearing by audio-visual communication.”<sup>493</sup> The examiner can substitute a telephone hearing for an in-person hearing or one by audio-visual equipment if a phone hearing would provide a full and fair evidentiary hearing, would not prejudice any party, and would cost less than conducting the hearing by audio-visual equipment or personal attendance of any individual.<sup>494</sup> The parties must exchange (ten days before the hearing) a written verified narrative of the testimony any of its witnesses (including experts) will present by phone.<sup>495</sup>

At the hearing, a party may appear in person or by counsel or other representative. Thus, USDA permits lay representation.<sup>496</sup>

After the hearing, the parties have an opportunity to submit proposed findings and conclusions and submit briefs. They must also make claims for attorney fees and other costs (although they do not yet know if they will be prevailing parties entitled to recover such costs).<sup>497</sup> The examiner “with the assistance and collaboration of department employees assigned for this purpose” shall prepare a report on the basis of evidence received at the hearing. It is prepared in the form of a final order for the signature of the Secretary of Agriculture but not served on the parties until the Secretary signs it.<sup>498</sup>

The documentary procedure (applicable to most cases involving less than \$30,000 in damages<sup>499</sup>) dispenses with oral proceedings. The verified pleadings, investigation reports, stipulations, and additional written verified statements or

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492. 7 C.F.R. § 47.15(a).

493. 7 C.F.R. § 47.15(c)(3)(iii). “If the examiner determines that a hearing conducted by audio-visual telecommunication would measurably increase the [USDA’s] cost of conducting the hearing, the hearing shall be conducted by personal attendance of any individual who is expected to participate in the hearing or by telephone.” *Id.*

494. 7 C.F.R. § 47.15(c)(4).

495. 7 C.F.R. § 47.15(f).

496. 7 C.F.R. § 47.15(d)(1). The regulations provide for disqualification of counsel or a lay representative because of unethical or unprofessional conduct. The examiner shall report such action to the Secretary who can, after notice and hearing, bar counsel or other representative from participating in other hearings.

497. 7 C.F.R. § 47.19(b)–(d).

498. 7 C.F.R. § 47.19(e).

499. Parties in cases where the claimed damages exceed \$30,000 can consent to use the documentary procedure in lieu of oral hearings. 7 C.F.R. § 47.20(b)(2).

deposition transcripts serve as the evidentiary record. The parties may submit briefs.<sup>500</sup> The examiner's report is the same as in the case of oral hearings.<sup>501</sup>

The examiner's report and the record in the case are transmitted to the Secretary of Agriculture.<sup>502</sup> If the Secretary agrees with the examiner's report, the Secretary signs it without further ado. If the Secretary disagrees with the examiner's report and if the Secretary "deems it advisable to do so," the examiner's proposed order is served on the parties as a tentative order, and the parties are allowed a period of time (not exceeding 20 days) to file exceptions to the report and written argument or briefs in support thereof.<sup>503</sup>

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500. 7 C.F.R. § 47.20(a), (c)-(i).

501. 7 C.F.R. § 47.20(k).

502. 7 C.F.R. § 47.21.

503. 7 C.F.R. § 47.23.





## APPENDIX A-2

# CIVILIAN BOARD OF CONTRACT APPEALS (CBCA)<sup>504</sup>

CBCA (housed within the General Services Administration) is an adjudicating tribunal that is responsible for resolving contract disputes between private contractors and most non-military federal agencies.<sup>505</sup> CBCA also is responsible for resolving a variety of other types of disputes involving the federal government. These include federal employee monetary claims and disputes relating to Federal Crop Insurance, Federal Motor Carrier Safety, and Indian Self-Determination.<sup>506</sup>

Under the Contract Disputes Act, a private contractor who has a contract dispute with an executive agency can take an “appeal” from an adverse decision of the agency’s contracting officer to CBCA.<sup>507</sup> Contractors have the choice of proceeding before CBCA or litigating in the Court of Federal Claims.<sup>508</sup> CBCA appeals are Type B adjudication. The exclusive record principle applies.<sup>509</sup> Unlike other Type B agencies, CBCA awards attorney fees to prevailing private contractors under the Equal Access to Justice Act.<sup>510</sup>

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504. This appendix does not discuss the Armed Service Board of Contract Appeals. ACUS excluded military and foreign affairs adjudication from the study because of resource constraints. The appendix also does not discuss two contract-related schemes operated by General Accountability Office (GAO). GAO’s scheme for making non-binding recommendations concerning bid protests (GAOBIDS0003) appears to be Type C adjudication; neither the statute nor the regulations appear to call for an evidentiary hearing although GAO may hold hearings. See 31 U.S.C. §§ 3554(a), 3555; 4 C.F.R. pt. 21. GAO’s scheme for resolving disputes relating to contracts by a legislative branch agency does appear to be Type B adjudication, but the number of cases appears to be very small. The ACUS database does not include this scheme. See 4 C.F.R. pt. 22 (these regulations parallel those of CBCA).

505. A 2006 statute consolidated numerous agency-specific boards of contract appeals into CBCA. See Jeri Kaylene Somers, *The Boards of Contract Appeals: A Historical Perspective*, 60 AM. U. L. REV. 745 (2011). CBCA is identified as GSAOCB0004 in the ACUS database.

506. ACUS website lists 11 case types. See Civilian Bd. of Contract Appeals, *The Board*, <http://www.cbca.gov/board/index.html> (last visited July 11, 2018).

507. 41 U.S.C. § 7104(a).

508. *Id.* See Michael Schaengold, *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Boards of Contract Appeals*, 17 FED. CIR. B.J. 279 (2008).

509. 48 C.F.R. §§ 6101.9, .24.

510. 5 U.S.C. § 504(b)(1)(C)(ii); 48 C.F.R. §§ 6101.1(b)(2), .30.

Panels of three Board Judges (BJs) usually hear CBCA cases. BJs have many of the job protections enjoyed by ALJs. BJs must have at least five years of experience in public contract law.<sup>511</sup> Unlike most AJs, they are not subject to performance evaluations. As of July 2018, CBCA has 14 BJs.<sup>512</sup>

CBCA regulations prohibit ex parte communications by any person “directly or indirectly involved in an appeal” to any Board member or Board staff.<sup>513</sup> Because the Board is an adjudicating tribunal, it has no need for a separation of functions provision. The regulations contain no provision dealing with possible bias by BJs.

CBCA does not allow lay representation. Private parties can represent themselves, and an officer can appear on behalf of a corporation.<sup>514</sup>

The procedural regulations contain elaborate rules for pleading and notice to opposing parties.<sup>515</sup> Electronic filing is permitted.<sup>516</sup> BJs have subpoena power.<sup>517</sup> The Board permits all forms of discovery (including depositions, interrogatories, and requests for production), but discovery is permitted only to the extent authorized by BJs. The Board may limit the frequency or extent of discovery if it would be burdensome or unduly expensive.<sup>518</sup> BJs are authorized to conduct pre-hearing conferences.<sup>519</sup>

ADR is strongly encouraged, and the Board provides trained neutrals to attempt to settle disputes by any ADR method (including mini-trials). ADR is even available before an agency contracting officer has filed a written report (which is normally required before a contractor can appeal to CBCA).<sup>520</sup>

CBCA’s rules provide that either party can waive an oral hearing and request a decision based on documents in the file.<sup>521</sup> The other party, however, may request an oral hearing. When one party requests an oral hearing, the party who waived the oral hearing is allowed to appear to cross-examine live witnesses. The rules direct BJs to admit any relevant and material evidence including hearsay unless found to be unreliable or untrustworthy. As to other matters relating to evidence, BJs look to the

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511. 41 U.S.C. § 7105(b)(2)(B). Board judges (referred to Board Members in the statute) are subject to removal in the same manner as ALJs.

512. Civilian Bd. of Contract Appeals, *Judges*, <https://cbca.gov/board/judges.html> (last visited July 11, 2018).

513. 48 C.F.R. § 6101.33(b)–(c).

514. 48 C.F.R. § 6101.5.

515. 48 C.F.R. pt. 6101.

516. 48 C.F.R. § 6101.1(b)(5)(iii).

517. 48 C.F.R. § 6101.16.

518. 48 C.F.R. § 6101.13–15.

519. 48 C.F.R. § 6101.11.

520. 48 C.F.R. § 6101.54. See Civilian Bd. of Contract Appeals, *Alternative Dispute Resolution*, <http://www.cbca.gov/adr/index.html> (last visited July 11, 2018).

521. 48 C.F.R. § 6101.18–19.

Federal Rules of Evidence for guidance.<sup>522</sup> CBCA hearings are open to the public but can be closed to protect confidential information.<sup>523</sup> A written decision is required based on evidence in the record and judicially noticed facts.<sup>524</sup>

The statute and regulations provide for small claims hearings if the dispute involves \$50,000 or less or the contractor is a “small business concern.” Small claims hearings are heard by a single BJ and an accelerated time table.<sup>525</sup> If the amount in dispute is \$100,000 or less, the regulations provide for an accelerated decision by only two BJs.<sup>526</sup>

There is no procedure for higher-level administrative reconsideration of BJ decisions. However, a party can request full Board reconsideration of a case in order to secure uniformity of decisions or because of the case’s exceptional importance. Such requests are disfavored.<sup>527</sup> Either side can appeal CBCA decisions to the Court of Appeals for the Federal Circuit.

Counting government contracts cases, CBCA decided 167 cases in 2017 (through November 9), 201 cases in 2016, and 236 cases in 2015. In those years, it decided 140, 222, and 227 cases other than government contracts cases. Thus, the total caseload was 307 in 2017 (up to November 9), 423 in 2016, and 463 in 2015.

If all cases were one-judge panels, the workload per judge in 2016 was about 30 per judge. If all cases were three-judge panels, the workload would be 90 per judge. Therefore, for statistical purposes, I estimate the workload at about 60 cases per judge.

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522. 48 C.F.R. § 6101.10.

523. 48 C.F.R. § 6101.21.

524. 48 C.F.R. § 6101.25.

525. 48 C.F.R. § 6101.52.

526. 48 C.F.R. § 6101.53.

527. 48 C.F.R. § 6101.28.



## APPENDIX A-3

# DEBARMENT AND SUSPENSION

Government agencies have power to exclude private parties from entering into transactional relationships with the government. These relationships include procurement contracts as well as non-procurement transactions such as loans or grants. Exclusion consists of debarment for a period of time and suspension of the private party from an existing relationship during investigation or litigation. The debarment and suspension process is obviously quite important, both for the protection of the government from irresponsible or corrupt contractors and to private parties doing business with the government. Exclusion is not intended as punishment of errant contractors but as protection for the government.

The procedural requirements that agencies must follow in making exclusion decisions are set forth in two sets of regulations applicable to executive branch agencies across the government. One set deals with contractual procurement, and the other deals with non-procurement transactions. Each executive agency is expected to adopt its own regulations to implement the government-wide exclusion regulations.<sup>528</sup> Thus, the procurement regulations differ from other Type B systems in that they authorize hearing procedures that apply across the entire government and are administered by many different agencies, each of which must adopt its own regulations.

The website of the Interagency Suspension and Debarment Committee (ISDC)<sup>529</sup> contains data on suspension and debarment activities across 24 agencies.<sup>530</sup> According to the 2016 ISDC annual report, in FY 2016 there were 718 suspensions, 1,855 proposed debarments (which prevent the government from contracting with the recipient until the matter is resolved), and 1,676 actual debarments for a total

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528. Congress has considered centralizing the suspension and debarment process into a single enforcement agency, rather than the existing decentralized system, but such legislation has not advanced. See Rhina M. Cardenal, *Is Congress Overthinking Suspension and Debarment? How to Improve the System Without Legislation*, 49 *PROCUREMENT LAW*, Winter 2014, at 3. Similarly, efforts to merge the two systems of regulation have borne little fruit. Robert F. Meunier & Trevor B.A. Nelson, *Is It Time for a Single Federal Suspension and Debarment Rule?*, 46 *PUB. CONT. L.J.* 553 (2017).

529. See text following note 563, for further discussion of ISDC.

530. See Letter from David M. Sims, Chair, ISDC, to Hon. Jason Chaffetz, Chairman, Committee on Oversight & Government Reform, U.S. House of Representatives (Jan. 12, 2017), <https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/272/2017/03/873-Report-FY-2016.pdf>.

of 4,249 actions.<sup>531</sup> There were 3,555 referrals to agency suspension and debarment officers (SDOs). These figures were about 10% lower in FY 2016 than in FY 2015. The numbers of suspensions and debarments have been relatively stable since 2011.<sup>532</sup> In addition, in FY 2016 there were 75 “administrative agreements.” Administrative agreements are negotiated between agencies and private contractors to “improve the ethical culture and corporate government processes of a respondent.” The agreements avoid formal debarment, but are often accompanied by monitoring or other forms of oversight. Finally, in FY 2016, there were 21 voluntary exclusions.

## A. Procurement Contracts

The regulations relating to debarment and suspension in procurement contracts are part of the Federal Acquisition Regulation or FAR.<sup>533</sup> FAR is authorized by a statute that authorizes the Administrator of the General Services Administration (GSA) to adopt regulations relating to procurement by executive branch agencies.<sup>534</sup> The statute requires that each agency head adopt “orders and directives” to “carry out” the regulations. The statute makes no reference to the procedures that the agency should implement the debarment and suspension function. FAR provides for a system of evidentiary hearings to carry out the debarment and suspension function. Therefore, such proceedings should be classified as Type B adjudication.<sup>535</sup>

FAR requires each agency to designate a “debarment official,” referred to herein as a Suspension and Debarment Officer or SDO, although some agencies use different titles. The SDO receives referrals of potential exclusion cases from within the agency and makes the final determination whether exclusion should occur. The SDO must follow the procedures spelled out in FAR. Debarments are normally for a three-year period.<sup>536</sup>

Debarment is a discretionary rather than a mandatory remedy. The regulations provide various criteria that the SDO should consider when deciding whether debarment should take place (and, if so, for how long and whether it applies to the entire

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531. The largest number of debarments were by the Army (339), HUD (192), DHS (280), Navy (186), and EPA (143).

532. A GAO report in 2011 criticized the exclusion programs of various agencies and triggered a much higher volume of exclusion actions in subsequent years.

533. 48 C.F.R. pt. 9, subpt. 9.4. *See generally* J. Michael Jones, Jr., *A Mechanic's View of the Government's Procurement Suspension and Debarment System: Time for a Major Change or a Little Tune-Up*, 2013 ARMY LAW. 32 (2013); Cardenal, *supra* note 528; Christopher Yukins, Cristiana Fortini Silva, & Mariana Avelar, *A Comparative View of Debarment and Suspension of Contractors in Brazil and in the USA*, 66 ADMIN. & CONSTIT. L. REV. (Brazil) 61 (2016).

534. 40 U.S.C. § 121(c).

535. Due process protections apply to exclusion proceedings, but FAR satisfies the requirements of due process. *IMCO v. United States*, 97 F.3d 1422, 1427 (Fed. Cir. 1996); *Girard v. Klopfenstein*, 930 F.2d 738, 743 (9th Cir. 1991).

536. 48 CFR § 9.406-4(a)(1).

company and also to its affiliates).<sup>537</sup> Unless exempted, debarment by one agency is effective throughout the executive branch.<sup>538</sup> The government maintains a computer database (SAMS) which contains information on outstanding debarment and suspension orders. Federal agencies must consult SAMS before making contracts or engaging in non-procurement transactions.

The causes for debarment include conviction of various crimes or a civil judgment relevant to procurement. The section lists specific offenses (such as tax evasion, various forms of theft, and intentionally affixing a Made in America label), and includes commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.<sup>539</sup> In addition, debarment can occur for actions (even without a conviction or a judgment) such as willful failure to perform the contract or violation of the drug-free workplace rules, having delinquent federal taxes exceeding \$3500, or “any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.”<sup>540</sup> In addition, debarment can occur for failure to disclose violations of federal criminal law including fraud, conflict of interest, bribery, violations of the False Claims Act, or significant overpayments on the contract.<sup>541</sup> Numerous statutes relating to procurement contain provisions calling for mandatory (rather than discretionary) exclusion for purposes of punishment, but do not provide for the procedures by which the agency carries them out.<sup>542</sup> FAR provides the necessary procedural ingredients for agencies to implement the statutory exclusion provisions.

One frequent user of procurement debarment actions is Immigration and Customs Enforcement (ICE). Debarment occurs because of immigration violations, such as knowingly employing undocumented employees. During an eight-month period in 2009 (shortly after ICE implemented a new strategy of making use of debarment), it debarred 45 businesses and 47 individuals.<sup>543</sup> The provisions for hearings in FAR

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537. 48 CFR § 9.406-1(a). Such factors include the public interest and whether the offending behavior is likely to be repeated. For discussion of agency discretion not to apply debarment, see KATE M. MANUEL, CONG. RESEARCH SERV., RL34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS 8–11 (2008).

538. 48 C.F.R. § 9.406-1(c)–(d).

539. 48 C.F.R. § 9.406-2(a).

540. 48 C.F.R. § 9.406-2(b)–(c). See Thomas B. Carr, *The Black Hole of Debarment: Catch-All Clauses*, 52 PROCUREMENT LAW., Winter 2017, at 8.

541. 48 C.F.R. § 9.406-2(b)(1)(vi).

542. See, e.g., 41 U.S.C. § 8303(c) (directing three-year debarment for violating a “Buy American” provision in a procurement contract); 41 U.S.C. § 3144(b)(2) (directing three-year debarment for violating the Davis-Bacon prevailing wage statute); 41 U.S.C. § 6504(b) (mandating three-year debarment for violating minimum wage or child labor laws).

543. Michael J. Davidson & Jennifer L. Longmeyer-Wood, *The ICE Suspension and Debarment Program Heats Up*, 46 PROCUREMENT LAW., Fall 2010, at 16.

do not apply to debarments because of immigration violations. Instead the immigration statute provides for a Type A hearing for employers charged by DHS with immigration violations.<sup>544</sup>

FAR requires agencies to establish procedures for adjudicating debarment issues “that are as informal as is practicable, consistent with principles of fundamental fairness.” After receiving a referral, the agency’s SDO must furnish a detailed notice of its proposal to debar “sufficient to put the contractor on notice of the conduct or transactions upon which it is based” and providing information on the agency’s hearings and procedures and the effect of debarment.<sup>545</sup>

Essentially, FAR calls for a two-step adjudicatory process. Step one affords the contractor “an opportunity to submit (in person, in writing, or through a representative) information and argument in opposition to the proposed debarment.”<sup>546</sup> The SDO then makes a decision on the basis of all the information in the administrative record, including the contractor’s submission.

Step two applies if the contractor’s submission in opposition raises a genuine dispute of material fact. In such cases, the SDO must afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents. Agencies must make a transcribed record of the proceedings.<sup>547</sup> It appears that there is little use of the step 2 proceedings; I was advised that GSA, for example, never uses it because the exclusion proceeding is dropped if there are disputed issues of material fact (and no indisputable grounds for exclusion).

Whether step two is triggered, an SDO’s decision is based on all the information in the administrative record. In step two cases, the deciding official must provide written findings of fact, and the decision shall be based on the facts as found and any other information in the record.<sup>548</sup> Therefore, the regulations clearly call for an evidentiary hearing and thus for Type B adjudication. The SDO may refer matters involving disputed material facts to another official for findings of fact; the SDO may reject such findings only after specifically determining them to be arbitrary and capricious or clearly erroneous.<sup>549</sup> In cases not based on a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.

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544. 8 U.S.C. § 1324a(c)(3).

545. 48 C.F.R. § 9.406-3(c). A number of agencies make use of show-cause letters which warn a recipient that the agency’s debarment program is reviewing matters for potential referral to an SDO. The letter gives the recipient an opportunity to respond prior to formal SDO action and may avoid issuance of a proposed debarment which immediately excludes a contractor from doing business with the government. According to the ISDC, 160 show cause letters were issued during FY 2016.

546. 48 C.F.R. § 9.406-3(b)(1).

547. 48 C.F.R. § 9.406-3(d). Step 2 does not apply if the action is based on a conviction or a civil judgment.

548. 48 C.F.R. § 9.406-3(d)(1)–(2).

549. 48 C.F.R. § 9.406-3(d)(2)(ii).



The regulations also provide for suspension of a contractual relationship. “Suspension is a serious action to be imposed on the basis of adequate evidence, pending the completion of investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the government’s interest.”<sup>550</sup> The causes for suspension are similar to those for debarment.<sup>551</sup>

The agency must provide detailed notice when a contractor is suspended, giving the cause and notifying the contractor that it can submit information and argument in opposition to the suspension and obtain a hearing to determine disputed material facts.

Hearings are provided *after* the contractor has been suspended.<sup>552</sup> In actions not based on an indictment, an evidentiary hearing shall be provided if there is a genuine dispute of material fact. However, no hearing is provided if the Department of Justice advises that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced. If a hearing is provided, agencies shall afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents.<sup>553</sup> The standard is “adequate evidence,” rather than preponderance of the evidence.<sup>554</sup>

The individual agency regulations adopted pursuant to the FAR usually add little detail to the provisions of the FAR.<sup>555</sup> One variation occurs at the Department of Labor. If there is a disputed issue of material fact, the fact-finding proceeding is conducted by an ALJ (although the proceeding is not under the APA); the final decision is made by the SDO.<sup>556</sup>

The regulations adopted by the Department of Defense are more detailed than those adopted by other agencies.<sup>557</sup> DOD’s regulations describe the two-step adjudicatory process sketched by the FAR. The SDO first conducts a presentation of matters in opposition to the suspension or proposed debarment.<sup>558</sup> At stage 1, matters in opposition may be presented in person, in writing, or through a representative. An in-person presentation is an informal meeting, nonadversarial in nature. The SDO may question the contractor or its representative. If the SDO determines that there are genuine disputes of material fact, the SDO proceeds to step two by selecting a

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550. 48 C.F.R. § 9.407-1(b)(1).

551. 48 C.F.R. § 9.407-2

552. 48 C.F.R. § 9.407-3(b)(1).

553. 48 C.F.R. § 9.407-3(b)(2).

554. 48 C.F.R. § 9.407-2(a).

555. *See, e.g.*, HHS, 48 C.F.R. § 309.407-3; USDA, 48 C.F.R. § 406-3; EPA, 48 C.F.R. § 1509.406-3.

556. 48 C.F.R. § 2909.406-3.

557. As noted above, note 531, the military makes more exclusion decisions than other executive branch agencies.

558. 48 C.F.R. ch. 2, app. H-103.

“designated fact finder” to conduct the fact-finding proceeding.<sup>559</sup> An official record is made of this proceeding. The Government’s representative and the contractor have an opportunity to present evidence. The contractor may appear in person or through a representative. Neither the Federal Rules of Evidence nor Federal Rules of Civil Procedure govern; hearsay may be presented and will be given appropriate weight. Witnesses may testify in person and are subject to cross-examination. The designated fact-finder will prepare written findings of fact and determine disputed facts by a preponderance of the evidence.<sup>560</sup> The SDO determines whether to continue the suspension or debar the contractor based on the entire administrative record including the findings of fact. The regulations do not explain who the designated fact-finder is and contain no provisions relating to separation of functions or ex parte communications.

The Department of Energy and GSA regulations are similar to DOD’s.<sup>561</sup> In step 1, the SDO conducts a meeting with the respondent. The respondent (appearing personally or through an attorney or other authorized representative) may present and explain evidence that causes for debarment do not exist, and present evidence of mitigating facts and arguments concerning the proposed debarment. In step 2, if there are disputed issues of material fact, a “fact finding official” conducts a fact-finding conference. The purpose is to provide the respondent an opportunity to dispute material fact through the submission of oral and written evidence. The fact-finding official delivers written findings of fact to the SDO. The SDO’s decision is based on the administrative record, which includes the fact-finding official’s written findings.

## **B. Non-Procurement Transactions**

Executive Order 12,549<sup>562</sup> authorizes a comparable set of regulations that apply to non-procurement debarment and suspension by executive agencies, including federal financial and nonfinancial assistance and benefit programs.<sup>563</sup>

EO 12,549 also called for the establishment of the ISDC to monitor and facilitate the process of exclusion across the government—both procurement and non-procurement contracts. The ISDC coordinates the process by selecting the lead agency to conduct debarment proceedings when several different agencies are affected. The ISDC website contains the current names of persons responsible for administering non-procurement debarment and suspension.<sup>564</sup>

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559. 48 C.F.R. ch. 2, app. H-104.

560. 48 C.F.R. ch. 2, app. H-106.

561. 48 C.F.R. §§ 509.4, 909.406-3. The two-step process consists of an informal presentation to the SDO. If there is a dispute of material facts, a fact-finding proceeding is conducted by an official who prepares findings of fact for the SDO.

562. Exec. Order No. 12,549, 51 Fed. Reg. 6370 (Feb. 21, 1986).

563. 2 C.F.R. § 180.970. Covered transactions include grants, scholarships, loans, subsidies, insurance and numerous other classifications.

564. Interagency Suspension and Debarment Comm., *About the ISDC*, <https://www.acquisition.gov/isdc-home> (last visited Jan. 24, 2018).

The EO provides that executive departments and agencies shall issue regulations governing implementation of the EO that are consistent with guidelines issued by the Office of Management and Budget (OMB) and the ISDC.<sup>565</sup> The departments and agencies shall “follow government-wide criteria and government-wide minimum due process procedures when they act to debar or suspend participants in affected programs.”<sup>566</sup>

OMB described its non-procurement debarment and suspension regulations as “guidelines” rather than as regulations. The applicable regulations must be adopted by each agency.<sup>567</sup> The regulations are written in a refreshing user-friendly format. Persons excluded under FAR from procurement transactions are also excluded by the non-procurement regulations and vice-versa.<sup>568</sup> In some cases, specific statutes require exclusion of grantees, using procedures set forth in the regulations.<sup>569</sup>

Procedures for suspension and debarment under the non-procurement regulations closely resemble the two-step format set forth in the FAR regulations, although they are presented in question-and-answer form.<sup>570</sup> “In deciding whether to suspend or debar you, a Federal agency handles the actions as informally as possible, consistent with principles of fundamental fairness.”<sup>571</sup>

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565. Exec. Order No. 12,549, *supra* note 562. The various sets of agency regulations add little to the OMB guidelines. For a list of agency regulations implementing the guidelines, see Interagency Suspension and Debarment Comm., *Debarment Regulations*, <https://www.acquisition.gov/isdc-debarment-regulations> (last visited July 11, 2018).

566. Exec. Order No. 12,549, *supra* note 562, at § 2(a).

567. 2 C.F.R. §§ 180.5, .15, .20.

568. 2 C.F.R. §§ 180.115, .140

569. *See* Drug-Free Workplace Act, 41 U.S.C. § 8103(b)(2), which references Executive Order No. 12,549 and regulations prescribed to implement it.

570. 2 C.F.R. pt. 180, subpt. G (suspension) and subpt. H (debarment).

571. 2 C.F.R. § 180.610(a).



# APPENDIX A-4

## DEPARTMENT OF ENERGY<sup>572</sup>

### A. General Information

The Department of Energy's (DOE) Office of Hearings and Appeals (OHA) adjudicates a number of different case types.<sup>573</sup> The caseload of OHA (measured by cases opened in FY 2016) is as follows.<sup>574</sup>

OHA Caseload	
Personnel security	106
Whistleblowing	20
FOIA & privacy	80
Exceptions, med certify, safety, others	45
TOTAL CASELOAD	251

This appendix focuses on the first two categories, personnel security and whistleblowing, which appear to be examples of Type B adjudication. The remaining case types do not involve evidentiary hearings and thus do not qualify as Type B adjudication.

OHA has approximately 12 administrative judges (AJs) who provide initial hearings. They work full-time as judges and are subject to performance evaluation based on the timeliness and quality of their work product. They are paid in the GS 13–15 range. Their title was formerly Hearing Officer; the AJ title was adopted in 2013. The purpose of the change was to enhance their stature and to bring them in line with the titles used at other federal agencies. Assuming 251 cases per year distributed among the 12 AJs, their caseload is about 21 cases per year or about 1.75 cases per month.

OHA reports that its average case processing time is a brisk 88 days. In personnel security cases, the time from submission of transcript to the decision is 15 days.

In initial hearings, DOE is represented by a lawyer. About half of respondents are represented (some representatives are non-lawyers).

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572. Thanks to Dan Solomon, Ann Augustyn, and Alan Morrison for their assistance.

573. The identifier code in the ACUS database is DOENOOH0001.

574. DEP'T OF ENERGY, OFFICE OF HEARINGS & APPEALS, FY 2016 ANN. REP.

Discovery is permitted in all types of cases in the discretion of the AJ.<sup>575</sup> AJs have subpoena authority. Discovery includes depositions and documents produced in response to a subpoena.<sup>576</sup> Ex parte contacts are prohibited. Parties receive notice of the hearing. The exclusive record principle applies.<sup>577</sup>

The formality of DOE hearings varies by case type. About 20% are document-only hearings (meaning no live-witness testimony or cross-examination). Of cases involving oral testimony, about 10% involve in-person hearings, and 90% are conducted via video. Some hearings are open to the public; others (such as security clearance cases) are closed.<sup>578</sup>

The AJ drafts the agency decision. In some cases, there is a time limit for preparing the decision (60 days for whistleblower cases, 45 days for medical certificate cases).

Cases are generally heard on a first-in/first-out basis. However, this may vary based upon the complexity of the issues presented and unforeseen difficulty in scheduling the hearing. Web-based electronic filing is permitted. Final decisions are published or posted on the agency website (except for those involving classified or other sensitive information). The record is not closed at the initial decision phase but can be supplemented on agency appeal. The regulations do not establish the contents of the record.

Voluntary ADR is available at all stages, from before the case or claim is filed to the post-hearing stage. ADR includes mediation and arbitration as well as neutral evaluation, mini-trials, peer review panels, ombudsmen, and partnering. ADR is provided by an agency ADR official who is part of the Alternative Dispute Resolution Office (ADRO).<sup>579</sup> During FY 2016, ADRO opened 53 new ADR cases (32 mediations, 21 facilitations and consultations). ADRO conducted 14 mediations of which 8 cases settled.<sup>580</sup> Most mediations concern equal employment opportunity issues, an area where OHA does not otherwise provide for hearings.

A party who is dissatisfied with the decision of an AJ may appeal to the Director of OHA.<sup>581</sup> The appeal structure varies depending on which case type is involved. Appeals are considered on a document-only basis and must be decided within 60 days. During FY 2013, four appeals were initiated. OHA decided four appeals (all whistleblower cases), some which were initiated in earlier years. In security clearance cases, a further appeal is available to the Secretary of Energy.

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575. See 10 C.F.R. § 708.28(b)(1)–(2).

576. See 10 C.F.R. §§ 708.28, 1003.8.

577. 10 C.F.R. § 1003.62(g).

578. See 10 C.F.R. § 1003.62(a).

579. See Office of Conflict Prevention and Resolution, Dep't of Energy, *The ADR Office*, <http://energy.gov/oha/services/applications-exceptions/alternative-dispute-resolution> (last visited July 11, 2018).

580. See note 574.

581. See 10 C.F.R. § 1003.30.

## B. Detailed Treatment of Personnel and Whistleblowing Cases

This section provides more detailed description of the Type B adjudication handled by DOE OHA. The hearings provided in personnel security and whistleblowing cases are quite formal and serve as examples of Type B adjudication that is as formal or even more formal than many Type A adjudication.

### *1. Generic Hearing Regulations*

Procedural regulations set forth in 10 C.F.R. Part 1003 govern OHA hearings. These regulations provide for an evidentiary hearing if it would materially advance the proceeding.<sup>582</sup> “If material factual issues remain in dispute after an application or appeal has been filed, the Director of OHA or his designee may issue an order convening an evidentiary hearing in which witnesses shall testify under oath, subject to cross-examination, for the record and in the presence of a Presiding Officer. A Motion for Evidentiary Hearing should specify the type of witness or witnesses whose testimony is sought, the scope of questioning that is anticipated, and the relevance of the questioning to the proceeding.”<sup>583</sup>

The regulations described below furnish additional procedural protections beyond those provided in the generic hearing regulations.

### *2. Personnel Security Cases*

Personnel security cases (sometimes referred to as security clearance cases) involve challenges by DOE or contractor employees to a decision that the employee be denied or deprived of access to classified material (which presumably means that the applicant does not get the job or an employee loses the job). The regulations<sup>584</sup> applicable to personnel security cases implement Executive Orders 12,968<sup>585</sup> and 10,865.<sup>586</sup> Executive Order 10,865 provides for a right to an adjudicatory hearing for a person denied access to classified material or whose access is revoked. It appears that the right to an evidentiary hearing arises from these executive orders rather than from an applicable statute.<sup>587</sup>

The regulations provide for detailed notice by the Manager of a DOE facility to an employee about whom there is substantial doubt concerning access.<sup>588</sup> The notice

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582. See 10 C.F.R. § 1003.62(a).

583. 10 C.F.R. § 1003.62(e).

584. 10 C.F.R. pt. 710.

585. See Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 7, 1995).

586. See Exec. Order No. 10,865, 25 Fed. Reg. 1583 (Feb. 24, 1960).

587. 42 U.S.C. § 2201 provides that the agency is authorized to “hold such meetings and hearings as the [agency] may deem necessary or proper. . . .” A summary of procedures for the Human Reliability Program, 10 C.F.R. pt. 712, which involves continuous evaluation of employees in sensitive positions for problems such as drug and alcohol abuse and which can also trigger OHA hearings is not included here because there were no OHA hearings under the Human Reliability Program in 2013 or 2014.

588. See 10 C.F.R. § 710.21.

(which shall be as comprehensive and detailed as national security permits) states the information that creates a substantial doubt. The employee can choose to have the Manager make the decision without a hearing or can elect a hearing before an AJ. If the employee selects a decision by the Manager without a hearing and it is unfavorable, the employee can appeal the decision to the DOE Headquarters Appeals Panel.<sup>589</sup>

If the employee opts for an AJ hearing, the case is assigned to an AJ. The AJ has subpoena authority. The AJ holds a prehearing conference and conducts a hearing within 90 days after a request for hearing is received.<sup>590</sup> Hearings are not open to the public. At the hearing, the employee can be represented by a “person of his own choosing.”<sup>591</sup> The AJ is prohibited from engaging in ex parte contacts (with the exception of procedural or scheduling matters). “DOE Counsel shall assist the [AJ] in establishing a complete administrative hearing record in the proceeding and bringing out a full and true disclosure of facts, both favorable and unfavorable.”<sup>592</sup> It is unclear whether this provision permits ex parte contact between DOE Counsel and the AJ.

All witnesses are subject to cross-examination, “if possible,” and “[w]henever reasonably possible, testimony shall be given in person.”<sup>593</sup> The AJ has the duty to assure that restricted data or national security information is not disclosed to persons who are not authorized to receive it. Formal rules of evidence do not apply, but the Federal Rules of Evidence may be used as a guide to “assure production of the most probative evidence available.”<sup>594</sup> The regulations provide that the utmost latitude shall be permitted with respect to relevancy, materiality, and competence. Every effort is made to obtain the best evidence available.

Hearsay is admissible in the AJ’s discretion for good cause without strict adherence to technical rules of admissibility and shall be accorded such weight as circumstances warrant. Cross-examination can be dispensed with if the witness is a confidential informant and disclosure of identity would be harmful to the national interest or in various circumstances relating to jeopardy to restricted data or national security. The employee receives a summary or description of the information in these circumstances and appropriate consideration is given to the lack of opportunity to cross-examine.<sup>595</sup>

The AJ’s decision must contain detailed and specific fact findings and a statement of reasons. To decide favorably to the employee, the AJ must determine that “the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest.”<sup>596</sup>

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589. See 10 C.F.R. § 710.22(c).

590. See 10 C.F.R. § 710.25.

591. 10 C.F.R. § 710.26(a).

592. 10 C.F.R. § 710.26(d).

593. *Id.*

594. 10 C.F.R. § 710.26(h).

595. See 10 C.F.R. § 710.26(m).

596. 10 C.F.R. § 710.27(a).



Both the employee and the Manager can appeal an unfavorable decision to the DOE Headquarters Appeals Panel. The Appeals Panel has three members consisting of DOE headquarters employees: the Principal Deputy Chief for Mission Support Operations, a DOE attorney designated by the General Counsel, and an individual designated by the head of the DOE Headquarters element with cognizance over the employee. Only one member of the Appeal Panel shall be from the “security field.”<sup>597</sup> The Appeals Panel can consider new information submitted by either side, provided that the other side has an opportunity to respond. Appeals must be decided within 45 days of the closing of the administrative record.<sup>598</sup> A further appeal to the Secretary of Energy is afforded whenever an individual was denied an opportunity to cross-examine adverse witnesses; the Secretary must personally review the record.<sup>599</sup>

### 3. Whistleblower Complaints

Detailed regulations prescribe the rules for hearings in the case of whistleblower complaints by employees of DOE contractors. The statutory authorization for these hearings is somewhat unclear. The regulations claim to be authorized by various statutes, most of which confer rulemaking authority on DOE but do not provide for hearings. The most relevant of the statutes cited as authority<sup>600</sup> (a statute administered by the Department of Labor) calls for “notice and opportunity for public hearing” in connection with whistleblower complaints.<sup>601</sup> However, DOL apparently ruled that it had no jurisdiction over complaints by DOE contractors. Consequently, DOE had to adopt its own whistleblower regulations.<sup>602</sup> Thus, it may be these regulations do not implement any statutory hearing requirement. However, by virtue of the detailed procedural regulations, they should be considered Type B adjudication. The regulations are a welcome example of user-friendly language; they are directed to “you,” meaning the complaining employee.

Whistleblower complaints by employees of DOE contractors allege retaliation by employers for disclosure of information concerning dangers to public or worker safety, substantial violations of law, fraud, or gross mismanagement. They also concern complaints for retaliation because an employee participated in congressional proceedings or refused to participate in dangerous activities.<sup>603</sup> DOE encourages informal settlement of whistleblower complaints, including through mediation.<sup>604</sup>

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597. 10 C.F.R. § 710.29(b).

598. *See* 10 C.F.R. § 710.29(f).

599. *See* 10 C.F.R. § 710.31.

600. 42 U.S.C. § 5851(b)(2)(A).

601. *See id.*

602. *See* 10 C.F.R. pt. 708. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (Mar. 3, 1992).

603. *See* 10 C.F.R. § 708.1.

604. *See* 10 C.F.R. § 708.20.

If complaints are not resolved informally, the employee can choose to have the complaint referred to OHA for an investigation followed by a hearing. The employee can also elect a hearing without an investigation. If there is an investigation by OHA, the investigator “may not participate or advise in the initial or final agency decision” and may not supervise or direct the AJ who hears the case.<sup>605</sup>

An OHA AJ schedules a hearing to be held by the 90th day after receipt of the complaint or after issuance of the investigator’s report, whichever is later.<sup>606</sup> The AJ may recommend, but not require, mediation at any time before the initial agency decision.<sup>607</sup>

At the hearing, the parties have the right to be represented by a person of their own choosing or proceed without representation. Testimony is given under oath, and witnesses are subject to cross-examination. Formal rules of evidence do not apply, but OHA may use the Federal Rules of Evidence as a guide. A court reporter makes a transcript. The AJ may order discovery on a showing that discovery is designed to produce evidence regarding a matter that is unprivileged and relevant. The AJ may permit discovery by deposition on oral examination or written questions; written interrogatories; production of documents or things; permission to enter upon land or other property for inspection; and requests for admission. The AJ may issue subpoenas for appearance of witnesses or production of documents or physical evidence. The AJ has typical powers over evidence and other procedural matters. “The [AJ] is prohibited, beginning with his or her appointment and until a final agency decision is issued, from initiating or otherwise engaging in *ex parte* (private) discussions with any party on the merits of the complaint.”<sup>608</sup>

The employee has the burden of proof to establish by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding or refused to participate in dangerous activity, and that such act was a contributing factor to alleged retaliatory acts by the contractor. Once the employee meets this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee’s disclosure, participation, or refusal.<sup>609</sup>

The AJ must issue an initial decision after receiving the transcript of the hearing (or if later, after receiving post-hearing submissions). The initial decision contains appropriate findings, conclusions, an order remedying retaliation (if retaliation is found), and the factual basis for each finding. The AJ may rely on, but is not bound by, the investigator’s report.<sup>610</sup>

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605. See 10 C.F.R. §§ 708.22(b), .25(b).

606. See 10 C.F.R. § 708.26.

607. See 10 C.F.R. § 708.27.

608. 10 C.F.R. § 708.28(b)(9).

609. See 10 C.F.R. § 708.29.

610. See 10 C.F.R. § 708.30(c).

A dissatisfied party may file a notice of appeal with the OHA Director within 30 days after receiving the initial decision. Such an appeal is necessary to exhaust administrative remedies. Within 15 days, the appellant must file a statement identifying the issues it wishes the OHA Director to review. The Director may consider any source of information that will advance the evaluation, provided that all parties have a right to respond to third party submissions.<sup>611</sup> The appeal decision must be issued within 60 days after the record is closed.

In whistleblower cases, a second level of appeal is provided. Any party can file a petition for review by the Secretary of Energy within 30 days after receiving an appeal decision from the OHA Director. The Secretary will reverse or revise an appeal decision by the OHA Director only under “extraordinary circumstances.”<sup>612</sup>

### **C. FOIA & Privacy Act Requests**

The regulations provide for written appeals to OHA of denials by DOE officials of requests for documents under the Freedom of Information Act (FOIA) and for information about an individual under the Privacy Act.<sup>613</sup> These appeals consist of written reviews without an oral hearing and without opportunity for further review within the agency.

The review is initiated based on a request filed by the private party whose request for information or documents was denied. The 2014 Annual Report states that a majority of the FOIA requests are from labor unions seeking to determine whether DOE contractors are complying with federal wage and hour laws. The average case processing time is 12 days. The most common type of case concerns the adequacy of DOE’s search in response to a FOIA request.

These written reviews are not required to be conducted by any statute or other source of law and are not evidentiary hearings. The reviews provide an opportunity for the requestor to make arguments concerning the applicability of FOIA or the Privacy Acts and presumably to introduce relevant factual material. The reviews do not seem constrained by an exclusive record requirement.

### **D. Exceptions**

The case type concerns the process for granting exceptions or waivers to generally applicable DOE requirements, such as energy conservation standards. An exception is granted where the application of a rule or order would constitute a gross inequity, serious hardship, or unfair distribution of regulatory burdens. Presumably, these cases are governed by the generic procedure regulations of Part 1003 and probably involve an exchange of written documents. Again, exception proceedings would appear to be Type C adjudication.

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611. *See* 10 C.F.R. § 708.33(b)(3).

612. 10 C.F.R. § 708.35(d).

613. *See* 10 C.F.R. §§ 1004.8, 1008.11.

## E. Medical Certificates

Under the regulations, OHA provides a review of determinations that a security officer at DOE or its contractors are medically unqualified for the job. The determination can be challenged by an “independent review” by DOE’s Office of Health, Safety, and Security following which OHA provides a final review.<sup>614</sup> The regulations do not explain what sort of procedure OHA should use in conducting its final appeal beyond an examination of the file and the security officer’s written request that states “with specificity” the basis for disagreement with the independent review.<sup>615</sup> It can be inferred, therefore, that no oral proceeding is available. This appears to be Type C adjudication as no evidentiary hearing is provided.

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614. *See* 10 C.F.R. § 1046.15(c)–(d).

615. *See id.*

## APPENDIX A-5

# DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS): DEPARTMENTAL APPEALS BOARD (DAB)<sup>616</sup>

DAB is an appellate board consisting of 5 members primarily concerned with resolving grant-making disputes. It provides de novo consideration of appeals from final written decisions by various offices within HHS relating to both mandatory grant programs (such as Medicaid) and discretionary grant programs (such as Head Start). It adjudicates disputes involving termination of grants or accounting (such as disallowance of expenditures by the grantee). The Board also reviews disputes concerning non-renewal of a previous grant.<sup>617</sup> There are no procedures for protesting decisions at the initial grant stage although informal conferences often take place in such situations. In addition to deciding grant cases, DAB also hears appeals from decisions of ALJs as required by numerous statutes administered by HHS.<sup>618</sup>

Grant cases are heard by a panel of three members (headed by a “presiding Board member”).<sup>619</sup> The panel is assisted by a group of experienced staff members who are attorneys or persons from other relevant disciplines such as accounting and who serve no function other than assisting the Board.<sup>620</sup> DAB has traditionally heard grant cases in board panels, rather than by delegating the initial decision function to AJs. Because it is relatively current in its grant case workload, and because grant cases normally present no issues of disputed fact, there appears to be little support for converting the panel system to one in which AJs make the initial decision.

DAB proceedings are Type B adjudication. Under some grant programs under which the DAB resolves disputes, statutes require HHS to provide a reasonable notice and opportunity for a full and fair hearing if a grant is terminated, reduced, or not

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616. Various DAB staff members assisted me in writing this section. They requested anonymity.

617. *See* 45 C.F.R. pt. 16, app. A.

618. *See* 42 C.F.R. § 498.1 (providing list of statutes giving rise to Type A proceedings).

619. The Board has published a helpful appellate manual. HEALTH & HUMAN SERVS., APPELLATE DIVISION PRACTICE MANUAL (2017), <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/practice-manual/index.html> (last visited July 11, 2018).

620. 42 C.F.R. § 16.5.

renewed.<sup>621</sup> In other cases, the statutes are not clear as to whether an evidentiary hearing must be provided since they require only “a thorough review of the issues, taking into account all relevant evidence.”<sup>622</sup> In any event the regulations clearly call for evidentiary hearings in all DAB grant cases.<sup>623</sup>

In the ten-year period from 2007–2016, the Board received 544 appeals in grant cases. Of these appeals, 238 were closed by decisions. The federal party was the prevailing party in 182 of the appeals. Of the remainder, 18 were decided wholly in favor of the non-federal party, 28 were split decisions, 6 modified the agency decision that was appealed, and 3 were remanded without a decision. As of May 2017, 32 appeals were pending in grant cases.

In 2016, according to its website, DAB handed down 95 decisions. In 2015, it delivered 57 decisions; 2014, 58 decisions; 2013, 61 decisions. Some 2015 cases were delayed by an office move which partly accounts for the large number of 2016 decisions. One-quarter to one-third of these decisions concern grant disputes (the rest are appeals of ALJ decisions that do not involve grant disputes). Most grant cases involve accounting disputes such as disallowance of outlays by the grantee. A few involve termination of grants because of grantee misconduct. (The substantive standards to be applied to grant disputes are set forth in 42 CFR Part 75).

Under the regulations, most DAB cases are decided on the written record consisting of documents and written arguments, plus oral argument. The panel chair may conduct an informal conference to deal with procedural issues during which the parties can make an oral presentation and discuss settlement. Pretrial conferences may be held by phone or video.<sup>624</sup>

The Board can supplement the written record by conducting a hearing involving witnesses, testimony, and cross-examination if it finds that “there are complex issues or material facts in dispute the resolution of which would be significantly aided by a hearing, or if the board determines that its decisionmaking otherwise would be enhanced by oral presentations and arguments in an adversary, evidentiary hearing.” Such hearings are preceded by a preliminary conference.<sup>625</sup> The presiding Board member generally will admit evidence unless it is clearly irrelevant, immaterial, or unduly repetitious. Evidence may be presented by phone or video. However, the use of trial-type proceedings is infrequent.

Where the amount in dispute is \$25,000 or less, the Board uses expedited procedures. Under the expedited process, each party submits any relevant background documents with a cover letter containing its arguments. Briefs are filed simultaneously, rather than sequentially. Then the presiding Board member arranges a telephone

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621. Under Head Start, see 42 U.S.C. § 9841(a)(3)(B).

622. 42 U.S.C. § 1316(e)(2)(B).

623. 45 C.F.R. pt. 16.

624. Pretrial conferences are discussed in detail in the Board’s *Manual*. See 45 C.F.R. §§ 16.4, 16.8, 16.10.

625. 42 C.F.R. pt. 16.

conference call to receive oral comments. Relatively few cases are decided under expedited procedures because most grant disputes involve much larger amounts. The \$25,000 figure has not been adjusted for many years.

The chair will assure that no Board or staff member will serve where his or her impartiality could reasonably be questioned.<sup>626</sup> Ex parte communications to Board or staff about matters involved in an appeal without notice to the other parties are prohibited. Board members and staff shall not consider any information outside the record.<sup>627</sup> The ban on ex parte communications does not apply to communications among the Board members and staff, communications concerning the Board's administrative functions or procedures, requests from the Board to a party for a document, and material which the Board includes in the record after notice and opportunity to comment.

The regulations encourage the use of mediation techniques to settle disputes about grants (even disputes that have not yet reached the Board). The Board may suggest the use of mediation and will provide a mediator or assist in selecting one. The Board will internally insulate the mediator from any board or staff members assigned to handle the appeal.<sup>628</sup> A staff member estimated that of every 100 grant cases, about 30 are settled by agreement of the parties, and 5 are mediated. The remainder go to hearing.

At DAB grant hearings, self-representation and lay representation are permitted but are used infrequently. Discovery usually consists of an exchange of documents. Grantees are entitled to receive sufficient information from government files to prepare their cases. The Board can order production of relevant information and could order depositions and interrogatories, but this is rare and discouraged. The Board has no subpoena power. DAB hearings are open to the public and documents can be filed electronically. Board decisions are precedential, and these precedential decisions cover many recurring issues. Oral arguments may be presented by phone or video. DAB decisions cannot be appealed to any higher authority within HHS.

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626. 42 C.F.R. § 16.5(d).

627. 42 C.F.R. §§ 16.17(a), 16.21(a).

628. Mediation is discussed in detail in the Board's *Manual*. 42 C.F.R. § 16.18.





## APPENDIX A-6

# EQUAL EMPLOYMENT OPPORTUNITY COMMISSION<sup>629</sup>

The primary work of the Equal Employment Opportunity Commission (EEOC) is enforcement of statutes and regulations against private companies and state/local employers—first through investigation and conciliation, and failing that, through federal-court litigation. However, the EEOC serves an adjudicatory function in connection with complaints of employment discrimination by employees of certain federal agencies. Covered agencies include executive branch agencies, non-uniformed employees of the military, the United States Postal Service, and a few others. The EEOC functions as a neutral arbiter between federal employees and their employer agencies.<sup>630</sup>

The adjudication is Type B because the EEOC’s procedural regulations provide for an evidentiary hearing. The statutes that require EEOC to enforce anti-discrimination principles against the federal government do not require hearings but authorize the EEOC to adopt procedural regulations.

There are five case types: (i) discrimination based on race, color, religion, sex, and national origin; (ii) discrimination based on age for employees aged 40 or older; (iii) discrimination based on disability; (iv) discrimination based on genetic information; and (v) unequal pay based on gender.<sup>631</sup>

The process by which federal employees adjudicate discrimination claims is carefully prescribed and is idiosyncratic.<sup>632</sup> EEOC maintains a helpful website.<sup>633</sup> An ACUS study about EEOC’s federal sector adjudication evaluated the status and organizational placement of EEOC’s administrative judges (AJs).<sup>634</sup>

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629. Thanks to Chai Feldblum and Anne Torkington for assistance with this chapter.

630. In the ACUS database, this function is coded as EEOCFEDS0002 at the hearing level and EEOC-GOVT0001 at the appellate level.

631. *See* 29 C.F.R. pt. 1614 (setting forth procedures for all five case types).

632. *See generally* ROBERT E. MCKNIGHT, JR., REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS, ch. 14 (3d ed. & 2014 supp.).

633. *See* Equal Emp’t Opportunity Comm., *Federal Sector*, <http://eeoc.gov/federal/> (last visited July 11, 2018).

634. *See* Wiener et al., *supra* note 75. Much information from the ACUS study is incorporated in this appendix.

The following discussion assumes that an “employee” works for a covered agency or was rejected when applying for employment by a covered agency. The employee believes that he or she is the victim of a prohibited form of discrimination. The discussion omits various exceptions and other nuances which are unnecessary for this general discussion.

The employee must first consult an Equal Employment Opportunity (EEO) counselor at the employing agency within 45 days from the day the alleged discrimination occurred or the employee became aware of it. The counselor explains the employee’s rights and duties under Title VII. Only claims discussed during the counseling period can be the basis for a complaint and eventually litigated before an EEOC AJ. The counselor offers the employee a choice to participate in EEO counseling or in an ADR process (including mediation).<sup>635</sup> If the dispute does not settle, the counselor issues a notice of right to file a complaint. This notice triggers a 15-day period for filing a formal complaint with the employing agency (normally on a standard form complaint document).

The employing agency can either dismiss the complaint (for a variety of reasons) or conduct an impartial investigation that must be completed within 180 days.<sup>636</sup> ADR continues to be available during the investigation. When the investigation is completed, the employing agency issues a notice giving the complainant two choices: (i) request a hearing before an EEOC AJ; or (ii) ask the agency to issue an immediate final decision.<sup>637</sup>

The regulations relating to AJ hearings provide that the employing agency can make an offer of resolution prior to the hearing.<sup>638</sup> If the complainant rejects it and the AJ decision provides a less favorable result than the offer of resolution, the complainant can be denied recovery of attorney fees. The AJ can order discovery from the employee or the employer agency (including depositions, interrogatories, disclosure of documents, or requests for admission)<sup>639</sup> but lacks subpoena power over third parties (such as ex-employees of the employer agency). The hearing is closed to the public. AJs do not apply the rules of evidence, but shall exclude irrelevant or repetitious evidence. The AJ can impose sanctions for non-disclosure of evidence. Summary judgment is possible as to an issue or to the entire case if there is no issue of material fact.<sup>640</sup> The hearing is transcribed by a court reporter; the employing agency pays for a verbatim

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635. *See* 29 C.F.R. § 1614.105.

636. *See* 29 C.F.R. § 1614.106.

637. *See* 29 C.F.R. § 1614.108(f).

638. *See* 29 C.F.R. § 1614.109.

639. *See* 29 C.F.R. § 1614.109(f)(1). For a detailed treatment of discovery, *see* EQUAL EMP’T OPPORTUNITY COMM’N, HANDBOOK FOR ADMINISTRATIVE JUDGES ch. 4 (2002) [hereinafter EEOC Handbook], <https://www.eeoc.gov/federal/ajhandbook.cfm#hearing>.

640. 29 C.F.R. § 1614.109(g).

transcript if needed. The exclusive record principle applies.<sup>641</sup> The AJ must furnish a decision within 180 days after receiving the file. Neither the regulations nor the EEOC's annual reports discuss whether videoconferencing is used for hearings.

The *AJ Handbook* defines and prohibits AJs from deciding cases in which they have a conflict of interest or are biased in favor of or against any party.<sup>642</sup> It also prohibits ex parte communications.<sup>643</sup> There is no provision in the regulations or the *Handbook* for separation of functions, but such provision would be superfluous because the EEOC functions as a tribunal to decide disputes between employees and other federal agencies and does not have investigating or prosecuting staff members in federal employment cases.

The AJ's decision is submitted to the employer agency, which has 40 days to issue a final decision. The final decision states whether the agency agrees with the AJ decision and will grant any relief the judge ordered or whether it elects to reject or modify the AJ decision. If the employing agency rejects or modifies the AJ's decision, it must file an administrative appeal with the EEOC Office of Federal Operations (OFO) at the same time that it issues its final decision on the complaint.

A complainant might disagree with the employing agency's final decision in one of two situations. First, the complainant requested a final agency decision instead of an AJ hearing. Second, the complainant requested an AJ hearing but disagrees with the agency's final order issued after the AJ hearing. In either case, the complainant can appeal the agency's final decision to OFO within 30 days (or can proceed directly to court for a de novo trial without further exhausting EEOC remedies).<sup>644</sup>

The EEOC's decision on such appeals is made by appellate attorneys in OFO who review the entire file. The appeal does not involve oral proceedings, only examination of the written record and written statements or briefs.<sup>645</sup> The EEOC appellate decision is de novo, but no new evidence is submitted. The substantial evidence rule applies to review of the AJ's findings of fact. Complainants or agencies can request reconsideration of the appeal decision.

A complaining employee (but not the employer agency) can seek de novo review in the federal district court after exhausting this complaint process (and in some

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641. 29 C.F.R. § 1610(h); EEOC Handbook, *supra* note 639, at ch. 7H.

642. EEOC Handbook, *supra* note 639, at ch. 7, III.A.1–2. The bias provision is noteworthy: “Bias: The Administrative Judge should not participate in any conduct during the hearing that presents the appearance of or demonstrates actual bias in favor of or against one of the parties. For example, it is improper for the Administrative Judge to eat lunch with a representative of one party during the course of the hearing. If a party or a witness accuses the Administrative Judge of bias during the course of the hearing, the Administrative Judge should document the allegations and the response on the record.”

643. *Id.* at ch. I.E.

644. If the complainant goes to court, the action is not an appeal from agency action. Rather, it is an original action, subject to an exhaustion requirement. The AJ's decision may be entered as evidence, though the courts give it no deference.

645. See 29 C.F.R. § 1614.403 (providing for filing statements or briefs with OFO).

situations without exhausting it, as in the situation when the complainant requested a final agency decision and does not appeal that decision).<sup>646</sup> Alternatively, if an employee is satisfied with the EEOC's decision but the employing agency has not complied with it, the employee can seek judicial enforcement.<sup>647</sup>

The EEOC currently employs approximately 110 AJs. In FY 2013, employees sought AJ hearings in 7,077 cases. In FY 2013, 6,789 cases were resolved at the AJ level; the number of cases pending at the end of the year was 8,313. In FY 2014, 8,086 cases were filed, and 6,347 were resolved at the AJ level. Cases pending at end of FY 2014 were 10,363. The average processing time for each case increased from 383 days in FY 2013 to 419 days in FY 2014. Thus, the workload per AJ is about 65 cases per year or about 1.3 per week.<sup>648</sup> Of the cases heard by AJs in FY 2014, 126 found that discrimination had occurred.

The EEOC currently employs about 30 appeals attorneys. In FY 2014, OFO received 4,003 appeals from final agency decisions and resolved 3,767 of them. 4,541 were pending at the end of FY 2014. By comparison, OFO received 4,244 such appeals in FY 2013. Thus, the workload of the appeals attorneys is about 125 per year or about 2.5 per week.

A complainant can be represented by an attorney or a lay advocate (such as a union representative).<sup>649</sup> If the representative is an employee of the agency, the representative must be given time during the workday to prepare the case. There is provision for the recovery of attorney fees if the employee is the prevailing party, but only if the employee was represented by an outside attorney.

Alternative dispute resolution (ADR) is extensively employed in the EEOC's federal employee process.<sup>650</sup> EEOC encourages federal agencies to provide ADR in employment discrimination cases including counseling (which is mandatory as explained above), negotiation, mediation and settlement conferences at various points in the process, including before and after the complaint is filed.

The AJs and appeals attorneys are subject to performance evaluation. They are evaluated quarterly and annually. Their opinions are read by supervisors and by other judges. Judges or appeals attorneys perceived to be doing a poor job are placed on a performance improvement plan. The AJs are almost all paid at the GS 14 levels (7% were GS 13s).<sup>651</sup>

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646. See Wiener et al., *supra* note 75, at 14–15; *Chandler v. Roudebush*, 425 U.S. 840 (1976) (federal employee claiming prohibited discrimination entitled to de novo judicial trial).

647. Wiener et al., *supra* note 75, at 14–15

648. The statistics in this paragraph and the following paragraph are drawn from the EEOC's Annual Report on the Federal Work Force, Part I, I-21 to I-25 (2014), <http://www.eeoc.gov/federal/reports/fsp2014/upload/Final-FY-2014-Annual-Report-Part-I.pdf> (last visited May 3, 2018).

649. See 29 C.F.R. § 1614.605.

650. See 29 C.F.R. §§ 1614.102(b)(2), .105(b)(2), .603; EEOC Handbook, *supra* note 639, at ch. 3; Equal Emp't Opportunity Comm'n, *Federal Sector Dispute Resolution Fact Sheet*, <http://eeoc.gov/federal/adr/facts.cfm> (last visited July 11, 2018).

651. See Wiener et al., *supra* note 75, at 43.

# APPENDIX A-7

## ENVIRONMENTAL PROTECTION

### AGENCY <sup>652</sup>

The EPA conducts a large volume of adjudication.<sup>653</sup> Most adjudication involving EPA enforcement (such as assessment of major civil penalties) is conducted as Type A adjudication.<sup>654</sup> EPA employs 4 ALJs who preside over Type A adjudicatory hearings.<sup>655</sup>

Adjudication involving minor civil penalties and the issuance, modification, reissuance, and revocation of various environmental permits is conducted as Type B adjudication.<sup>656</sup> Generally, the applicable statutes relating to permitting provide for a “public hearing,”<sup>657</sup> language that does not trigger the APA’s Type A adjudication provisions. EPA’s Type B adjudication is governed by detailed regulations.<sup>658</sup> After an initial decision in *either* Type A or Type B adjudication, the parties can seek reconsideration in the form of an appeal to an internal EPA appellate body called the Environmental Appeals Board (EAB).<sup>659</sup> The EAB is the final EPA decisionmaker on administrative appeals under all major environmental statutes the EPA administers.

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652. Thanks to Kathie Stein, Jonathan Fleuchaus, and Randy Hill for assistance with this appendix. The ACUS database EPAOALJ0001 contains 48 case types.

653. *See generally* Randolph L. Hill et al., *Internal Administrative Appeals of Governmental Decisions on the Environment*, in ENVIRONMENTAL DECISIONMAKING (Leroy C. Paddock et al. eds., 2016); Anna L. Wolgast et al., *The United States Environmental Adjudication Tribunal*, 3 J. CT. INNOVATION 185 (2010).

654. Regulations for EPA APA hearings are set forth in 40 C.F.R. pt. 22. *See* Wolgast, *supra* note 653, at 188–90.

655. Env’tl. Prot. Agency, *About the Office of Administrative Law Judges*, <http://www2.epa.gov/aboutepa/about-office-administrative-law-judges-oalj> (last visited July 12, 2018).

656. EPA treats termination of a permit before its expiration date as a Type A proceeding as it is akin to a sanction. *See* 40 C.F.R. § 22.3; ENVIRONMENTAL APPEALS BOARD, PRACTICE MANUAL 4, 36 (2013) [hereinafter EAB PRACTICE MANUAL], [https://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/8f612ee7fc725edd852570760071cb8e/889f7aab01cf481c85257afd0054d515/\\$FILE/Practice%20Manual%20August%202013.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/889f7aab01cf481c85257afd0054d515/$FILE/Practice%20Manual%20August%202013.pdf).

657. *See, e.g.*, 33 U.S.C. § 1342(a), relating to NPDES permits.

658. 40 C.F.R. pt. 124. *See* EPAOPRMT0006 in the ACUS database. Many of the permit programs are administered by state environmental agencies; the regulations require that states provide procedures parallel to those used by the EPA. *See* 40 C.F.R. § 124.1.

659. The EAB is described in 40 C.F.R. § 1.25(e) and discussed further below. *See* note 660.

The EPA originally treated permit cases as Type A adjudication, but transitioned to a non-APA system in 1980 and 2000.<sup>660</sup> The First Circuit upheld EPA's decision to conduct permitting hearings as Type B adjudication.<sup>661</sup> That decision accorded *Chevron* deference to uphold the EPA's interpretation of statutes using the term "public hearing" to permit EPA to conduct Type B proceedings.

### A. Minor Civil Penalties

Smaller civil penalties under several statutes, including the Clean Water Act, are adjudicated as Type B cases. The smaller civil penalties are referred to as Class I cases; larger civil penalties are referred to as Class II.<sup>662</sup>

The regulations relating to Class I cases provide that the presiding officer is a regional judicial officer (RJO). The RJO is an EPA attorney rather than an ALJ.<sup>663</sup> The detailed regulations covering penalty adjudication are virtually the same for Class I and Class II cases, except that RJOs preside in Class I cases.<sup>664</sup> Discovery in Class I cases is limited.<sup>665</sup> The regulations contain detailed provisions preventing ex parte communication<sup>666</sup> and assuring separation of functions in Class I cases.<sup>667</sup> Provisions relating to bias are the same for RJOs and ALJs.<sup>668</sup> RJOs can exercise subpoena power

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660. 40 C.F.R. § 124.21.

661. *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006) (interpreting language in the Clean Water Act).

662. *See* 33 U.S.C. § 1319(g)(2). Class I penalties under Clean Water Act cannot exceed \$10,000 per violation with a maximum of \$25,000. The APA does not apply to adjudication of Class I penalties, but the statute calls for an evidentiary hearing in such cases. "Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence." Class II penalties, which cannot exceed \$10,000 per day with a \$125,000 maximum, are adjudicated under the APA. Similarly, *see* 42 U.S.C. § 300h-2(c)(3) (Safe Drinking Water Act); 42 U.S.C. § 9609(a) (Superfund); 42 U.S.C. § 11045(b)(1)–(2) (Emergency Preparedness). *See generally* William Funk, *Close Enough for Government Work? Using Informal Procedures for Imposing Administrative Penalties*, 24 SETON HALL L. REV. 1 (1993). EPA also adjudicates civil penalty cases referred to it by the Army Corps of Engineers (ACE). Interview with Lance Wood and Max Wilson of ACE.

663. 40 C.F.R. § 22.51.

664. The excluded provisions are 40 C.F.R. sections 22.11, 22.16(c), 22.21(a), 22.29. These sections relate to intervention, non-party briefs, and interlocutory appeals.

665. The normal discovery rules do not apply in Class I proceedings except that discovery of the respondent's economic benefit from the violation and respondent's ability to pay civil penalties is permitted. 40 C.F.R. §§ 22.19, 22.52.

666. 40 C.F.R. § 22.8.

667. "[An RJO] shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as a Regional Judicial Officer. [An RJO] shall not knowingly preside over a case involving any party concerning whom the [RJO] performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. [An RJO] shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel." 40 C.F.R. § 22.4(b).

668. 40 C.F.R. § 22.4(d).

and order pre-hearing conferences.<sup>669</sup> The Federal Rules of Evidence do not apply.<sup>670</sup> ADR is encouraged.<sup>671</sup>

In the period 2010-2015, 26 Class I civil penalties were adjudicated by RJOs and 11 were appealed to EAB. In that period, ALJs adjudicated 6 Class II penalties.<sup>672</sup>

## **B. Initial Decisions to Grant, Deny, or Terminate Permits**

Broadly speaking, the regulations create a notice-and-comment system for making initial permitting decisions. The process is collaborative and institutional. This procedure applies both to the issuance of (or refusal to issue) a permit and to termination of a permit.<sup>673</sup> The regional administrator (or state authority) first issues a draft permit or draft denial of an application, accompanied by a fact sheet explaining the decision including any conditions placed on the permit.<sup>674</sup> Members of the public and local governments are notified of the draft decision and are invited to submit comments.<sup>675</sup>

EPA holds a public hearing if the Regional Director finds a significant degree of public interest in a draft permit (or on the Director's own motion).<sup>676</sup> The regional administrator designates a presiding officer (usually a regional judicial officer) who is responsible for its scheduling and orderly conduct of the hearing.<sup>677</sup> Any person may submit oral or written statements and data concerning the draft permit. The public comment period on the draft permit is extended to the close of the public hearing and may be extended further.<sup>678</sup> A tape recording or written transcript of the hearing shall be made available to the public.<sup>679</sup> Persons must "raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing)" and supply all supporting materials during that period.<sup>680</sup>

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669. 40 C.F.R. § 22.4(c)(8)–(9).

670. 40 C.F.R. § 22.22(a).

671. 40 C.F.R. § 22.18(b).

672. Email from Kathie Stein to Michael Asimow (Feb. 23, 2016).

673. See 40 C.F.R. § 124.13. Some permit revocation proceedings are handled as Type A adjudication.

674. 40 C.F.R. §§ 124.6–.8.

675. 40 C.F.R. §§ 124.10–.11.

676. 40 C.F.R. § 124.12(a)(1)–(3). See generally *Sierra Pac. Indus.*, 16 E.A.B. 1, 27–39 (2013) (available on EAB website). The *Sierra Pacific* opinion held that the Director's decision to deny a public hearing was clearly erroneous. It enumerated the factors to be considered in determining whether the "significant degree of public interest" standard has been met. These include the materiality of issues in the request for a hearing, the number of requests and comments, media coverage, significance of the issues, and demographic information such as environmental justice concerns.

677. 40 C.F.R. § 124.12(b). The presiding officer is ordinarily a regional judicial officer (RJO).

678. 40 C.F.R. § 124.12(c).

679. 40 C.F.R. § 124.12(d).

680. 40 C.F.R. § 124.13.

The regional director issues a “final permit decision” after the public comment period concludes. The final permit decision contains a response to comments specifying which provisions, if any, of the draft permit were changed in the final decision. It also includes the reasons for the changes and describes and responds to all significant comments on the draft permit.<sup>681</sup>

### C. Appeal to the EAB

The EAB hears appeals from EPA enforcement and permit decisions (but not decisions made under state authority). The EAB was created in 1992 “to recognize the growing importance of EPA adjudicatory proceedings as a mechanism for implementing and enforcing the environmental laws and to ‘inspire confidence in the fairness of Agency adjudication.’”<sup>682</sup> It alleviated decisionmaking burdens on the EPA Administrator.<sup>683</sup> The EAB is independent of all Agency components and answers only to the Administrator.<sup>684</sup>

When the EAB is the decisionmaker in an enforcement proceeding (whether Type A or Type B), its members and their decisional advisers are prohibited from engaging in *ex parte* discussion on the merits of the proceeding with agency staff members who performed a prosecutorial or investigative function in the proceeding (or a factually related proceeding) or with any interested person outside EPA.<sup>685</sup> The principle of exclusive record applies to the EAB.<sup>686</sup>

Any person who filed comments on the draft permit or participated in a public hearing on the draft permit may file a petition for review, including review of any conditions imposed by the permit.<sup>687</sup> The EPA will consider only issues that had been raised by the petitioner or by others at the permit issuance stage.<sup>688</sup> The EAB assigns a lead judge to the case who works with an assigned staff attorney to determine whether the case is properly within the scope of the Board’s jurisdiction, whether it was timely filed, and whether it should be dismissed on jurisdictional grounds without an adjudication of the merits. For the vast majority of appeals, the case then proceeds to briefing.<sup>689</sup>

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681. 40 C.F.R. § 124.17.

682. EAB PRACTICE MANUAL, *supra* note 656, at 1. *See also* Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320 (Feb. 13, 1992) (amending 40 C.F.R. 1.25 to establish the EAB). The preamble has a thorough discussion of the reasons for establishing the Board.

683. *See* Wolgast, *supra* note 653, at 186–87.

684. *Id.*

685. 40 C.F.R. § 22.8.

686. 40 C.F.R. § 124.18.

687. EAB permits electronic filing of documents. EAB PRACTICE MANUAL, *supra* note 656, at 11.

688. *Id.* at 43.

689. Wolgast, *supra* note 653, at 191.



The EAB may hold oral argument on its own initiative or at its discretion if requested. The request must explain why oral argument should be permitted.<sup>690</sup> Opinions are published in Environmental Appeals Decisions and posted online.<sup>691</sup>

The EAB acts as an appellate body. It considers cases solely on the administrative record<sup>692</sup> and exercises a limited scope of review of the initial permit decision. A petition to the EAB must be based on a “finding of fact or conclusion of law that is clearly erroneous or an exercise of discretion or an important policy consideration that the [EAB] should, in its discretion, review.”<sup>693</sup> The EAB’s review power is exercised sparingly because most permit issues should be resolved at the regional level.<sup>694</sup> However, the Board thoroughly considers the merits of the issues presented to it and will remand a permit if the region’s analysis is incomplete or its rationale unclear, if the region failed to follow required procedures, or if the region failed to address significant comments.

The EAB is composed of four Environmental Appeals Judges appointed by the EPA Administrator.<sup>695</sup> The Board sits in randomly-assigned panels of three and decides each matter by a majority vote. Each EAB judge is a career member of the government’s Senior Executive Service with significant experience in EPA permit and enforcement matters.<sup>696</sup> An EAB judge shall recuse him or herself from deciding a particular case if the member in previous employment performed prosecutorial or investigative functions with respect to the case, participated in the preparation or presentation of evidence in the case, or was otherwise personally involved in the case.<sup>697</sup>

Statistics concerning the regional appeal process are not available. I was advised that EAB has considered about 600 appeals over the last 10 years, about two-thirds of the cases involving permit appeals and one-third penalties.<sup>698</sup> As of September 2015, of 1,058 final decisions issued by EAB (including Type A, Type B, and CERCLA reimbursement cases), approximately 91% were not judicially reviewed. Of the 9% of

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690. 40 C.F.R. § 124.19(h). Video conference facilities are available so counsel can argue from a remote location. Documents can be filed electronically. 40 C.F.R. §124.19(i)(ii); *see* Wolgast, *supra* note 653, at 192.

691. Wolgast, *supra* note 653, at 192.

692. 40 C.F.R. § 124.19(a)(4)(ii); Hill, *supra* note 653, at 10.

693. 40 C.F.R. § 124.19(a)(4)(i).

694. *In re* Charles River Pollution Control Dist., 16 E.A.D. 622, 624 (EAB 2015) (citing Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)).

695. The Board is assisted by eight attorneys who serve as counsel to the Board and three administrative professionals. Wolgast, *supra* note 653, at 191; Email from EAB Judge Kathie Stein to Michael Asimow (Feb. 23, 2016).

696. Hill, *supra* note 653, at 2.

697. 40 C.F.R. § 1.25(e). Board members are also disqualified by reason of financial bias. Wolgast *supra* note 653, at 191.

698. Email from EAB Judge Kathie Stein to Michael Asimow (Feb. 23, 2016).

cases in which review was sought, 2% were settled on appeal or voluntarily dismissed, 6% were won by EPA, and less than 1% were reversed.<sup>699</sup>

The EAB encourages ADR and offers the services of an EAB judge acting as a neutral evaluator and mediator. Video-conferencing equipment is available for use in ADR proceedings.<sup>700</sup>

The EAB also considers petitions for reimbursement of reasonable costs incurred by persons who have complied with orders issued by EPA or another federal agency under CERCLA to abate actual or threatened releases of hazardous substances. The statute provides for a reimbursement petition to the President.<sup>701</sup> The President delegated his authority to decide claims for reimbursement to the EPA Administrator<sup>702</sup> who re-delegated that authority to the EAB.<sup>703</sup>

The Board has established procedures for submission and review of reimbursement petitions. Under these procedures, petitioners must demonstrate that they were not liable for response costs or that EPA's selection of the ordered response action was arbitrary and capricious. If the petition raises fact issues, EAB can designate an EPA employee who had no prior involvement in the matter to serve as a hearing officer and issue a recommended decision. EAB may also decide to hold oral argument. If reimbursement is granted, there is a further proceeding to determine the amount. Reimbursement decisions are reviewable by a de novo proceeding in federal court.

## D. Releases from Toxic Waste Facilities

EPA also uses a streamlined form of Type B adjudication to resolve issues relating to corrective measures following the release into the environment from a hazardous waste facility.<sup>704</sup> The Resource Conservation and Recovery Act (RCRA) calls for a “public hearing” in such cases. The Type B procedure that EPA employs in RCRA cases shows that it is possible to provide the safeguards implied by an evidentiary hearing even in situations requiring urgent action.

Under the regulations,<sup>705</sup> the Regional Administrator (RA) starts the proceeding by issuing an Initial Administrative Order (IAO) which contains the administrative record produced during the investigative process and proposed corrective measures. The respondent triggers the “public hearing” procedure by filing a response. The

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699. *Id.*

700. Env'tl. Appeals Bd., *EAB FAQ*, ¶ 40, [https://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/General+Information/Frequently+Asked+Questions?OpenDocument](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Frequently+Asked+Questions?OpenDocument) (last visited July 12, 2018); ENVTL. APPEALS BD., ALTERNATIVE DISPUTE RESOLUTION PROGRAM INFORMATION SHEET.

701. CERCLA § 106, 42 U.S.C. § 9606(a), (b)(2).

702. Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987).

703. Env'tl. Prot. Agency, Redelegation of Authority under CERCLA and SARA, R-14-27 Petitions for Reimbursement (May 25, 1988).

704. 42 U.S.C. § 6928(b), (h).

705. 40 C.F.R. pt. 24. The streamlined procedure does not apply if EPA seeks to suspend or revoke a hazardous waste permit or assess a civil monetary penalty.

Regional Judicial Officer (or other EPA attorney) serves as the presiding officer (PO). The PO cannot have had prior contact with the case and is prohibited from conducting any ex parte communications with outsiders or with staff members serving as prosecutors or investigators in the case.<sup>706</sup> The PO orders an “expeditious” schedule setting the “public hearing” within 45 days. The respondent must file a detailed memorandum setting forth its position on all issues, including proposed modifications of the IAO. The respondent can also request that not more than 25 questions be put to the RA concerning factual issues in the case. If the PO approves the questions, the RA must respond in writing within 14 days. The PO can order either side to provide additional information and can exercise subpoena power.<sup>707</sup>

The hearing consists of oral arguments and rebuttals by each side. The PO can put questions to either side, but there is no direct testimony or cross-examination. The respondent can introduce new documents only if it can establish that the documents could not have been previously submitted.<sup>708</sup> The PO submits a recommended decision; either side has 21 days to submit comments on it. The RA makes the final decision; there is no appeal to the EPA administrator or the EAB in these cases. Both the recommended and final decisions are subject to the exclusive record principle, meaning that they must be based solely on material in the record.<sup>709</sup> This procedure was judicially upheld.<sup>710</sup>

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706. 40 C.F.R. § 24.13.

707. 40 C.F.R. § 24.14.

708. 40 C.F.R. § 24.15.

709. 40 C.F.R. § 24.17.

710. *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989). Prior to the adoption of these regulations, EPA used Type A adjudicatory procedure for RCRA orders, whether or not they involved license revocation or civil penalties, even though the statute called only for a “public hearing.” It then adopted the streamlined Type B procedure for cases involving only corrective actions without license revocation or civil penalties. In *Chemical Waste Management*, the D.C. Circuit upheld the EPA’s interpretation of the term “public hearing,” using *Chevron* methodology because the term is ambiguous and EPA’s interpretation was reasonable.



## APPENDIX A-8

# EXECUTIVE OFFICE OF IMMIGRATION REVIEW <sup>711</sup>

This appendix discusses the adjudicatory process in immigration cases, including disputes relating to admissibility, removal (formerly referred to as deportation), and asylum.<sup>712</sup> The Executive Office of Immigration Review (EOIR), a division of the Department of Justice, is responsible for conducting adjudicatory hearings and administrative appeals in immigration cases.<sup>713</sup> This Appendix considers adjudicatory evidentiary hearings required by law, but excludes informal adjudication that precedes evidentiary hearings in immigration cases or entirely supplants them.<sup>714</sup>

Immigration Courts (ICs) conduct adjudicatory hearings. Immigration judges (IJs) preside at IC hearings. IJs are supervised by the Chief Immigration Judge. Decisions of IJs are appealed to the Board of Immigration Appeals (BIA). Judicial opinions and academic scholarship criticize the quality of IC and BIA decision-making, question the independence of the EOIR decisionmakers, and advance a variety

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711. Thanks to Dana Leigh Marks, Russell Wheeler, Jill Family, and Jennifer Chacon for assistance with this appendix.

712. For a summary of the removal process, see Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication 9–12* (June 7, 2012) (report to Admin. Conf. of the U.S.), <https://www.acus.gov/report/immigration-removal-adjudication-report>. Many immigration cases are criminal prosecutions, but these are not discussed in this memo. This administrative process is DOJXEOIR0001 in the ACUS database which lists 11 case types.

713. See 8 C.F.R. § 1003.0. EOIR also conducts hearings through its Office of the Chief Administrative Hearing Officer (OCAHO) in cases involving employer sanctions, anti-discrimination provisions, and document fraud. These Type A hearings are not discussed in this Appendix.

714. Numerous adjudicatory decisions by immigration personnel do not trigger adjudicatory hearings and thus should be considered Type C adjudication. For example, there is no right to an adjudicatory hearing in connection with expedited removal by a DHS officer at ports of entry of an alien who makes no claim to refugee status. 8 U.S.C. § 1225(b)(1)(A)(i). See Jennifer Lee Koh, *Removal in the Shadows of Immigration Courts*, 90 S. CAL. L. REV. 181 (2017) (vast majority of removal orders are not reviewable by Immigration Court).

of restructuring proposals.<sup>715</sup> Such criticisms and proposals are beyond the scope of this appendix and will not be further addressed.

### A. Immigration Court

There are presently about 334 IJs in 58 ICs, although EOIR is trying to hire more.<sup>716</sup> Each IJ on average currently handles more than 1,800 matters per year, although per-judge caseloads range from less than 1,000 to over 3,000.<sup>717</sup> IJs have been subject to performance evaluation since 2008; the impact of these evaluations is subject to debate.<sup>718</sup> The Attorney General has imposed production quotas on IJs requiring them to conclude at least 700 cases per year with less than a 15% remand rate in order to obtain a satisfactory performance evaluation.<sup>719</sup>

Respondents (that is, non-citizens subject to removal proceedings) may face waiting times of several years. In FY 2016, the IC received 328,112 cases and completed 273,390.<sup>720</sup> There were 518,545 pending cases at the end of FY 2016.<sup>721</sup> The backlog has increased steadily from 262,681 cases at the end of FY 2010. Because many respondents are held in detention, the lengthy waiting times are a matter of serious concern, although EOIR does prioritize cases of respondents in detention.

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715. See, e.g., Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010); Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC'Y REV. 117 (2016) (inconsistent results in bond hearings); APPLESEED, REIMAGINING THE IMMIGRATION COURT ASSEMBLY LINE: TRANSFORMATIVE CHANGE FOR IMMIGRATION JUSTICE SYSTEM (2012), <http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf>.

716. See generally Benson & Wheeler, *supra* note 712, at 6–7, for discussion of the legal status of IJs. EOIR is severely underfunded, a reality that constrains the hiring of additional IJs or providing them with additional staff support. *Id.* at 31–32. Additional appropriations allocated in FY 2016 have permitted hiring of additional personnel. Some IJs have administrative responsibilities and thus do not carry full caseloads.

717. For analysis of IJ workloads, see *id.*, at 24–30. These are much heavier caseloads than in other federal Type B adjudications. *Id.* at 27.

718. See Legomsky, *supra* note 715, at 1662–63, arguing that the evaluations focus mostly on productivity rather than on outcomes. Benson and Wheeler state that the evaluation process is subject to potential manipulation, but they encountered little evidence of it. Benson & Wheeler, *supra* note 712, at 106–10, 117–18. The President of the National Association of Immigration Judges is critical of performance evaluations. Email from Dana Leigh Marks to Michael Asimow, Dec. 18, 2015.

719. Attorney General Jeff Sessions, Remarks to the Executive Office of Immigration Review Legal Training Program (June 11, 2018).

720. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2016 STATISTICS YEARBOOK 1 (2017) [hereinafter EOIR FY 2016 Statistics Yearbook].

721. *Id.* at W1. As of September 2017, the backlog was over 600,000 cases. PBS News Hour, *How a "Dire" Immigration Court Backlog Affects Lives*, Sept. 18, 2017, <https://www.pbs.org/newshour/show/dire-immigration-court-backlog-affects-lives>.

Detailed regulations (supplemented by a practice manual) provide the rules of practice at IC proceedings.<sup>722</sup> IC jurisdiction commences when the Department of Homeland Security (DHS) files a charging document (often called the “Notice to Appear”) with an IC and serves it on the respondent.<sup>723</sup> An attorney represents DHS. Generally, the first encounter between a respondent and an IC is a “master calendar” proceeding at which an IJ explains the respondent’s rights, notifies the respondent of the right to retained counsel, and schedules further proceedings.<sup>724</sup>

The respondent may be represented by an attorney (at no expense to the government) who is eligible to practice in any state and is registered with EOIR.<sup>725</sup> EOIR permits representatives to make a limited appearance (for example appearing in a bond or motions proceeding without having to represent the respondent in other proceedings). If the respondent is unrepresented, the respondent can request additional time to hire an attorney. EOIR provides respondents with lists of pro bono providers.

EOIR also permits lay representation in IC proceedings according to detailed regulations.<sup>726</sup> Permitted lay representatives include law students,<sup>727</sup> law graduates not yet admitted to the bar,<sup>728</sup> reputable individuals with a pre-existing relationship

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722. See 8 C.F.R. pt. 1003, subpt. C and pt. 1240, subpt. A; EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP’T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL (Dec. 2016) [hereinafter Practice Manual].

723. See 8 C.F.R. §§ 1003.13–.15; Practice Manual, *supra* note 722, ¶ 4.2.

724. Benson & Wheeler, *supra* note 712, at 14–15.

725. 8 C.F.R. § 1003.16. According to EOIR, approximately 55% of respondents before the IC are represented. See EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2014 STATISTICS YEARBOOK F1 (2017). However, Eagly & Shafer conclude that only 37% of respondents had counsel in removal proceedings (using as a sample all cases decided between 2007 and 2012), and only 45% of that number had representation at all IC hearings. Less than 2% of respondents facing removal secured pro bono representation from nonprofits or law school clinics. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7 (2016). The discrepancy arises from the fact that respondents with counsel are involved in more proceedings than unrepresented respondents; consequently, counting only proceedings inflates the percentage of parties who are represented. Only about 14% of respondents held in detention were represented. Success rates of respondents represented by counsel were much better than for unrepresented parties. In addition, Eagly & Shafer report that the presence of counsel produced substantial efficiency gains. See also Benson & Wheeler, *supra* note 712, at 56 (reporting that almost all IJs believe that the presence of attorneys enhances efficiency and makes their jobs easier); Ryo, *supra* note 715, at 30–32 (represented detainees have much better results in bond hearings than unrepresented detainees).

726. 8 C.F.R. pt. 1292; Practice Manual, *supra* note 722, at ch. 2.

727. The student must file a statement that he or she is participating under the direct supervision of a faculty member, licensed attorney, or accredited representative, in a legal aid program or clinic conducted by the law school or non-profit organization and is appearing without remuneration from the respondent.

728. The law graduate must file a statement that he or she is appearing under the supervision of a licensed attorney or accredited representative without remuneration. In the case of law students or graduates, the IJ (or other official before whom he or she wishes to appear) has discretion not to permit such appearance or to require the presence of the supervising faculty member, attorney, or accredited representative.

to the person represented,<sup>729</sup> accredited representatives,<sup>730</sup> and an accredited official of a foreign government to which the respondent owes allegiance. Both attorney and lay representatives practicing before the IC or BIA are subject to disciplinary sanctions.<sup>731</sup> Non-lawyer immigration specialists, visa consultants, and “notaries” are not authorized to represent parties before the IC.<sup>732</sup>

At hearings, EOIR makes no special provisions for self-represented respondents. Through its Office of Legal Access Programs (OLAP), EOIR operates the Legal Orientation Program (LOP) which funds nonprofit organizations that provide services to litigants, including training of attorneys and lay representatives. OLAP also launched the Immigration Court Helpdesk (ICH) which provides information to self-represented persons who are not in detention. It maintains Self-Help Legal Centers in some IC facilities; these are bulletin boards providing resources in English and Spanish, including “how-to” guides. Its website also contains forms, “self-help” materials, a “virtual law library,” and various IC manuals.<sup>733</sup>

The statute and regulations make no provision for ADR. However, an IJ may schedule a pre-hearing conference to narrow issues, obtain stipulations, exchange information voluntarily, and otherwise to simplify and organize the proceeding.<sup>734</sup> The ACUS study of IC procedures indicates that IJs used various techniques to narrow the issues, but that prehearing conferences are not routine (largely because of caseload pressures). The study recommends better utilization of various devices to narrow the issues and improve pre-hearing document sharing.<sup>735</sup> It also recommended that the ICs employ pro se law clerks to assist self-represented parties.

The regulations and the practice manual relating to the IC and the BIA do not require separation of functions or prohibit ex parte contacts. However, the *Ethics*

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729. Practice Manual, *supra* note 722, ¶ 2.9. The relationship may be as a relative, neighbor, clergyman, business associate, or personal friend. The pre-existing relationship requirement may be waived in cases where adequate representation would not otherwise be available. The IC must give permission for this representation. Such permission shall not be granted with respect to any individual who regularly engages in immigration and naturalization practice or preparation or holds himself out to the public as qualified to do so.

730. Accredited representatives work for non-profit charitable organizations recognized by the Board that make only nominal charges for representation. Such representatives must be of good moral character and be accredited by the Board. 8 C.F.R. § 1292.2; Practice Manual, *supra* note 722, ¶ 2.4.

731. 8 C.F.R. § 1292.3.

732. Practice Manual, *supra* note 722, ¶ 2.7.

733. This information on EOIR’s assistance to self-represented parties is taken from Vogelmann, *supra* note 310, at 37–40.

734. 8 C.F.R. § 1003.21(a); Practice Manual, *supra* note 722, ¶ 4.18. The IJ may also order any party to file a pre-hearing statement of position that may include stipulated facts, a statement that the parties have communicated in good faith to stipulate to the fullest extent possible, a list of proposed witnesses and what they will establish, a list of and copies of exhibits, the time required to present the case, and a statement of unresolved issues. The IJ may also require both parties to make any evidentiary objections regarding matters in the pre-hearing statement.

735. Benson & Wheeler, *supra* note 712, at 68–74.



and *Professionalism Guide for Immigration Judges* prohibits ex parte contacts (unless expressly authorized by law). The Guide permits an IJ to “consult with court staff and court officials, including supervisors, whose functions are to aid the Immigration Judge in carrying out the Immigration Judge’s adjudicative responsibilities, or with other [IJs], provided the [IJ] makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility to personally decide the matter.”<sup>736</sup>

Neither the regulations nor the practice manual contains provisions on bias; however, the *Ethics and Professionalism Guide* requires IJs to be impartial and avoid the appearance of prejudice or bias, and a memorandum outlines procedures for issuing recusal orders in immigration proceedings.<sup>737</sup>

IJs have subpoena power and can order the taking of depositions of witnesses who are not available to testify at the hearing.<sup>738</sup>

IC hearings are generally conducted in person or through video conference.<sup>739</sup> Video conference hearings are generally used to hear cases of respondents in detention<sup>740</sup> and are quite controversial.<sup>741</sup>

The IC provides interpreters for the native language of the respondent.<sup>742</sup> It has embarked on a program to provide full and complete interpretation to all respondents in court proceedings but has had some difficulties in doing so.<sup>743</sup>

At IC hearings (often referred to as individual calendar or merits hearings), respondents are provided with a reasonable opportunity to examine the evidence against them,

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736. DEP’T OF JUSTICE, *supra* note 275, at Rule XXXII(2).

737. *Id.* at Rules V, IX.

738. 8 C.F.R. § 1003.35; Practice Manual, *supra* note 722, ¶ 4.20.

739. Telephone hearings are also possible but only with consent of the respondent. 8 U.S.C. § 1229(b)(2)(B); 8 C.F.R. § 1003.2(c); Practice Manual, *supra* note 722, ¶¶ 4.6–4.7. Credible fear determinations may be reviewed by the IJ through telephone conferences without consent of the respondent. 8 C.F.R. § 1003.25(c); Practice Manual, *supra* note 722, ¶ 4.7.

740. In 2012, IJs conducted about 134,000 hearings by video conference. See Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 Nw. U. L. REV. 933 (2015).

741. The ACUS study canvassed the arguments on both sides of the video conference issue and made various suggestions for improving video hearings, assuming that video conferencing is here to stay. Benson & Wheeler, *supra* note 712, at 89–100. EOIR contends that video conferencing is a “force multiplier” that improves efficiency, lowers transportation costs, strengthens court safety, expands access to counsel, and reduces the time immigrants spend in detention. Critics of televised adjudication believe that the practice prejudices respondents as opposed to those who receive face-to-face hearings. Eagly concludes that IJs do not appear to be biased against respondents whose cases are heard by video conference rather than in person. However, she contends that video conferencing depresses the engagement of respondents with the adversarial process, making them less likely to retain counsel or request a hearing or apply for discretionary relief.

742. Practice Manual, *supra* note 722, ¶ 4.11.

743. Jim Harvill, *Immigration Courts Could Lose a Third of Their Interpreters*, LINKEDIN, Oct. 7, 2015, <https://www.linkedin.com/pulse/immigration-courts-could-lose-third-interpreters-jim-harvill?articleId=6057577953682866176> (discussing potential pay cuts for interpreters).

to present evidence on their behalf, and to cross-examine witnesses.<sup>744</sup> The respondent cannot examine national security information proffered by the government in opposition to admission or discretionary relief.<sup>745</sup> In absentia hearings are conducted if the respondent fails to appear.<sup>746</sup> IC hearings are generally open to the public.<sup>747</sup>

IJ decisions shall be based only on evidence produced at the hearing.<sup>748</sup> An applicant for admission has the burden of establishing admissibility “clearly and beyond a doubt.”<sup>749</sup> Respondents have the burden to establish by clear and convincing evidence that they are lawfully present in the U.S. pursuant to a prior admission. In contrast, DHS has the burden to establish removability by clear and convincing evidence in the case of a respondent who has been admitted to the U.S. No decision on removability is valid unless based on reasonable, substantial, and probative evidence.<sup>750</sup> A respondent has the burden of proof (presumably by a preponderance of the evidence) to establish eligibility for relief from removal and has the burden to establish that he or she merits a favorable exercise of discretion.<sup>751</sup>

Many IC decisions require an assessment of witness credibility. The statute allows the IJ to consider a variety of circumstances in assessing credibility including demeanor and consistency of the statements.<sup>752</sup>

The IJ’s decision may be in writing or oral. If oral, a memorandum summarizing the oral decision is served on the parties.<sup>753</sup> A respondent may file one motion to reconsider an IJ decision that the respondent is removable; the motion must specify the errors of law or fact in the IJ order. The respondent may also file one motion to

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744. See Practice Manual, *supra* note 722, ¶ 4.16 for discussion of IC hearings.

745. 8 U.S.C. § 1229a(b)(4).

746. 8 C.F.R. § 1003.26.

747. 8 C.F.R. § 1003.27(a); Practice Manual, *supra* note 722, ¶ 4.9. However, hearings may be closed to protect witnesses, parties, or the public interest. Hearings shall be closed in cases of spousal or child abuse, and in national security cases. 8 C.F.R. §§ 1003.27(b)–(d), 1246.

748. 8 U.S.C. § 1229a(c)(1)(A).

749. 8 C.F.R. § 1240.12(a).

750. 8 U.S.C. § 1229a(c)(3).

751. 8 U.S.C. § 1229a(c)(4).

752. The IJ may base a credibility determination on the demeanor, candor, or responsiveness of the witness, the inherent plausibility of the account, the consistency between witness’ oral and written statements (considering the circumstances under which the statements were made), the internal consistency of such statements with other evidence of record, and any inaccuracies or falsehoods in such statements whether they go to the heart of the applicant’s claim, or any other relevant factor. There is no presumption of credibility, but if no adverse credibility determination is explicitly made, the witness shall have a rebuttable presumption of credibility on appeal. 8 U.S.C. § 1229a(c)(4)(C).

753. 8 C.F.R. § 1003.37.

reopen proceedings based on newly discovered facts.<sup>754</sup> An IJ's decision is final unless the respondent or the government appeals to the BIA.<sup>755</sup>

## B. Board of Immigration Appeals

The BIA is authorized to consist of 21 members headed by a Chair.<sup>756</sup> The EOIR director can appoint temporary Board members for a term not exceeding six months. Temporary members are present or retired IJs, retired BIA members, or senior EOIR attorneys.<sup>757</sup> The BIA hears appeals of decisions by IJs or DHS.<sup>758</sup> Cases can also be certified to the BIA or the BIA can certify a case to the Attorney General.<sup>759</sup>

The Chairman divides the Board into three-member panels and designates a presiding member of each panel. Panels decide cases by majority vote.<sup>760</sup> A single member adjudicates most Board cases. Three-member panels are required:

- to settle inconsistencies among the rulings of different immigration judges;
- to establish a precedent construing the meaning of laws, regulations, or procedures;
- to review a decision by an IJ or DHS that is not in conformity with the law or with applicable precedents;
- to resolve a case or controversy of major national import;
- to review a clearly erroneous factual determination by an IJ; and
- to reverse the decision of an IJ or DHS in a final order, other than nondiscretionary dispositions.<sup>761</sup>

BIA does not engage in de novo review of fact findings. It is permitted to overturn IJ findings (including findings relating to credibility) only if they are clearly erroneous. The Board decides questions of law, discretion, and judgment de novo. If further fact-finding is needed, the BIA remands the case to the IJ.

The regulations provide that BIA decisions can be referred to the Attorney General (AG) for final decision. Referral can occur if the AG directs the case be referred to him or her, if the chair or a majority of the BIA believes there should be a referral,

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754. 8 U.S.C. § 1229a(c)(6)–(7). See 8 C.F.R. § 1003.23 for treatment of motions to reconsider and reopen.

755. 8 C.F.R. § 1003.39.

756. 8 C.F.R. § 1003.1(a)(1)–(2); EXEC. OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, BIA PRACTICE MANUAL (Mar. 23, 2018) [hereinafter BIA Practice Manual]. The Chair supervises and issues operating instructions for the Board but has no authority to direct the result of an adjudication assigned to another Board member.

757. 8 C.F.R. § 1003.1.

758. For list of decisions that can be appealed to BIA, see 8 C.F.R. § 1003.1(b); BIA Practice Manual, *supra* note 756, at ch. 1.4.

759. 8 C.F.R. § 1003.1(c), (h).

760. 8 C.F.R. § 1003(a)(3).

761. 8 C.F.R. § 1003(c)(6); BIA Practice Manual, *supra* note 756.

or if the DHS Secretary or the Secretary's designee requests it.<sup>762</sup> Referral is rare but does occur.<sup>763</sup>

Single member decisions adopt the IJ decision without further explanation or provide brief opinions of a few sentences.<sup>764</sup> Oral argument can be scheduled at the discretion of a three-judge panel, but no oral argument is allowed in a case assigned to a single Board member.<sup>765</sup>

In FY 2016, BIA received 30,200 appeals and completed 33,240.<sup>766</sup> Pending cases at the end of FY 2016 totaled 13,930, which is considerably less than the pending case total of 24,824 at the end of FY 2012.<sup>767</sup> The respondent but not the government can seek judicial review of BIA decisions in the Court of Appeals; such cases are a significant part of the caseload of federal appellate courts.<sup>768</sup>

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762. 8 C.F.R. § 1003(h). See Alberto Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841 (2016).

763. See Reynaldo Castro-Tum, 27 I.&N. Dec. 187 (A.G. 2018).

764. 8 C.F.R. § 1003(e)(4). Legomsky, *supra* note 715, at 1657.

765. 8 C.F.R. § 1003(e)(7). Oral argument is extremely rare—perhaps no more than three per year. Benson & Wheeler, *supra* note 712, at 21.

766. EOIR FY 2016 Statistics Yearbook, *supra* note 720, at R.2.

767. *Id.* at W3.

768. In the year ending March 31, 2017, immigration appeals accounted for 82% of administrative agency appeals heard by the Court of Appeals. Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics 2017*, <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017> (last visited July 12, 2018).

## APPENDIX A-9

# MERIT SYSTEMS PROTECTION BOARD

The Merit Systems Protection Board (MSPB)<sup>769</sup> functions as an independent tribunal, adjudicating appeals taken by federal employees who complain of adverse job action by their employer agencies. The most frequent cases heard by MSPB involve removal and other disciplinary action taken by federal agencies against their civil service employees. In addition, MSPB adjudicates cases concerning veterans employed by the federal government, retirement plan issues, whistleblower disputes, and numerous other schemes involving federal employment. For the most part, the same procedural regulations apply to all of them.<sup>770</sup>

MSPB primarily conducts Type B adjudication. However, in several classes of cases (involving complaints by federal ALJs, Hatch Act cases, removal of Senior Executive Service employees, and complaints by employees of the MSPB itself) it conducts Type A adjudication.<sup>771</sup>

In FY 2016, MSPB resolved 9,794 appeal cases. This figure includes 8,602 cases resolved at the AJ level, 12 initial decisions by ALJs, and 1,180 final decisions issued by the three-member Board after a petition for review of an AJ decision. At the AJ level, about 92% of cases affirmed the employer agency action. At the MSPB level, about 87% of decisions affirmed the employer agency decision.<sup>772</sup>

MSPB conducts formal evidentiary hearings. Most such hearings are required by statute,<sup>773</sup> but some of them are required by regulations.<sup>774</sup> With the exception of

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769. MSPBAPPJ0001 in the ACUS database, listing 13 case types.

770. 5 C.F.R. pt. 1201.

771. These cases are heard by ALJs at other agencies including the FTC and the Coast Guard. MERIT SYS. PROT. BD. ANN. REP. 5 (2016).

772. *Id.*

773. By statute, an employee subject to various adverse personnel actions may submit an appeal to the MSPB and shall have the right to “a hearing for which a transcript will be kept.” 5 U.S.C. § 7701(a)(1). The statute makes clear that the hearing can be conducted by either by an ALJ or by an AJ employed by the Board. In case of a removal, the Board employee shall be “experienced in hearing appeals.” 5 U.S.C. § 7701(b)(1).

774. For example, a regulation relating to claims that OPM has an unfair employment practice (such as an irrationally discriminatory examination or job qualification) provides for an “appeal” to MSPB. 5 C.F.R. § 104(a). In turn, MSPB regulations provide for an evidentiary hearing in this class of cases. 5 C.F.R. § 1201.3(a)(7).

its Type A hearings (not discussed in this appendix), the presiding officers are MSPB administrative judges (AJs). AJ decisions are subject to review by the Board.

The procedural regulations provide that an employer agency that takes action against its employee must furnish the employee with a notice that spells out the employee's right to appeal to MSPB.<sup>775</sup> The employee then has 30 days to file an appeal with one of the Board's regional offices. The regulations provide for class as well as individual appeals.<sup>776</sup> Electronic filing of documents is permitted and encouraged.<sup>777</sup>

An employee is entitled to be represented by any person the employee chooses.<sup>778</sup> The *MSPB Judge's Handbook*<sup>779</sup> requires special efforts to accommodate pro se appellants, including holding an early status conference to explain what is required. The *Handbook* provides that filings by pro se appellants should not be rejected on technical grounds and such appellants should receive great latitude in questioning witnesses.

MSPB strongly encourages settlement and mediation. The AJ can initiate settlement activity at any time.<sup>780</sup> The AJ will suspend a pending hearing for 30 days in order to allow the parties to seek mediation through MSPB's Mediation Appeals Program (MAP).<sup>781</sup> MAP offers the services of certified mediators as an alternative to the formal appeals processes set forth in the agency's regulations. Participation in MAP is free and confidential. The MAP website states that, since the program's inception in FY 2005, approximately 60% of all mediated cases have settled by the conclusion of the MAP process. Surveys of MAP participants note that 95% of such participants would use the program again.

MSPB judges can be disqualified for "personal bias."<sup>782</sup> A party asserting such bias must file a withdrawal motion as soon as the party has reason to believe there is a basis for disqualification. If the judge denies the motion, the party requesting withdrawal may request certification of the issue to the Board as an interlocutory appeal.

The regulations prohibit written or oral ex parte communications between an interested party and a decision-making official (DMO). Interested parties are the parties to the case and their representatives or any other person whose interest might be affected by the decision. A DMO is any judge or employee designated to hear and decide cases. Prohibited communications are those that involve the merits of the case or that violate rules requiring submissions to be in writing. Accordingly, it is not a prohibited ex parte

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775. 5 C.F.R. § 1201.21–.24.

776. 5 C.F.R. § 1201.27. *See* Class Actions, MSPB Judges Handbook, *supra* note 301, at ch. 3, ¶ 4.

777. 5 C.F.R. § 1201.14.

778. 5 C.F.R. § 1201.31.

779. MSPB Judges Handbook, *supra* note 301, at ch. 2, ¶ 7.

780. 5 C.F.R. § 1201.41(c). *See* MSPB Judges Handbook, *supra* note 301, at ch. 11.

781. 5 C.F.R. § 1201.28(d). *See* MSPB Judges Handbook, *supra* note 301.

782. 5 C.F.R. § 1201.42(b). The grounds for disqualification are expanded to include "a. A party, witness, or representative is a friend or relative of, or has had a close professional relationship with the AJ; or b. personal bias or prejudice of the AJ." MSPB Judges Handbook, *supra* note 301, at 13.

communication if a party asks about such matters as the status of a case, when it will be heard, or methods of submitting evidence to the Board.<sup>783</sup> Ex parte communications are prohibited from the time the persons involved know that the Board may consider the matter until the time the board has issued a final decision.<sup>784</sup>

There are no specific provisions for separation of functions, but such provisions seem unnecessary since MSPB is an independent tribunal that has no prosecuting or investigating staff members.

The MSPB has subpoena power.<sup>785</sup> In addition, the regulations provide for all the methods of discovery contained in the Federal Rules of Civil Procedure, including depositions.<sup>786</sup> The Federal Rules of Civil Procedure provisions on discovery are instructive but not controlling. A prehearing conference or a status conference is held in nearly every case.<sup>787</sup>

MSPB regulations also provide for intervention as of right by the Office of Personnel Management and Office of Special Counsel and by interested parties at the AJ's discretion.<sup>788</sup> The AJ can certify important issues of law and policy to the Board for an interim appeal.<sup>789</sup>

The normal procedure calls for a trial-type adversarial hearing with oral witness testimony and cross-examination.<sup>790</sup> On most issues, the agency has the burden to establish the validity of its action by a preponderance of the evidence.<sup>791</sup> The AJ can take official notice of matters of common knowledge or matters that can be verified.<sup>792</sup>

The regulations do not state whether the AJ should follow the Federal Rules of Evidence, noting only that “[a]ny evidence and testimony that is offered in the hearing and excluded by the judge will be described, and that description will be made a part of the record.”<sup>793</sup>

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783. 5 C.F.R. § 1201.101. See MSPB Judges Handbook, *supra* 301, at 80.

784. 5 C.F.R. § 1201.102.

785. 5 C.F.R. § 1201.81; MSPB Judges Handbook, *supra* note 301, at 31.

786. 5 C.F.R. §§ 1201.71–75.

787. MSPB Judges Handbook, *supra* note 301, at ch. 9.

788. 5 C.F.R. § 1201.34. MSPB Judges Handbook, *supra* note 301, at 16.

789. 5 C.F.R. §§ 1201.91–93. MSPB Judges Handbook, *supra* note 301, at 29.

790. 5 C.F.R. §§ 1201.51–58. This provision is not applicable to written (document-only) hearings or to oral arguments.

791. 5 C.F.R. § 1201.56.

792. 5 C.F.R. § 1201.64. The parties may be given an opportunity to object to the taking of official notice. The taking of official notice of any fact satisfies a party's burden of proving that fact.

793. 5 C.F.R. § 1201.61. The *Judge's Handbook* is also silent on this issue, but cautions against receiving irrelevant evidence. MSPB Judges Handbook, *supra* note 301, at ch. 10, ¶ 14.

Although hearings are normally open to the public, the AJ may close the hearing if necessary to protect the appellant's privacy or for other reasons such as protection of trade secrets or national security.<sup>794</sup>

MSPB's regulations do not address the use of video or telephonic hearings. However, the Board has held that AJs can order video conference in any case, even if a party objects.<sup>795</sup>

The AJ must prepare an initial decision including provision for interim relief, if any.<sup>796</sup> The losing party has 35 days to file a petition for review by MSPB.<sup>797</sup> MSPB has discretion as to whether to accept the petition for review. It may but need not provide for oral argument.<sup>798</sup> Its final decisions may be designated as precedential.

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794. 5 C.F.R. § 1201.52(a); MSPB Judges Handbook, *supra* note 301, at ch. 10, ¶ 3.

795. MSPB Judges Handbook, *supra* note 301, at 49. The *Handbook* also notes that, when facts are undisputed and sole purpose of hearings is to provide opportunity for oral argument, hearings by telephone may be appropriate.

796. 5 C.F.R. § 1201.111.

797. 5 C.F.R. § 1201.113.

798. 5 C.F.R. § 1201.117.



## APPENDIX A-10

# UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

The United States Patent and Trademark Office (PTO) is located in the Department of Commerce.<sup>799</sup> This appendix covers the PTO’s adjudication of patent and trademark disputes.

### A. Patent Trial and Appeal Board (PTAB)

The Patent Trial and Appeal Board (PTAB)<sup>800</sup> carries out the USPTO’s adjudicatory functions related to patents. PTAB consists of the PTO Director and Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and administrative patent judges (APJs). Decisions of PTAB are not further reviewable at the administrative level but are subject to judicial review.<sup>801</sup>

APJs shall be “persons of competent legal knowledge and scientific ability who are appointed by the Secretary of Commerce in consultation with the Director.”<sup>802</sup> There are currently about 284 APJs.<sup>803</sup> The APJs are highly experienced; most of them are former private patent attorneys.<sup>804</sup> Most of the APJs are located at the PTAB office in Alexandria, Va., but some are located at one of the four satellite office of the Board.

PTAB has two different functions—appeals and trials.<sup>805</sup> It hears *appeals* by patent applicants of adverse decisions by patent examiners and from *ex parte* re-examination decisions.<sup>806</sup> It conducts *trials* in cases of disputes between patent holders and third

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799. 35 U.S.C. § 1. I appreciate the assistance of Mark Lemley, Lisa Ouellette, Michelle Lee, Melissa Wasserman, Emily Bremer, and Melissa Brand in preparing this appendix.

800. PTAB is the successor to the Board of Patent Appeals and Interferences. *See* America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

801. In the ACUS database PTAB is USDCPATE0021.

802. 35 U.S.C. § 6(a).

803. Melissa Brand, *The Potential Expansion of Chevron at the United States Patent and Trademark Office*, 43 ADMIN. & REG. L. NEWS 12, Fall 2017; Michael Wagner, *An Introduction to Administrative Patent Judges at the Patent Trial and Appeal Board*, 62 FED. LAW. 36, May 2015.

804. Wagner, *supra* note 803.

805. For discussion of PTAB trial and appeal procedures, see *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016).

806. 35 U.S.C. § 6(b).

parties.<sup>807</sup> A three-member APJ panel decides each appeal or trial.<sup>808</sup> There is no administrative appeal of APJ decisions, but the PTO director has power to order a rehearing of APJ decisions and can select the APJs who will sit on the rehearing.

The statute does not specifically provide for evidentiary hearings. In context, however, the statutory provisions calling for “appeals,” “reviews,” and “proceedings” require evidentiary hearings, although as discussed below these hearings are based entirely on written evidence. Therefore, PTAB conducts Type B adjudication.<sup>809</sup>

The regulations permit parties to be represented by a registered patent attorney or a registered non-attorney patent agent.<sup>810</sup> In appeal cases, the Board may allow the appearance of counsel who is not a registered representative, but not by an unregistered lay representative.<sup>811</sup> In trial cases, parties may represent themselves. If represented by counsel, parties must appoint both a lead and backup counsel, both of whom must be registered representatives.<sup>812</sup> In either case, counsel can be disqualified and subject to sanctions.<sup>813</sup>

The regulations prohibit *ex parte* communications with PTAB members or employees assigned to the proceeding in trial cases,<sup>814</sup> but this provision does not apply to appeal cases.<sup>815</sup> Electronic document filing is accepted.<sup>816</sup> Video hearings are available on request.<sup>817</sup> Oral arguments are open to the general public.<sup>818</sup>

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807. *Id.* The Supreme Court has ruled that assigning inter partes review cases to PTAB does not offend Article III of the Constitution because such claims involve a matter of public rather than private right. Even though inter partes review trials involve disputes between two private parties, the issue is whether the patent should have issued in the first place, a matter of public right. Also, the fact that PTAB uses court-like processes does not mean that it is a court. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365 (2018).

808. 35 U.S.C. § 6(c). The judges are connected by video conference facilities so they may be located at different offices of the Board. *Wagner*, *supra* note 803, at 36.

809. The Federal Circuit has directly applied provisions of the APA to PTAB hearings, thus treating them as Type A adjudication. *See text* at notes 63–65.

810. 37 C.F.R. § 1.31.

811. 37 C.F.R. § 41.5(a). The regulations do not permit lay representation before the PTAB.

812. The Board may allow a backup counsel who is not a registered practitioner “upon showing that counsel is an experienced litigating attorney and has an established familiarity with the subject matter at issue in the proceeding.” 37 C.F.R. § 42.10(c).

813. 37 C.F.R. §§ 41.5(b), (e), 42.10(d). *See* 37 C.F.R. pt. 11 for detailed regulations about registration of patent attorneys and agents.

814. “Communication regarding a specific proceeding with a Board member . . . is not permitted unless both parties have an opportunity to be involved in the communication.” 37 C.F.R. § 42.5(d).

815. 37 C.F.R. § 41.11.

816. 37 C.F.R. § 42.6(b).

817. U.S. Patent & Trademark Office, *Video and Telephonic Hearings*, <https://www.uspto.gov/page/video-and-telephonic-hearings> (last visited July 12, 2018).

818. U.S. Patent & Trademark Office, *Hearings*, <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/hearings> (last visited July 12, 2018).

### 1. Appeals (*Ex Parte* Cases)

Part 41 of the regulations prescribes procedures for appeals.<sup>819</sup> Appeals are sometimes referred to as *ex parte* proceedings, meaning that the only parties are the patent examiner and a patent applicant or a patentee. Any person can trigger the *ex parte* reexamination process through a request to the PTO claiming that a “substantial new question of patentability” exists with respect to the patent.<sup>820</sup> An applicant can appeal if a patent application has been rejected or an *ex parte* reexamination request has been granted.<sup>821</sup>

In an appeal, the APJ panel considers all the evidence presented in the appellant’s briefs. The briefs can rely only on evidence previously considered by the examiner (except when a new administrative or judicial precedent arose after the examiner’s consideration).<sup>822</sup> The appellant can request an oral argument if the appellant believes it would be necessary or desirable. The Board can refuse the application for an oral argument if it is determined to be unnecessary.<sup>823</sup> Cases are given the same consideration whether there is an oral argument.

### 2. Trials (*Inter Partes* Cases)

Part 42 of the regulations describes the procedure in trials.<sup>824</sup> Trial cases involve a third party that is challenging a patent. These include *inter partes* reviews (IPRs),<sup>825</sup> post-grant reviews,<sup>826</sup> derivations,<sup>827</sup> and challenges to covered business method patents.<sup>828</sup>

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819. 37 C.F.R. § 41.30. Part 41 of the regulations describes procedures for both trials and appeals but now seem applicable only to appeals. Part 42 of the regulations (promulgated in 2013) describes procedures for trials.

820. 35 U.S.C. § 303(a). See Stefan Blum, *Ex Parte Reexamination: A Wolf in Sheep’s Clothing*, 73 OHIO ST. L.J. 395, 413–19 (2012); Jacob S. Sherkow, *Administrating Patent Litigation*, 90 WASH. L. REV. 205, 236 (2015) (in most patent infringement cases in court, the defendant requests USPTO re-examination and district court case is often stayed until USPTO acts).

821. Appeals are Case Type 6 in USDCPATE0021.

822. 37 C.F.R. § 41.47(e)(1).

823. 37 C.F.R. § 41.47(f).

824. For detailed procedural rules including a timeline, see the Patent Office Trial Practice Guide, 77 Fed. Reg. 48,756 (2012). In the ACUS database, PTAB trial proceedings are case types 1 through 5 in USDCPATE0021.

825. An *inter partes* review arises when a third party challenges a patent because it lacks novelty or is obvious. See 35 U.S.C. §§ 102, 103, 311; 37 C.F.R. pt. 42, subpt. C. This replaces the former category of *inter partes* re-examination.

826. Post-grant review involves a challenge to a patent on grounds other than lack of novelty or obviousness, such as a failure to meet the clear statement requirements of § 112. See 35 U.S.C. ch. 32; 37 C.F.R. pt. 42, subpt. C.

827. In a derivation proceeding, a patent applicant B complains that an earlier patent held by A was derived from B’s idea and A’s application was not authorized. See 35 U.S.C. § 135(a)(1); 37 C.F.R. pt. 42, subpt. E.

828. 37 C.F.R. pt. 42, subpt. D.

Proceedings challenging the validity of a patent can also be brought as civil actions in federal district court.<sup>829</sup> The IPR remedy is attractive to challengers because PTAB proceedings cost much less than federal court litigation<sup>830</sup> and the APJs are more expert than federal district judges and juries in matters of patent law. Moreover, the burden of proof before PTAB on the issue of invalidity is preponderance of the evidence, rather than the clear and convincing standard used in federal court.<sup>831</sup> About 70% of PTAB trial cases are “substitution” cases, meaning they result from prior patent infringement cases brought in federal court; the defendant is granted a stay, so it can challenge the validity of the patent in an IPR proceeding before PTAB. The remaining 30% of PTAB trial cases do not result from prior federal court litigation.<sup>832</sup>

Under the regulations, the term “trial” means a “contested case instituted by the PTAB based upon a petition.” PTO trial proceedings have two phases: an APJ panel first decides whether the petition shows a reasonable likelihood that at least one claim might be invalid. If so, the panel institutes review.<sup>833</sup> After institution of review, the panel must generally make the final decision on the patent’s validity within one year.<sup>834</sup>

The regulations provide for discovery during trial proceedings.<sup>835</sup> Discovery includes a series of initial disclosures (either by agreement or by order)<sup>836</sup> plus additional discovery (either by agreement or by order on a showing that additional discovery is in the interest of justice).

Uncompelled direct testimony must be submitted in the form of an affidavit or deposition transcript. Compelled testimony (including cross-examination of affiants) is also presented in the form of depositions.<sup>837</sup> Expert testimony is furnished in affidavit

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829. See 35 U.S.C. § 315. When PTAB declares a patent valid, the patentee must pursue issues of infringement and damages in federal district court.

830. See Saurabh Vishnubhakat, Arti K. Rai & Jay P. Kesan, *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 BERKELEY TECH. L.J. 45, 51, 59 (2016) [hereinafter Vishnubhakat]. IPR costs about \$350,000, whereas federal court litigation costs about \$700,000 for low-stakes cases and many millions for high stakes cases.

831. See Stuart Minor Benjamin & Arti K. Rai, *Administrative Power in the Era of Patent Stare Decisis*, 65 DUKE L.J. 1563, 1565–67, 1570–71 (2016). In addition, PTAB uses a different standard for construction of patent claims than is used in court, which could make it easier to invalidate the patent. See *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016).

832. Vishnubhakat, *supra* note 830.

833. The decision to institute review is normally non-appealable, even after PTAB has rendered its final order. See *Cuozzo Speed Techs.*, 136 S. Ct. at 2140. The *Cuozzo* decision leaves open the question of appealability of the decision on constitutional grounds or in cases in which PTAB acts outside its statutory limits. Once review is granted, PTAB must review all of the claims of invalidity, even those that it believes have no merit. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018) (overturning a regulation that allowed PTAB to refuse to adjudicate claims that the APJ panel determined had no merit).

834. Benjamin & Rai, *supra* note 831, at 1569.

835. See 37 C.F.R. § 42.51.

836. See 77 Fed. Reg. 48,756, 48,761–62 (2012).

837. See 37 C.F.R. § 42.53(a).

form.<sup>838</sup> The Federal Rules of Evidence are applicable to trial proceedings.<sup>839</sup> Any party can request oral argument.<sup>840</sup> The parties may agree to settle any case, but the proposed settlement is not binding on the APJs.<sup>841</sup> The parties may resort to binding arbitration, but the Board is not a party to the arbitration.<sup>842</sup> The case terminates in a judgment rendered by the APJ panel.<sup>843</sup>

PTAB occasionally designates APJ decisions as precedential,<sup>844</sup> but otherwise APJ decisions are not treated as precedents.<sup>845</sup> PTAB practice requires that a majority of all of the active APJs approve the designation of a decision as precedential which seems unduly cumbersome.

### 3. Statistical Information<sup>846</sup>

In FY 2016, PTAB received 1,701 trial petitions.<sup>847</sup> It disposed of 1,780 cases (through refusal to institute proceedings,<sup>848</sup> termination, or decision). At the end of FY 2016, 1,614 trial cases were pending. Historically, about 23% of petitions resulted in actual trials, so it is estimated that in 2016 there were about 391 PTAB hearings in trial cases.<sup>849</sup>

In FY 2016, PTAB received 8,544 ex parte appeals. It decided or terminated 14,468 appeals. Pending appeal cases at the end of FY17 numbered 13,034. The backlog of appeal cases has been substantially reduced from prior years.

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838. 37 C.F.R. § 42.65.

839. 37 C.F.R. § 42.62(a).

840. 37 C.F.R. § 42.70(a).

841. 37 C.F.R. § 42.74(a).

842. 37 C.F.R. § 42.410.

843. 37 C.F.R. § 42.73.

844. U.S. Patent & Trademark Office, *Precedent Opinions*, <https://www.uspto.gov/patents-application-process/appealing-patent-decisions/decisions-and-opinions/precedential> (last visited July 12, 2018). Only 11 of the 37 precedent decisions to date involve trials rather than appeals.

845. Brand, *supra* note 803. The Chief Judge can designate an APJ panel opinion as an “informative decision” without a vote of the APJs and without approval of the Director, but informative decisions are not treated as precedents. They are intended as guidance. *See* Aqua Prods. Inc. v. Matal, 872 F.3d 1290, 1336 (Fed. Cir. 2017) (op. of Reyna, J.). In the *Aqua Products* case, the Federal Circuit divided on whether precedential and informative decisions of PTAB are entitled to *Chevron* deference.

846. U.S. PATENT & TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REP. (2016) (more statistical information is available in Tables 13a and 14); U.S. PATENT & TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT (2017).

847. Of the 1,701 trial petitions, 1,570 were IPR reviews.

848. In FY 2016, PTAB made 933 decisions to institute trial proceedings and 496 refusals to institute trial proceedings. There were 456 settlements of trial proceedings, including those before and after institution of trial proceedings.

849. Historically, about 20% of challengers won; 52% of patent owners won; and the balance were mixed results. By comparison, 4,529 patent challenges were filed in federal district court during 2016. This data was extracted from LexMachina.com.

If we assume that in FY 2017, PTAB will receive about 2,000 trial petitions and 8,000 appeals, and that APJs sit in panels of three, the workload for each of 225 APJs would be about 132 cases per year.

## **B. Trademark Trial and Appeal Board (TTAB)<sup>850</sup>**

Trademark adjudication occurs before the Trademark Trial and Appeal Board (TTAB). The governing statute is the Lanham Act.<sup>851</sup> Procedural regulations are set forth in 37 C.F.R. Part 2. USPTO has published a useful practice manual.<sup>852</sup>

Like PTAB, TTAB practice is divided into trials (often called “inter partes” proceedings, meaning that they involve disputes between a third party and a trademark registrant) and appeals (often referred to as “ex parte” cases, meaning challenges by persons whose application for registration of a mark was rejected by a trademark examiner).<sup>853</sup>

The TTAB includes the Director and Deputy Director of the USPTO, the Commissioner for Patents, the Commissioner for Trademarks, and administrative trademark judges (ATJs). There are currently about 25 ATJs who sit in panels of three.<sup>854</sup>

As in the case of patents, the relevant statutes do not call for evidentiary hearings. Instead the statute provides for an “appeal” to the TTAB from the final decision of a trademark examiner.<sup>855</sup> The TTAB shall “determine and decide” in cases of interference, opposition to registration, application to register as a concurrent user, or application to cancel the registration of a mark.<sup>856</sup> In context, however, it is clear that an evidentiary hearing is required, although these hearings are entirely in writing except for oral argument. Oral argument is voluntary and can be done through videoconference.<sup>857</sup> The exclusive record principle is protected.<sup>858</sup> Therefore TTAB proceedings are Type B adjudication.

There is no administrative appeal from a decision by an ATJ. As in the case of PTAB, the director of the PTO can order a rehearing of an ATJ decision and can designate the ATJs who will sit on the rehearing. TTAB decisions are reviewable by the U.S. Court of Appeals for the Federal Circuit<sup>859</sup> or alternatively by a de novo federal

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850. The TTAB is USDCTRAD0020 in the ACUS database.

851. 15 U.S.C. § 1051 *et seq.*

852. U.S. PATENT & TRADEMARK OFFICE, TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (June 2017) [hereinafter TTAB Practice Manual].

853. Trials are case type 1 in ACUS database USDCTRAD0020; appeals are case type 2.

854. L.A. Intellectual Prop. Law Ass’n, *Current Roster of TTAB Administrative Trademark Judges*, Jan. 26, 2018, <http://www.laipla.net/current-roster-of-ttab-administrative-trademark-judges/>.

855. 15 U.S.C. § 1070.

856. 15 U.S.C. § 1067(a).

857. TTAB Practice Manual, *supra* note 852, at § 802.03.

858. *Id.* at §§ 802.02, 803.

859. 15 U.S.C. § 1071(a)(1); 37 C.F.R. § 2.145(a)–(b).

district court action.<sup>860</sup> In addition, the Code provides that any person who could seek judicial review in the Federal Circuit can bring a civil action in federal district court.<sup>861</sup>

Only attorneys can represent parties before the Trademark Office.<sup>862</sup> Unlike patent litigation, there is no registration requirement for attorneys. Although parties can represent themselves,<sup>863</sup> non-lawyers cannot represent clients.<sup>864</sup> Thus there is no lay representation in trademark practice.

### 1. Appeals (*Ex Parte* Cases)

An applicant for trademark registration may appeal a final refusal by the examiner to the TTAB.<sup>865</sup> The applicant and the examiner file briefs with the TTAB.<sup>866</sup> The record is complete prior to the filing of an appeal. TTAB will ordinarily not consider additional evidence after an appeal is filed.<sup>867</sup> The appellant may request oral argument; in that case, the examiner will also make an oral argument.<sup>868</sup>

### 2. Trials (*Inter Partes* Cases)<sup>869</sup>

Inter partes trademark disputes (such as opposition to registration,<sup>870</sup> cancellation of registration,<sup>871</sup> interference,<sup>872</sup> or concurrent use<sup>873</sup>) commence upon filing a notice with the Trademark Office.<sup>874</sup> The applicant or registrant must file an answer to this notice.<sup>875</sup>

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860. 15 U.S.C. § 1071(b).

861. *Id.*; 37 C.F.R. § 2.145(c). If a defeated party seeks review in the Court of Appeals, the adverse party may elect to transfer the matter to district court.

862. 37 C.F.R. § 11.14(a). However, foreign lawyers are permitted. § 11.14(c). This rule applies to TTAB proceedings as well as to proceedings before examiners. 37 C.F.R. § 2.17(a).

863. Self-representation includes representation by a non-lawyer representing a corporation in which the person is an officer, a partnership in which the person is a partner, or a firm in which the person is a member. 37 C.F.R. § 11.14(e).

864. 37 C.F.R. §§ 2.17(f), 11.14(b), (c).

865. *See* 15 U.S.C. § 1062(b).

866. 37 C.F.R. § 2.142(b).

867. If either party desires to introduce additional evidence, it can request the Board to suspend the appeal and remand the application for further examination. 37 C.F.R. § 2.142(d).

868. 37 C.F.R. § 2.142(e)(1).

869. TTAB decisions in opposition cases have collateral estoppel effect when the same issue arises in infringement litigation in court. *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293 (2015).

870. 15 U.S.C. § 1063.

871. 15 U.S.C. § 1064. Typically, cancellation petitions allege that a registered mark would cause the owner of an existing mark damages by blurring or dilution.

872. 15 U.S.C. § 1066.

873. 15 U.S.C. § 1052(d).

874. 37 C.F.R. §§ 2.101, 2.111.

875. 37 C.F.R. § 2.104.

The Federal Rules of Civil Procedure govern inter partes proceedings.<sup>876</sup> The assignment of testimony periods corresponds to setting a case for trial in court proceedings; the taking of depositions during the assigned testimony periods corresponds to the trial in court proceedings; and the oral hearing corresponds to the oral summation in court proceedings.<sup>877</sup>

The discovery rules are modeled on the Federal Rules of Civil Procedure,<sup>878</sup> including the requirement of mandatory initial disclosures<sup>879</sup> and a mandatory conference to discuss settlement and agree on a discovery plan.<sup>880</sup> A TTAB attorney or an ATJ may participate in this conference. In general, the material so discovered can be offered in evidence by the adverse party.

The TTAB then schedules a second discovery period in which the plaintiff and defendant present their case in chief, again by taking the deposition of the party's witnesses<sup>881</sup> either upon written or oral questions.<sup>882</sup> Adverse parties can cross-examine the witnesses.<sup>883</sup> Objections to questions are noted in the record. The Federal Rules of Evidence apply to TTAB proceedings.<sup>884</sup>

After completion of the discovery period, the parties file briefs with the TTAB.<sup>885</sup> On request, the parties conduct oral argument before at least 3 ATJs.<sup>886</sup> Parties can participate through video-conference.<sup>887</sup> Arguments are open to the public.<sup>888</sup>

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876. 37 C.F.R. § 2.116. The opponent in an opposition proceeding or petitioner in a cancellation proceeding shall be in the position of a plaintiff, and the applicant in an opposition proceeding or the respondent in a cancellation proceeding shall be in the position of defendant.

877. 37 C.F.R. § 2.116(d)–(f).

878. 37 C.F.R. § 2.120(a)–(b).

879. FED. R. CIV. P. 26(a).

880. FED. R. CIV. P. 26(f).

881. *See* 37 C.F.R. § 2.121.

882. 37 C.F.R. § 2.123(a). If the parties so stipulate, an affidavit can be substituted for a deposition. 37 C.F.R. § 2.123(b). If the witness' deposition is to be by written questions, the opposing party must receive copies of the questions and can submit cross-examination questions. 37 C.F.R. § 2.124.

883. 37 C.F.R. § 2.123(e)(3).

884. 37 C.F.R. § 2.122(a).

885. 37 C.F.R. § 2.128.

886. 37 C.F.R. § 2.129.

887. TTAB Practice Manual, *supra* note 852, at § 802.03.

888. U.S. Patent & Trademark Office, *General Counsel—Public Board Hearing Information*, <https://www.uspto.gov/learning-and-resources/ip-policy/general-counsel-public-board-hearing-information> (last visited July 12, 2018).



### 3. *Statistical Information*<sup>889</sup>

In FY 2017, the TTAB received 3,158 appeals. Of these, 517 matured to the point they were ready for decision, and 649 were actually decided. At the end of FY 2017, 65 appeals were awaiting decisions.<sup>890</sup>

In FY 2017, TAB received filings of 8,357 trial cases—6,156 oppositions and 1,722 cancellations. Of these, 162 matured to the point that they were ready for decision and 160 cases were decided. At the end of FY 2014, 28 trials were awaiting decisions. The workload of the 25 ATJs is calculated based on the actual number of appeals and trial cases they decided. In 2017 there were 809 decisions. Assuming panels of 3 ATJs per case, the workload per ATJ is 96 cases per year.

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889. U.S. Patent & Trademark Office, *TTAB Incoming Filings and Performance Measures for Decisions*, <http://www.uspto.gov/trademarks-application-process/appealing-trademark-decisions/ttab-incoming-filings-and-performance> (last visited July 12, 2018).

890. At the end of the third quarter of 2015, 119 appeals and 36 trials were awaiting decision.



# APPENDIX A-11

## PROVIDER REIMBURSEMENT

### REVIEW BOARD <sup>891</sup>

The Provider Reimbursement Review Board (PRRB) is one of numerous adjudicatory schemes arising out of Medicare, Medicaid, and the Affordable Care Act.<sup>892</sup> PRRB reviews determinations concerning the amounts that Medicare will pay to providers of services under Medicare Part A, which, broadly speaking, applies to hospital care.

Providers of services request reimbursement for services provided under Part A. These claims are reviewed by private fiscal intermediaries (referred to by the regulations as “contractors”). If the dispute involves at least \$1,000 but less than \$10,000, providers that disagree with contractor decisions have a right to a hearing by a contractor hearing officer or panel of hearing officers<sup>893</sup> who are unbiased and have had no “direct responsibility” for the decision under review.<sup>894</sup> The exclusive record principle applies.<sup>895</sup> Decisions by contractor hearing officers are subject to a further review by a reviewing officer of the Centers for Medicare and Medicaid Services (CMS).<sup>896</sup> Because contractor hearing officers are private rather than government adjudicators, they are beyond the scope of this study.

If the dispute is for \$10,000 or more (or in the case of a group appeal, the aggregate claims involving a common issue total \$50,000 or more<sup>897</sup>), the providers can appeal an unfavorable contractor decision to the PRRB. PRRB hearings are subject

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891. Thanks to Eleanor Kinney and Suzanne Cochran for assistance on this Appendix. PRRB is HHSOPRR.B0005 in the ACUS database.

892. Many such programs, such as the Medicare Office of Hearings and Appeals, utilize Type A adjudication. *See* HHSO0BEN0001 in the ACUS website. *See generally* ELEANOR D. KINNEY, ADMINISTRATIVE LAW OF HEALTH CARE IN A NUTSHELL (2017).

893. Provisions for contractor hearings are provided in 42 C.F.R. §§ 405.1809–.1834.

894. 42 C.F.R. §§ 405.1817, .1831(b).

895. 42 C.F.R. §§ 405.1827(b), .1845(g).

896. 42 C.F.R. § 405.1834.

897. 42 C.F.R. § 405.1837.

to discretionary review by the Administrator or Deputy Administrator of CMS (on its own motion or on request from a party)<sup>898</sup> and then to judicial review.<sup>899</sup>

PRRB hearings are subject to the exclusive record requirement.<sup>900</sup> Hence PRRB provides Type B adjudication. PRRB consists of five members,<sup>901</sup> all of whom participate in each PRRB decision. The parties may opt for a “record hearing” in which the case is submitted based on the existing written record<sup>902</sup> or for an oral adversarial hearing including cross-examination<sup>903</sup> and oral argument.<sup>904</sup> Oral hearings are conducted by the full board. The PRRB resolved about 20% of cases through record hearings, 65% through in-person oral hearings, and 10% through telephone hearings.<sup>905</sup> Video-conference is available to present testimony of a witness who cannot be physically present. Electronic document filing is now permitted although not reflected in the Board’s rules. PRRB does not employ AJs.

PRRB regulations provide for discovery that is controlled by Board members.<sup>906</sup> PRRB has subpoena power.<sup>907</sup> Parties may be represented by an attorney or by any other chosen representative.<sup>908</sup> The Federal Rules of Evidence do not apply.<sup>909</sup> The

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898. 42 C.F.R. § 405.1875.

899. 42 C.F.R. § 405.1877. According to the ACUS website, there are 12 appellate officials at CMS, and a panel of three CMS officials considers each appeal.

900. 42 U.S.C. § 1395oo(d); 42 C.F.R. § 405.1871(a)(2).

901. The members of the Board “shall be persons knowledgeable in the field of payment of cost reimbursement,” and at least one of them shall be a certified public accountant. Two Board members shall be “representative of providers of services.” Board members serve staggered three-year terms. 42 C.F.R. § 405.1845(a)–(b).

902. Record hearings are appropriate if the case involves only legal interpretation or very limited fact disputes and the parties agree that the case is appropriate for a record hearing. *CTRS. FOR MEDICARE & MEDICAID SERVS., PROVIDER REIMBURSEMENT REVIEW BOARD RULES*, Rule 32.3 (2013) [hereinafter PRRB Rules].

903. 42 C.F.R. § 405.1859.

904. 42 C.F.R. § 405.1861.

905. Telephone hearings are appropriate in a case involving a strictly legal issue or one that has few factual issues. PRRB Rules, *supra* note 902, at Rule 32.2. The statistics provided on the website do not add up to 100%.

906. 42 C.F.R. § 405.1853(e); PRRB Rules, *supra* note 902, at Rule 26. “The Board may permit discovery of a matter that is relevant to the specific subject matter of the Board hearing, provided the matter is not privileged or otherwise protected from disclosure and the discovery request is not unreasonable, unduly burdensome, or expensive, or otherwise inappropriate.” 42 C.F.R. § 405.1853(e)(1)(ii).

907. 42 C.F.R. § 405.1857.

908. 42 C.F.R. § 405.1881.

909. 42 U.S.C. § 1395oo(c), 42 C.F.R. § 405.1855.

regulations require disqualification of biased board members.<sup>910</sup> The PRRB rules (though not the regulations) prohibit substantive ex parte communication with Board members or staff.<sup>911</sup> There is no provision for separation of functions or any restrictions on communication between the staff and Board members; separation of functions may be unnecessary, however, since PRRB is an adjudicating tribunal without a prosecuting or investigating function.<sup>912</sup> PRRB hearings are not open to the public.<sup>913</sup>

The regulations encourage negotiation between providers and contractors to resolve disputed issues.<sup>914</sup> Mediation is provided by PRRB staff members. About two-thirds of the Board's cases are settled through negotiation or mediation. The regulations provide for an initial status conference conducted by one or more members of the Board (in person or by telephone) which includes discussion of potential settlement; the Board may conduct further status conferences where it is necessary and appropriate to do so.<sup>915</sup>

The Board is able to reduce its caseload by deciding many cases on an aggregate basis.<sup>916</sup> Providers subject to common control must aggregate their cases. The Board also aggregates cases (sometimes involving hundreds of providers) if their claims present a common issue. This class action technique seems like a valuable innovation.

The Board's written decision must include findings of fact and conclusions of law, specifically explaining whether the provider carried its burden of proof to establish entitlement of relief by a preponderance of the evidence and containing appropriate citations. The Board must give "great weight" to CMS interpretive rules or policy statements.<sup>917</sup>

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910. 42 C.F.R. § 405.1847 provides: "No Board member shall join in the conduct of a hearing in a case in which he is prejudiced or partial with respect to any party or in which he has any interest in the matter pending for decision before him." Under the PRRB Rules, a Board member "may recuse him or herself if there are reasons that might give the appearance of an inability to render a fair and impartial decision." A party may request recusal prior to the hearing date. PRRB Rules, *supra* note 902, at Rules 45.1–45.2.

911. PRRB Rules, *supra* note 902, at Rule 40.2. Ex parte communication with staff regarding procedural matters is not prohibited. The regulations prohibit ex parte communication during the CMS appeal process but not the PRRB hearing process. 42 C.F.R. § 405.1875(d).

912. See Phyllis E. Bernard, *Social Security and Medicare Adjudications at HHS: Two Approaches to Administrative Justice in an Ever-Expanding Bureaucracy*, 3 HEALTH MATRIX 339, 410–12 (1993) (discussing importance of the PRRB's Board Advisors in the processing and decision of cases).

913. Hearings are open to the parties, to CMS representatives, and to "such other persons as the Board deems necessary and proper." 42 C.F.R. § 405.1851. Presumably this provision is justified since the hearings concern private financial information of service providers.

914. 42 C.F.R. § 405.1853(a).

915. 42 C.F.R. § 405.1853(c)–(d).

916. See Admin. Conf. of U.S., Recommendation 2016-2, *Aggregate Agency Adjudication*, 81 Fed. Reg. 40,259, 40,260 (Jun. 21, 2016), for discussion of aggregate agency adjudication.

917. 42 C.F.R. § 405.1871.

According to the ACUS database, 3,907 PRRB cases were filed in FY 2013, and 1,833 were decided. This figure for decided cases includes the many cases settled by negotiation or mediation.

The PRRB's website listing its substantive decisions<sup>918</sup> provides information on only 25 decisions in 2012, 42 in 2013, 30 in 2014, 30 in 2015, 27 in 2016, and 31 in 2017. I understand that this is the full number of cases decided on the merits. PRRB issues a much larger number of jurisdictional determinations which concern various procedural issues arising in its cases. It publishes about 300 jurisdictional decisions that present important issues but decides many more than that without publishing the decisions. Many of the Board's decisions give permission to the claimant to secure expedited judicial review of issues of law (such as the validity of regulations) that are outside the Board's jurisdiction.

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918. Ctrs. for Medicare & Medicaid Servs., *List of PRRB Decisions*, <https://www.cms.gov/Regulations-and-Guidance/Review-Boards/PRRBReview/List-of-PRRB-Decisions.html#> (last visited July 12, 2018).

## APPENDIX A-12

# VETERANS' BENEFITS <sup>919</sup>

This appendix focuses on the Board of Veterans Appeals (BVA), which conducts Type B adjudication.<sup>920</sup>

### A. VA Claims Adjudication—Introduction

The Department of Veterans Affairs (VA) decides a vast number of benefit claims.<sup>921</sup> The caseload is rising steadily. The number of new claims currently exceeds one million per year, but this figure understates the caseload because many such claims seek several different benefits.<sup>922</sup> As of the end of 2017, there were about 327,000 pending claims before VA Regional Offices (VAROs), which make the initial decision in claims cases. Of this number, about 74,000 had been pending more than 125 days.<sup>923</sup> There have been many criticisms of the VA's claims process and numerous proposals for improving it,<sup>924</sup> but these are beyond the scope of this appendix.

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919. Thanks to James Ridgway, Stacey-Rae Simcox, and Ron Smith for assistance with this appendix. The system of hearings for resolution of disputes about veterans' benefits is DOVABENE0001 in the ACUS website. It lists 34 case types.

920. By statute the BVA shall "conduct hearings and dispose of appeals properly before the Board in a timely manner." 38 U.S.C. § 7101.

921. Over 4,500,000 veterans receive pensions or benefits, and about more than one million were added during the last 4 years. The annual outlay in FY 2015 to pay these benefits is over \$63.5 billion. See U.S. Dep't of Veterans Affairs, *Veterans Benefits Administration Reports*, [https://www.benefits.va.gov/reports/detailed\\_claims\\_data.asp#](https://www.benefits.va.gov/reports/detailed_claims_data.asp#) (last visited May 5, 2018).

922. See James D. Ridgway, *Why So Many Remands? A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 145–50 (2009). Each unrelated benefit in a claim is referred to as an "issue." Ridgway observes that 22% of disability claims had at least eight issues. *Id.* at 146. He estimates that the number of different benefits sought is at least double and probably more than triple the number of claims that VA receives each year. In FY 2016, the BVA decided 52,011 cases, but these cases involved 146,128 issues. BD. OF VETERANS' APPEALS ANN. REP. 28 (2016) [hereinafter BVA 2016 ANN. REP.].

923. See U.S. Dep't of Veterans Affairs, *supra* note 921. These figures are a remarkable improvement from the situation a few years ago, apparently achieved by transferring personnel from the appeals level into claims processing. Michael J. Wishnie, *'A Boy Gets Into Trouble' Service Members, Civil Rights, and Veterans' Exceptionalism*, 97 B.U. L. REV. 1709 (2017). In 2012, there were 883,930 cases pending and 611,073 pending more than 125 days. As discussed below, however, there are much longer delays at the BVA level.

924. See, e.g., James D. Ridgway, *A Benefits System for the Information Age*, 7 VETERANS L. REV. 36 (2015).

Assessing claims for service-connected disability (by far the most common type of claim) requires complex medical judgments. The claimant must suffer from a current disability that is connected to a disease or injury received during service (the “nexus” requirement). VA assigns a rating (from 0% to 100%) to the disability. It is estimated that around 88% of claims for disability compensation are granted, at least in part.<sup>925</sup>

Claimants who disagree with a VARO decision can seek relief before the BVA. A veteran who loses before the BVA can obtain judicial review from the Court of Appeals for Veterans Claims (CAVC). The Court of Appeals for the Federal Circuit (CAFC) reviews CAVC decisions on questions of statutory or regulatory interpretation. Discussion of the judicial review phase of veterans’ claims is beyond the scope of this book.

## **B. The VA Claims Process Is Inquisitorial and Paternalistic**

The adjudicatory process for resolving VA claim disputes is uniquely inquisitorial and paternalistic. Thus, there is no statute of limitations on making a claim. VAROs are subject to elaborate notice requirements. It must notify the claimant of any information or evidence that is necessary to substantiate the claim and furnish all necessary assistance to the claimant in obtaining evidence and medical opinions.<sup>926</sup> The various procedural rules are heavily slanted in the direction of assisting veterans and requiring the VA to develop all issues raised in any documents or testimony. No government official appears during VARO consideration or BVA hearings to oppose the granting of benefits. At all levels, the VA must give the veteran the benefit of the doubt if the positive and negative evidence is approximately balanced.<sup>927</sup> A veteran may “reopen” a rejected application by presenting “new and material evidence,” and some cases are reopened on multiple occasions (in fact about three-quarters of the claims filed with the VA are actually reopened claims rather than new ones). A decision by the VARO or BVA can be administratively set aside at any time if based on a “clear and unmistakable error.”

The VA’s inquisitorial system of fact determination and decisionmaking is rooted in the long and convoluted history of veterans’ benefits.<sup>928</sup> In the past, these benefits

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925. James D. Ridgway, *The Veterans’ Judicial Review Act Twenty Years Later*, N.Y.U. ANN. SURV. AM. L. 116 (2010).

926. See 38 U.S.C. §§ 5102(b), 5103(a) (imposing obligations to notify claimant of any information needed to complete the application or to substantiate the claim); 38 U.S.C. § 5103A (imposing on the VA an obligation to exercise reasonable efforts to assist the claimant in obtaining evidence and records and in providing medical examinations and opinions). See *Shinseki v. Sanders*, 556 U.S. 396, 406–11 (2009) (simplifying rules of prejudicial error when VA fails to follow the notice requirements in the statute and regulations).

927. 38 U.S.C. § 5107(b).

928. For a detailed account of the history of veterans’ benefits, see James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans’ Benefits Before Judicial Review*, 3 VETERANS L. REV. 135 (2011).



were regarded as gratuities, not entitlements, and the bureaucratic structure that delivered the benefits was wholly paternalistic. In a paternalistic system, there was no place for lawyers or for adversarial procedures like administrative trials.<sup>929</sup> Today, veterans' benefits are an entitlement, not a gratuity, but the older paternalistic and inquisitorial decisionmaking process has survived.<sup>930</sup> However, the judicial review system is adversarial, not inquisitorial, and has compelled the VA to move in the direction of more adversarial claims procedures.<sup>931</sup>

### C. The VA Claims Process—VARO Level<sup>932</sup>

Various teams at the VAROs process VA claims, but the decision is the responsibility of a single lay adjudicator (referred to herein as a “ratings specialist”).<sup>933</sup> The file includes the detailed medical opinions submitted by the claimant (such as reports of personal physicians), the VA medical staff, and independent physicians consulted by the VA. For the most part, the VARO process operates on a documents-only basis without a personal appearance by the veteran.

Claimants dissatisfied with the VARO decision file a Notice of Disagreement (NOD). The claimant can obtain a review of the case by a Decision Review Officer (DRO), a senior VARO adjudicator who has not previously been involved in investigation of the case.<sup>934</sup> The DRO may seek additional evidence. At the veteran's request, the DRO will provide an informal hearing. If the claimant remains dissatisfied with the VARO decision after DRO review, the VARO prepares a Statement of the Case (SOC) which contains detailed findings and an explanation of the decision. Within 60 days from the mailing of the SOC, the veteran must file Form VA-9 to perfect the right of appeal to the BVA.

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929. See Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefit System*, 13 KAN. J.L. & PUB. POL'Y 303, 304–15 (2003) (distinguishing the paternalistic model from the social insurance model applicable to more modern benefit programs).

930. Even the judicial review system has paternalistic elements. By statute a claimant must file an appeal with CAVC within 120 days after mailing of the BVA's decision. This deadline is not “jurisdictional,” so it is subject to equitable tolling. The paternalistic nature of VA benefits was an important factor in the Supreme Court's decision on this point. “What is most telling [of Congress' intent in imposing the 120-day rule] are the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefit claims. The solicitude of Congress for veterans is of long standing. . . . And that solicitude is plainly reflected in the VJRA, as well as in subsequent laws that place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions. . . .” *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (internal citations and quotation marks deleted).

931. See Ridgway, *supra* note 924, at 45–47; Charles L. Cragin, *The Impact of Judicial Review on the Department of Veterans Affairs' Claim Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 ME. L. REV. 23 (1994).

932. For an outline of the claims process, see U.S. Dep't of Veterans Affairs, *Compensation*, <http://www.benefits.va.gov/compensation/process.asp> (last visited July 12, 2018).

933. 38 C.F.R. § 3.103(c)(1).

934. 38 C.F.R. § 3.2600.

Congress enacted the Veterans Appeals Improvement and Modernization Act in 2017.<sup>935</sup> The Act goes into effect in 2019 and is currently being implemented by administrative action.<sup>936</sup> It allows a claimant who has been rejected by the VARO officer to choose one of three alternatives. The claimant can obtain a closed-record appeal from a higher-level VARO review officer (apparently replacing the DRO). The claimant can elect to submit new evidence to the same VARO official who had denied the claim. Or the claimant can get an immediate appeal to the BVA. The Act also limits the VA's obligation to assist the veteran. This appendix does not further discuss the provisions of the 2017 Act.

#### **D. The Board of Veterans Appeals (BVA)**

The BVA's decision is *de novo* but is based primarily on the written record made at the VARO level.<sup>937</sup> Claimants frequently seek to introduce new evidence at the BVA level. If the claimant waives remand to the VARO to evaluate the new evidence, the BVA judge considers this evidence and decides the case accordingly.<sup>938</sup> BVA is required to consider and decide every possible issue or claim raised by the appellant's appeal documents as well as the documents and oral testimony submitted prior to the Board's decision.<sup>939</sup> BVA is pursuing legislative changes to the appeals process which would, among other things, preclude appellants to the BVA from introducing new evidence and might well speed up the incredibly slow process of BVA review by eliminating some of the time-consuming procedural steps in existing practice.<sup>940</sup>

The BVA has about 72 Veterans Law Judges (VLJs). The BVA decided about 52,011 cases in FY 2016. The Board states that it renders 660 decisions per fulltime VLJ (up from 532 in FY 2013 and 645 in FY 2015).

During FY 2016, BVA provided 13,353 oral hearings (of the total of 52,011 decisions). Requesting a hearing considerably prolongs the BVA decisional process, so the great majority of the claimants waive the hearing; their cases are decided on the written record. Single VLJs conduct BVA hearings either in person or by video-conference. The

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935. Pub. L. No. 115-55, 131 Stat. 1105.

936. See Robert Chisholm, *An On-Ramp to the Future of VA Appeals*, 43 ADMIN. & REG. L. NEWS 6, Spring 2018.

937. 38 U.S.C. § 7104(a). 38 C.F.R. § 19.4.

938. 38 C.F.R. §§ 19.9(b), (d)(3), 20.1304(c) (new evidence can be introduced before BVA if appellant waives the right to have it considered by the regional office or if the Board believes that the new evidence will enable it to award benefits).

939. *Percy v. Shinseki*, 23 Vet. App. 37, 47 (2009) (citing numerous cases).

940. BVA 2016 ANN. REP., *supra* note 922, at 9.

proceedings are quite informal.<sup>941</sup> The Board handled about 61% of its oral hearings by video-conference in FY 2016 and hopes to increase this percentage.<sup>942</sup>

During FY 2016, the Board received 86,386 cases. It expects to receive 92,868 cases in FY 2017. At the end of FY 2016, the Board's backlog was about 115,847 cases. The waiting time between the filing of a NOD and a BVA decision averaged six years in FY 2016;<sup>943</sup> the period between the time an appeal was received by BVA and the time of decision was about 374 days. If the BVA remands the case, the remand proceedings averaged 422 days.

Of the 52,011 decisions in FY 2016, the Board allowed 31.8% of the appeals, remanded 46.0%, and denied 18.0%.<sup>944</sup>

The regulations do not prohibit *ex parte* communications with BVA judges, either by VA personnel or by outsiders, and it is unknown whether such communications occur. The regulations do not provide for any ADR in BVA cases. The BVA employs pre-hearing conferences or other case management procedures, especially in the case of unrepresented claimants.<sup>945</sup>

## E. Representation in the VA Claims Process

VA practice at the VARO level is mostly de-lawyered. Veterans are usually represented at both the VARO and BVA levels by lay representatives supplied free by veteran service organizations (VSOs) such as the American Legion.<sup>946</sup> Veterans are seldom represented by lawyers during the VARO process because the statute prohibits compensation of lawyers before the filing of a NOD.<sup>947</sup> The regulations permit

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941. See *BD. OF VETERANS' APPEALS, U. S. DEP'T OF VETERANS AFFAIRS, HOW DO I APPEAL?* (May 2015).

942. At present, the video-conference system is not very convenient because the terminals are often located far from veterans and their representatives. However, BVA is working to improve access to terminals. Email from Stacey-Rae Simcox to Michael Asimow (Jan. 5, 2016).

943. The delay in preparing the statement of the case at the VARO level was 480 days; it took an additional 644 days to certify the record to the BVA. BVA 2016 ANN. REP. *supra* note 922, at 22.

944. *Id.* In FY 2016, 4.2% of the cases were classified as "other" (apparently meaning dismissal).

945. 38 CFR § 20.708; Vogelmann, *supra* note 310, at 32.

946. See 38 C.F.R. §§ 14.628, 14.629(a). All representatives (including those employed by the VSOs) are subject to a code of conduct and to suspension from practice for violations. 38 U.S.C. § 5904(a); 38 C.F.R. § 14.632. In 2014, VSOs represented claimants in 76.8% of BVA cases; attorneys represented veterans in 10.9% of BVA cases; claimants represented themselves in 9.4% of cases; and "others" represented claimants in 2.9% of cases.

947. 38 U.S.C. § 5904(c)(1). This statute formerly prohibited compensation of attorneys at any stage of the VA claims process in excess of \$10. The Supreme Court upheld the constitutionality of the \$10 fee limit on compensation of attorneys in *Walters v. National Association of Radiation Survivors*, 473 U.S. 3045 (1985). The Court believed that the presence of attorneys would be detrimental to the paternalistic and inquisitorial VA adjudication system. It also believed that the free VSO representatives probably did about as good a job as attorneys. For criticism of the assumptions in *Walters* in light of present day realities at the VA, see Stacey Rae-Simcox, *Thirty Years After Walters*, 84 U. CIN. L. REV. 671 (2015). After *Walters*, Congress permitted compensation of attorneys after the veteran files a NOD.

representation by non-lawyer “agents” (who must pass an examination and take CLE courses) and by other lay representatives on a one-time only basis.<sup>948</sup> The success rate of lawyers and non-lawyer representatives before BVA is similar, but attorneys had a clear edge in denied cases.<sup>949</sup>

About 10% of veterans are self-represented before the BVA. Consistent with its paternalistic roots, the VA provides significant assistance to self-represented parties (as well as to those represented by lawyers or lay representatives). In addition to pre-hearing conferences, used to “make the claimant feel comfortable and able to present his or her case,”<sup>950</sup> the various rules requiring the VA to assist the claimant, giving claimant the benefit of the doubt, permitting the record to be supplemented before the BVA, flexible deadlines, and leaving the record open to allow additional evidence, are all particularly helpful to self-represented parties. The VA also provides helpful plain-English manuals on its website and maintains call centers to assist claimants.<sup>951</sup>

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948. 38 C.F.R. § 14.630.

949. Attorneys were successful in 35.5% of their cases, agents 30.3%, others 28.1%, and no representation 22%. The various VSOs fell within a range of 28.1% (American Legion) to 35.7% (Military Order of the Purple Heart). In the defeat column, lawyers lost 13.7% of their cases while the VSO's were in a range of 18.7% (Paralyzed Veterans of America) to 23.6% (State Service Organizations). BVA 2016 ANN. REP. *supra* note 922, at 27. These statistics do not cover success rates at the VARO level, only the BVA level. There is no empirical evidence about whether the VSO representatives or the agents perform as well as lawyers.

950. Vogelmann, *supra* note 310, at 32.

951. *Id.* at 32–34.

**APPENDIX B**  
**ADMINISTRATIVE CONFERENCE**  
**Recommendation 2016-4**

**Evidentiary Hearings Not Required  
by the Administrative Procedure Act**

**Adopted December 13, 2016**

Federal administrative adjudication can be divided into three categories:

(a) Adjudication that is regulated by the procedural provisions of the Administrative Procedure Act (APA) and usually presided over by an administrative law judge (referred to as Type A in the report that underlies this recommendation and throughout the preamble)<sup>1</sup>;

(b) Adjudication that consists of legally required evidentiary hearings that are not regulated by the APA's adjudication provisions in 5 U.S.C. §§ 554 and 556–557 and that is presided over by adjudicators who are often called administrative judges, though they are known by many other titles (referred to as Type B in the report that underlies this recommendation and throughout the preamble)<sup>2</sup>; and

(c) Adjudication that is not subject to a legally required (i.e., required by statute, executive order, or regulation) evidentiary hearing (referred to as Type C in the report that underlies this recommendation and throughout the preamble).<sup>3</sup>

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1. *See* Administrative Procedure Act, 5 U.S.C. §§ 554–559 (2012). In a few kinds of cases, the “presiding employees” in APA hearings are not administrative law judges. Congress may provide for a presiding employee who is not an ALJ. *See id.* § 556(b).

2. This type of adjudication is subject to 5 U.S.C. § 555 (requiring various procedural protections in all adjudication) and 5 U.S.C. § 558 (relating to licensing), as well as the APA's judicial review provisions.

3. *See generally* Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act (Nov. 10, 2016) [hereinafter Asimow], *available at* <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.

This recommendation concerns best practices for the second category of adjudication, that is, Type B adjudication.<sup>4</sup> In these adjudications, although there is no statutory mandate to hold an “on the record” hearing,<sup>5</sup> a statute, regulation, or other source of law does require the agency to conduct an evidentiary hearing. Because the APA’s adjudication provisions in 5 U.S.C. §§ 554 and 556–557 are not applicable to these adjudications, the procedures that an agency is required to follow are set forth elsewhere, most commonly in its own procedural regulations.

Type B adjudications are extremely diverse.<sup>6</sup> They involve types of matters spanning many substantive areas, including immigration, veterans’ benefits, environmental issues, government contracts, and intellectual property. Some involve disputes between the federal government and private parties; others involve disputes between two private parties. Some involve trial-type proceedings that are at least as formal as Type A adjudication. Others are quite informal and can be decided based only on written submissions. Some proceedings are highly adversarial; others are inquisitorial.<sup>7</sup> Caseloads vary. Some have huge backlogs and long delays; others seem relatively current. The structures for internal appeal also vary.

The purpose of this recommendation is to set forth best practices that agencies should incorporate into regulations governing hearing procedures in Type B adjudications. The procedures suggested below are highlighted as best practices because they achieve a favorable balance of the criteria of accuracy (meaning that the procedure produces a correct and consistent outcome), efficiency (meaning that the procedure minimizes cost and delay), and acceptability to the parties (meaning that the procedure meets appropriate standards of procedural fairness).

Some of the best practices set forth in this recommendation may not be applicable or desirable for every Type B adjudicatory program. Accordingly, the recommendation does not attempt to prescribe the exact language that the agency should employ

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4. Traditionally, Type A adjudication has been referred to as “formal adjudication” and Type B and Type C adjudication have been treated in an undifferentiated way as “informal adjudication.” This recommendation does not use that terminology for several reasons. First, the nature of Type B adjudication as involving a legally required hearing sharply distinguishes it from Type C adjudication and makes it feasible to prescribe best practices. Second, the term “informal adjudication” can be a misnomer when applied to Type B adjudication; in fact, Type B adjudication is often as “formal” or even more “formal” than Type A adjudication. Finally, Type C adjudication—which can properly be referred to as “informal adjudication”—is an enormous category, consisting of many millions of adjudications each year. This type of adjudication is highly diverse and does not easily lend itself to an overarching set of best practices.

5. See *id.* at 7–9 (discussing the boundary between Type A and Type B adjudication).

6. See *generally id.* (describing the vast variety of evidentiary hearings that are not required by the APA). See also Federal Administrative Adjudication, *available at* <https://www.acus.gov/research-projects/federal-administrative-adjudication> (providing an extensive database that maps the contours of administrative adjudication across the federal government).

7. See Asimow, *supra* note 3, at 11–12, 84–88 (providing examples of inquisitorial adjudications).

in its procedural regulations.<sup>8</sup> This recommendation should be particularly useful to agencies that are either fashioning procedural regulations for new adjudicatory programs or seeking to revise their existing procedural regulations.

## RECOMMENDATION

### *Integrity of the Decisionmaking Process*

1. *Exclusive Record.* Procedural regulations should require a decision to be based on an exclusive record. That is, decisionmakers should be limited to considering factual information presented in testimony or documents they received before, at, or after the hearing to which all parties had access, and to matters officially noticed.
2. *Ex Parte Communications.* Procedural regulations should prohibit ex parte communications relevant to the merits of the case between persons outside the agency and agency decisionmakers or staff who are advising or assisting the decisionmaker. Communications between persons outside the agency and agency decisionmakers or staff who advise or assist decisionmakers should occur only on the record. If oral, written, or electronic ex parte communications occur, they should be placed immediately on the record.
3. *Separation of Functions.* In agencies that have combined functions of investigation, prosecution, and adjudication, procedural regulations should require internal separation of decisional and adversarial personnel. The regulations should prohibit staff who took an active part in investigating, prosecuting, or advocating in a case from serving as a decisionmaker or staff advising or assisting the decisionmaker in that same case. Adversary personnel should also be prohibited from furnishing ex parte advice or factual materials to a decisionmaker or staff who advise or assist decisionmakers.
4. *Staff Who Advise or Assist Decisionmakers.* Procedural regulations should explain whether the agency permits ex parte advice or assistance to decisionmakers by staff. The staff may not have taken an active part in investigating, prosecuting, mediating, or advocating in the same case (see paragraph 3). The advice should not violate the exclusive record principle (see paragraph 1) by introducing new factual materials. The term “factual materials” does not

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8. Drafters of procedural regulations implementing these best practices may want to consult the Conference-prepared 1993 Model Adjudication Rules for guidance on language, though those rules are directed to adjudication governed by the APA. See Michael Cox, *The Model Adjudication Rules (MARS)*, 11 T.M. COOLEY L. REV. 75 (1994). The Conference has initiated a new Model Adjudication Rules Working Group to revise the model rules. See Admin. Conf. of the U.S., Office of the Chairman Model Adjudication Rules Working Group, available at <https://www.acus.gov/research-projects/office-chairman-model-adjudication-rules-working-group> for more information.

include expert, technical, or other advice on the meaning or significance of “factual materials.”

5. *Bias.* Procedural regulations should prohibit decisionmaker bias in adjudicatory proceedings by stating that an adjudicator can be disqualified if any of the following types of bias is shown:
  - a. Improper financial or other personal interest in the decision;
  - b. Personal animus against a party or group to which that party belongs; or
  - c. Prejudgment of the adjudicative facts at issue in the proceeding.

Procedural regulations and manuals should explain when and how parties should raise claims of bias, and how agencies resolve them.

### *Pre-Hearing Practices*

6. *Notice of Hearing.* Procedural regulations should require notice to parties by appropriate means and sufficiently far in advance so that they may prepare for hearings. The notice should contain a statement of issues of fact and law to be decided. In addition, the notice should be in plain language and, when appropriate, contain the following basic information about the agency’s adjudicatory process:

- a. Procedures for requesting a hearing;
- b. Discovery options, if any (see paragraph 10);
- c. Information about representation, including self-representation and non-lawyer or limited representation, if permitted (see paragraphs 13–16), and any legal assistance options;
- d. Available procedural alternatives (e.g., in-person, video, or telephonic hearings (see paragraph 20); written and oral hearings (see paragraph 21); and alternative dispute resolution (ADR) opportunities (see paragraph 12));
- e. Deadlines for filing pleadings and documents;
- f. Procedures for subpoenaing documents and witnesses, if allowed (see paragraph 11);
- g. Opportunity for review of the initial decision at a higher agency level (see paragraph 26);
- h. Availability of judicial review; and
- i. Website address for and/or citation to the procedural regulations and any practice manuals.

7. *Confidentiality.* Procedural regulations should provide a process by which the parties may seek to keep certain information confidential or made subject to a protective order in order to protect privacy, confidential business information, or national security.

8. *Pre-Hearing Conferences.* Procedural regulations should allow the decision-maker discretion to require parties to participate in a pretrial conference if the



decisionmaker believes the conference would simplify the hearing or promote settlement. The decisionmaker should require that (a) parties exchange witness lists and expert reports before the pretrial conference and (b) both sides be represented at the pretrial conference by persons with authority to agree to a settlement.

9. *Inspection of Materials.* Procedural regulations should permit parties to inspect unprivileged materials in agency files that are not otherwise protected.
10. *Discovery.* Agencies should empower their decisionmakers to order discovery through depositions, interrogatories, and other methods of discovery used in civil trials, upon a showing of need and cost justification.
11. *Subpoena Power.* Agencies with subpoena power should explain their subpoena practice in detail. Agencies that do not have subpoena power should seek congressional approval for subpoena power, when appropriate.
12. *Alternative Dispute Resolution.* Agencies should encourage and facilitate ADR, and ensure confidentiality of communications occurring during the ADR process.

### *Hearing Practices*

13. *Lawyer Representation.* Agencies should permit lawyer representation.
14. *Non-Lawyer Representation.* Agencies should permit non-lawyer representation. Agencies should have the discretion to (a) establish criteria for appearances before the agency by non-lawyer representatives or (b) require approval on a case-by-case basis.<sup>9</sup>
15. *Limited Representation.* Agencies should permit limited representation by lawyers or non-lawyers, when appropriate (i.e., representation of a party with respect to some issues or during some phases of the adjudication).
16. *Self-Representation.* Agencies should make hearings as accessible as possible to self-represented parties by providing plain language resources, legal information, and other assistance, as allowed by statute and regulations.<sup>10</sup>

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9. Agencies should refer to Recommendation 86-1, Nonlawyer Assistance and Representation, 51 Fed. Reg. 25,641 (June 16, 1986), available at <https://www.acus.gov/recommendation/nonlawyer-assistance-and-representation>, when establishing or improving their procedures related to non-lawyer representation.

10. Agencies should refer to Recommendation 2016-6, Self-Represented Parties in Administrative Hearings, 81 Fed. Reg. 94,319 (Dec. 23, 2016), available at <https://www.acus.gov/recommendation/self-represented-parties-administrative-proceedings-final-recommendation>, when establishing or improving their procedures related to self-represented parties.

17. *Sanctions.* Agencies with the requisite statutory power should authorize decisionmakers to sanction attorneys and parties for misconduct. Sanctions can include admonitions, monetary fines, and preclusion from appearing before the agency. Agencies should have a mechanism for administrative review of any sanctions.
18. *Open Hearings.* Agencies should adopt the presumption that their hearings are open to the public, while retaining the ability to close the hearings in particular cases, including when the public interest in open proceedings is outweighed by the need to protect:
  - a. National security;
  - b. Law enforcement;
  - c. Confidentiality of business documents; and
  - d. Privacy of the parties to the hearing.
19. *Adjudicators.* Agencies that decide a significant number of cases should use adjudicators—rather than agency heads, boards, or panels—to conduct hearings and provide initial decisions, subject to higher-level review (see paragraph 26).
20. *Video Conferencing and Telephone Hearings.* Agencies should consult the Administrative Conference’s recommendations<sup>11</sup> in determining whether and when to conduct hearings or parts of hearings by video conferencing or telephone.
21. *Written-Only Hearings.* Procedural regulations should allow agencies to make use of written-only hearings in appropriate cases. Particularly good candidates for written-only hearings include those that solely involve disputes concerning:
  - a. Interpretation of statutes or regulations; or
  - b. Legislative facts as to which experts offer conflicting views.Agencies should also consider the adoption of procedures for summary judgment in cases in which there are no disputed issues of material fact.

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11. Agencies should refer to Recommendation 2011-4, Agency Use of Video Hearings: Best Practices and Possibilities for Expansion, 76 Fed. Reg. 48,795 (Aug. 9, 2011), available at <https://www.acus.gov/recommendation/agency-use-video-hearings-best-practices-and-possibilities-expansion>; Recommendation 2014-7, Best Practices for Using Video Conferencing for Hearings, 79 Fed. Reg. 75,119 (Dec. 17, 2014), available at <https://www.acus.gov/recommendation/best-practices-using-video-conferencing-hearings>; and the Conference’s Handbook on Best Practices for Using Video Conferencing in Adjudicatory Hearings, available at <https://www.acus.gov/report/handbook-best-practices-using-video-conferencing-adjudicatory-hearings>, when establishing or improving their video conferencing hearings.

22. *Oral Argument.* Agencies generally should permit oral argument in connection with a written-only hearing if a party requests it, while retaining the discretion to dispense with oral argument if it appears to be of little value in a given case or parts of a case.
23. *Evidentiary Rules.* Procedural regulations should prescribe the evidentiary rules the decisionmaker will apply in order to avoid confusion and time-consuming evidentiary disputes.<sup>12</sup>
24. *Opportunity for Rebuttal.* Agencies should allow an opportunity for rebuttal, which can take the form of cross-examination of an adverse witness as well as additional written or oral evidence. Agencies should have the discretion to limit or preclude cross-examination or have it be conducted in camera in appropriate cases, such as when:
- a. The dispute concerns a question of legislative fact where the evidence consists of expert testimony;
  - b. Credibility is not at issue;
  - c. The only issue is how a decisionmaker should exercise discretion;
  - d. National security could be jeopardized; or
  - e. The identity of confidential informants might be revealed.

#### *Post-Hearing Practices*

25. *Decisions.* Procedural regulations should require the decisionmaker to provide a written or transcribable decision and specify the contents of the decision. The decision should include:
- a. Findings of fact, including an explanation of how the decisionmaker made credibility determinations; and
  - b. Conclusions of law, including an explanation of the decisionmaker's interpretation of statutes and regulations.
26. *Higher-Level Review.* Apart from any opportunity for reconsideration by the initial decisionmaker, procedural regulations should provide for a higher-level review of initial adjudicatory decisions. Agencies should give parties an opportunity to file exceptions and make arguments to the reviewing authority. The reviewing authority should be entitled to summarily affirm the initial decision without being required to write a new decision.

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12. Agencies should refer to Recommendation 86-2, Use of Federal Rules of Evidence in Federal Agency Adjudications, 51 Fed. Reg. 25,642 (June 16, 1986), available at <https://www.acus.gov/recommendation/use-federal-rules-vidence-federal-agency-adjudications>, when considering whether or how to use the Federal Rules of Evidence.

27. *Precedential Decisions.* Procedural regulations should allow and encourage agencies to designate decisions as precedential in order to improve decisional consistency. These decisions should be published on the agency's website to meet the requirements of 5 U.S.C. § 552.

*Management of Procedures*

28. *Complete Statement of Important Procedures.* Agencies should set forth all important procedures and practices that affect persons outside the agency in procedural regulations that are published in the Federal Register and the Code of Federal Regulations and posted on the agency website.

29. *Manuals and Guides.* Agencies should provide practice manuals and guides for decisionmakers, staff, parties, and representatives in which they spell out the details of the proceeding and illustrate the principles that are set forth in regulations. These manuals and guides should be written in simple, non-technical language and contain examples, model forms, and checklists, and they should be posted on the agency website.

30. *Review of Procedures.* Agencies should periodically re-examine and update their procedural regulations, practice manuals, and guides.

31. *Feedback.* Agencies should seek feedback from decisionmakers, staff, parties, representatives, and other participants in order to evaluate and improve their adjudicatory programs.

**APPENDIX C**  
**ADMINISTRATIVE CONFERENCE**  
**Recommendation 2018-3**

**Electronic Case Management in  
Federal Administrative Adjudication**

**Adopted June 15, 2018**

Courts and adjudicative agencies have increasingly come to rely on technology to manage various aspects of their adjudicative activities. Some of these federal agencies have adopted and implemented a form of electronic management for their casework, but others have not done so. Although practical considerations or resource constraints may sometimes weigh against the use of an electronic case management system (eCMS), agencies can often realize considerable efficiencies and reap other benefits by adopting such a system.

**Benefits of an Electronic Case Management System**

As referred to here, an electronic case management system includes the functions usually associated with a paper-based case management system from the filing of a case to its resolution and beyond, such as: the initial receipt of the claim, complaint, or petition; the receipt, organization, and secure storage of evidence and briefs; the scheduling of hearings or other proceedings; the maintenance of tools to facilitate the analysis and resolution of the case; and the collection and reporting of data relating to the case, including when evidence was received, the time the case has remained pending, employees who have processed the case, and the outcome of the case, including any agency decision.

An eCMS, properly implemented, may perform these functions in a more efficient and cost-effective manner than a paper-based management system.<sup>1</sup> For example, maintaining paper records can be costly with respect to storage space, mailing fees, and staff time for agency employees needed to receive, store, track, and retrieve records, and locate lost or misfiled records. An eCMS may reduce these costs in addition to reducing processing time and improving interactions with litigants and the public. In addition to improving the traditional functions of a paper-based case management system, an eCMS may also provide new functionalities, such as making structured data available for analysis that can be used to improve an agency's operations.

Perhaps more importantly, an eCMS can assist adjudicative agencies in fulfilling their duties under various laws that impose requirements related to paperwork reduction, agency efficiency, public access to records, and technology management. For example, the Government Paperwork Elimination Act requires that federal agencies use electronic forms, electronic filing, and electronic signatures to conduct official business with the public, when practicable.<sup>2</sup> Further, the E-Government Act of 2002 directs agencies to establish “a broad framework of measures that require using Internet-based information technology to improve citizen access to government information and services.”<sup>3</sup> And finally, beyond statutory requirements, an eCMS can also assist an agency's implementation of best practices for public access and participation, consistent with the objectives of past ACUS recommendations relating to both adjudication and rulemaking.<sup>4</sup>

### **Considerations in Adopting an Electronic Case Management System**

Despite the advantages of an eCMS, the decision to implement an eCMS must be carefully considered. It may not be cost efficient for every adjudicative agency to implement an eCMS given agency-specific factors such as caseload volume. For example, there may be significant costs associated with the development, purchase, and maintenance of new hardware and software. Further, the need to train agency staff in new business processes associated with the eCMS may also be significant, as the new operations may be substantially different. In addition, an agency may need to allocate resources to ensure that any new eCMS complies with existing legal

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1. Felix F. Bajandas & Gerald K. Ray, Implementation and Use of Electronic Case Management Systems in Federal Agency Adjudication (May 23, 2018) (report to the Admin. Conf. of the U.S.), <https://acus.gov/report/final-report-implementation-and-use-electronic-case-management-systems-federal-agency>.

2. Government Paperwork Elimination Act, Pub. L. No. 105-277, 112 Stat. 2681-749 (1998) (codified at 44 U.S.C. § 3504 note).

3. E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified at 44 U.S.C. § 101 note).

4. See Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039, 31,039 (Jul. 5, 2017); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269, 76,269 (Dec. 17, 2013); and Admin. Conf. of the U.S., Recommendation 2011-1, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2,257, 2,264 (Jan. 17, 2012).

requirements, such as the protection of private information about individuals, as required by the Privacy Act.<sup>5</sup>

If, after considering the costs, an agency decides to implement an eCMS to partially or fully replace a paper-based case management system, the agency must consider a number of factors in deciding *what* particular eCMS features are to be used and how they are to be designed and implemented. Planning for an eCMS implementation thus requires a comprehensive understanding of an agency's structure and business process. Agencies considering implementing or enhancing an eCMS may find further benefit in studying the experiences of other agencies' eCMS implementations, and they should examine those experiences carefully, due to the highly fact-specific nature of a consideration of the costs and benefits of an eCMS.

The implementation or expansion of an eCMS deserves full and careful consideration by federal adjudicative agencies, with recognition that each agency is unique in terms of its mission, caseload, and challenges. This Recommendation suggests that agencies implement or expand an eCMS only when they conclude, after conducting a thorough consideration of the costs and benefits, that doing so would lead to benefits such as reduced costs and improved efficiency, accuracy, public access, and transparency without impairing the fairness of the proceedings or the participants' satisfaction with them.

## RECOMMENDATION

1. Federal adjudicative agencies should consider implementing electronic case management systems (eCMS) in order to reduce costs, expand public access and transparency, increase both efficiency and accuracy in the processing of cases, identify opportunities for improvement through the analysis of captured data, and honor statutory requirements such as the protection of personally identifiable information.
2. Federal adjudicative agencies should consider whether their proceedings are conducive to an eCMS and whether their facilities and staff can support the eCMS technology. If so, agencies should then consider the costs and benefits to determine whether the implementation or expansion of an eCMS would promote the objectives identified in Recommendation 1 as well as the agency's statutory mission without impairing the fairness of proceedings or the participants' satisfaction with them. This consideration of the costs and benefits should include the following non-exclusive factors:
  - a. Whether the agency's budget would allow for investment in appropriate and secure technology as well as adequate training for agency staff.

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5. Privacy Act of 1974 (codified at 5 U.S.C. § 552a), as amended by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (codified at 5 U.S.C. § 101 note).

- b. Whether the use of an eCMS would reduce case processing times and save costs, including printing of paper and the use of staff resources to store, track, retrieve, and maintain paper records.
- c. Whether the use of an eCMS would foster greater accessibility and better public service.
- d. Whether users of an eCMS, such as administrative law judges, other adjudicators, other agency staff, parties, witnesses, attorneys or other party representatives, and reviewing officials would find the eCMS beneficial.
- e. Whether the experiences of other agencies' eCMS implementations provide insight regarding other factors which may bear on the manner of an eCMS implementation.

3. The following possible eCMS features, currently implemented by some federal adjudicative agencies, should be considered by other agencies for their potential benefits:

- a. Web access to the eCMS that allows parties the flexibility to file a claim, complaint, or petition; submit documents; and obtain case information at any time.
- b. Streamlining of agency tasks in maintaining a case file, such as sorting and organizing case files, providing simultaneous access to files and documents by authorized users, tracking deadlines and elapsed age of a case, notifying parties of new activity in a case, and pre-populating forms with data from the case file.
- c. The comprehensive capture of structured and unstructured data that allows for robust data analysis to identify opportunities for improving an agency's operations, budget formulation, and reporting.
- d. Streamlined publication of summary data on agency operations.

4. Federal adjudicative agencies that decide to implement or expand an eCMS should plan and manage their budgets and operations in a way that balances the needs of a sustainable eCMS with the possibility of future funding limitations. Those agencies should also:

- a. Consider the costs associated with building, maintaining, and improving the eCMS.
- b. Consider whether the adoption of an eCMS requires modifications of an agency's procedural rules. This would include addressing whether the paper or electronic version of a case file will constitute the official record of a case and whether filing methods and deadlines need to be changed.
- c. Consider whether to require non-agency individuals to file claims, complaints, petitions, and other papers using the eCMS. Such consideration should include the accessibility, suitability, usability, and burden of the eCMS for its likely user population, and whether creating exceptions to electronic filing procedures would assist in maintaining sufficient public access.



- d. Create a map or flow chart of their adjudicative processes in order to identify the needs of an eCMS. This involves listing the tasks performed by employees at each step in the process to ensure the eCMS captures all of the activities that occur while the case is pending, from initial filing to final resolution. It also includes identifying how members of the public or other non-agency users will access and interact with the eCMS. To the extent practical, this effort should also involve mapping or flow-charting the legal and policy requirements to decisional outcomes.
  - e. Put in place a management structure capable of: (1) restoring normal operations after an eCMS goes down (incident management); (2) eliminating recurring problems and minimizing the impact of problems that cannot be prevented (problem management); (3) overseeing a new release of an eCMS with multiple technical or functional changes (release management); (4) handling modifications, improvements, and repairs to the eCMS to minimize service interruptions (change management); and (5) identifying, controlling, and maintaining the versions of all of the components of the eCMS (configuration management).
  - f. Establish a “service desk,” which is a central hub for reporting issues with the eCMS, providing support to eCMS users, and receiving feedback on the resolution of problems. A service desk should gather statistics of eCMS issues in order to help guide future improvements of the eCMS. A service desk could also enable eCMS users to offer suggestions for improving the eCMS.
  - g. Plan adequate and timely training for staff on the use of the eCMS.
5. Federal adjudicative agencies that decide to implement or expand an eCMS must do so in such a way that appropriate protections for privacy, transparency, and security are preserved by:
- a. Ensuring that the agency’s compliance with the Privacy Act, other statutes protecting privacy, and the agency’s own privacy regulations and policies remains undiminished by the implementation or expansion of an eCMS.
  - b. To the extent it is consistent with Recommendation 5(a) above, making case information available online to parties and, when appropriate, the public, taking into account both the interests of transparency (as embodied in, for example, the Freedom of Information Act’s proactive disclosure requirements) as well as the benefits of having important adjudicative documents publicly available.
  - c. Adopting security measures, such as encryption, to ensure that information held in an eCMS cannot be accessed or changed by unauthorized persons.
  - d. Ensuring that sensitive information is not provided to unintended third parties through private email services, unsecured data transmission, insider threats, or otherwise.

- e. Keeping track of the evolution of security technologies and considering the adoption of those technologies as they mature in order to ensure the integrity of agency information systems.
6. Federal adjudicative agencies that decide to implement or expand an eCMS should consider how to analyze and leverage data that is captured by the eCMS to improve their adjudicative processes, including through the use of natural language processing, machine learning, and predictive algorithms. Agencies should consider:
- a. Evaluating how eCMS features could generate the types of data that would be useful for evaluating the effectiveness of their adjudicative processes and policies.
  - b. Capturing and analyzing such data about adjudicative processes and policies to detect and define problem areas that present opportunities for improvement.
  - c. Upon identification of areas for improvement in the adjudication process, taking corrective action, refining performance goals, and measuring performance under the newly improved process.
  - d. Hiring staff trained in data science to facilitate data analysis and giving that staff access to subject matter experts within agencies.
7. Collaborating with other agencies on best practices for data analytics.

**APPENDIX D**  
**ADMINISTRATIVE CONFERENCE**  
**Recommendation 2016-6**

**Self-Represented Parties in Administrative Proceedings**

**Adopted December 14, 2016**

Federal agencies conduct millions of proceedings each year, making decisions that affect such important matters as disability or veterans' benefits, immigration status, and home or property loans. In many of these adjudications, claimants appear unrepresented for part or all of the proceeding and must learn to navigate hearing procedures, which can be quite complex, without expert assistance.<sup>1</sup> The presence of self-represented parties in administrative proceedings can create challenges for both administrative agencies and for the parties seeking agency assistance. Further, the presence of self-represented parties raises a number of concerns relating to the consistency of outcomes and the efficiency of processing cases.

Because of these concerns, in the spring of 2015 the Department of Justice's Access to Justice Initiative asked the Administrative Conference to co-lead a working group on self-represented parties in administrative proceedings, and the Conference agreed. The working group, which operates under the umbrella of the Legal Aid

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1. The term "self-represented" is used to denote parties who do not have professional representation, provided by either a lawyer or an experienced nonlawyer. Representation by a non-expert family member or friend is included in this recommendation's use of the term "self-represented." Administrative agencies generally use the term "self-represented," in contrast to courts' use of the term pro se. Because this recommendation focuses on agency adjudication, it uses the term "self-represented," while acknowledging that the two terms are effectively synonymous.

Interagency Roundtable (LAIR), has been meeting since that time.<sup>2</sup> During working group meetings, representatives from a number of agencies, including the Social Security Administration (SSA), Executive Office for Immigration Review (EOIR), Board of Veterans' Appeals (BVA), Internal Revenue Service (IRS), Department of Health and Human Services (HHS), Department of Agriculture (USDA), and Department of Housing and Urban Development (HUD) participated and shared information about their practices and procedures relating to self-represented parties. In working group meetings, agency representatives agreed that proceedings involving self-represented parties are challenging, and expressed interest both in learning more about how other agencies and courts handle self-represented parties and in improving their own practices. This recommendation, and its accompanying report,<sup>3</sup> arose in response to those concerns.<sup>4</sup>

While civil courts have long recognized and worked to address the challenges introduced by the presence of self-represented parties, agencies have increasingly begun to focus on issues relating to self-representation only in recent years. Agencies are undertaking numerous efforts to accommodate self-represented parties in their adjudication processes.<sup>5</sup> Yet quantitative information on self-representation in the administrative context is comparatively scarce, and there is much insight to be gained from the civil courts in identifying problems and solutions pertaining to self-representation. Although there are important differences between procedures in administrative proceedings and those in civil courts, available information indicates that the two contexts share many of the same problems—and solutions—when dealing with self-represented parties.

Challenges related to self-represented parties in administrative proceedings can be broken down into two main categories: those pertaining to the efficiency of the administrative proceeding and those relating to the outcome of the procedure.

From an efficiency standpoint, self-represented parties' lack of familiarity with agency procedures and administrative processes can cause delay both in individual cases and on a systemic level. Delays in individual cases may arise when self-represented

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2. LAIR was established in 2012 by the White House Domestic Policy Council and the Department of Justice. See *White House Legal Aid Interagency Roundtable*, U.S. DEP'T OF JUST., <https://www.justice.gov/lair> (last visited Aug. 16, 2016). It was formalized by presidential memorandum in the fall of 2015. See Memorandum from the President to the Heads of Exec. Dep'ts and Agencies (Sept. 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/24/presidential-memorandum-establishment-white-house-legal-aid-interagency>.

3. Connie Vogelmann, *Self-Represented Parties in Administrative Hearings* (Sept. 7, 2016), <https://www.acus.gov/sites/default/files/documents/Self-Represented-Parties-Administrative-Hearings-Draft-Report.pdf>.

4. This recommendation primarily targets the subset of administrative agencies that conduct their own administrative hearings. Components of a number of federal agencies—including HUD, HHS, and USDA—do not conduct hearings directly, and instead delegate adjudication responsibilities to state or local entities. Because the challenges facing these components are quite distinct, they are not addressed in this recommendation.

5. *Id.* at 28–50.

parties fail to appear for scheduled hearings, file paperwork incorrectly or incompletely, do not provide all relevant evidence, or make incoherent or legally irrelevant arguments before an adjudicator. In the aggregate, self-represented parties also may require significant assistance from agency staff in filing their claims and appeals, which can be challenging given agencies' significant resource constraints. Finally, self-represented parties may create challenges for adjudicators, who may struggle to provide appropriate assistance to them while maintaining impartiality and the appearance of impartiality. These problems are exacerbated by the fact that many agencies hear significant numbers of cases by self-represented parties each year.

Self-represented parties also may face suboptimal outcomes in administrative proceedings compared to their represented counterparts, raising issues of fairness. Even administrative procedures that are designed to be handled without trained representation can be challenging for inexperienced parties to navigate, particularly in the face of disability or language or literacy barriers. Furthermore, missed deadlines or hearings may result in a self-represented party's case being dismissed, despite its merits. Self-represented parties often struggle to effectively present their cases and, despite adjudicators' best efforts, may receive worse results than parties with representation.

Civil courts face many of these same efficiency and consistency concerns, and in response have implemented wide-ranging innovations to assist self-represented parties. These new approaches have included in-person self-service centers; workshops explaining the process or helping parties complete paperwork; and virtual services such as helplines accessible via phone, email, text, and chat. Courts have also invested in efforts to make processes more accessible to self-represented parties from the outset, through the development of web resources, e-filing and document assembly programs, and plain language and translation services for forms and other documents. Finally, courts have also used judicial resources and training to support judges and court personnel in their efforts to effectively and impartially support self-represented parties.

These innovations have received extremely positive feedback from parties, and early reports indicate that they improve court efficiency and can yield significant cost savings for the judiciary.<sup>6</sup> Administrative agencies have also implemented, or are in the process of implementing, many similar innovations.<sup>7</sup> For instance, some agencies make use of pre-hearing conferences to reduce both the necessity and the complexity of subsequent hearings.<sup>8</sup>

This recommendation builds on the successes of both civil courts and administrative agencies in dealing with self-represented parties and makes suggestions for further improvement. In making this recommendation, the Conference makes no normative judgment on the presence of self-represented parties in administrative proceedings. This

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6. Richard Zorza, Trends in *Self-Represented Litigation Innovation*, in FUTURE TRENDS IN STATE COURTS 85 (Carol R. Flango et al. eds., 2006). See generally JOHN GREACEN, THE BENEFITS AND COSTS OF PROGRAMS TO ASSIST SELF-REPRESENTED LITIGANTS (2009).

7. Vogelmann, *supra* note 3, at 28–50.

8. *Id.* at 32–33.

recommendation assumes that there will be circumstances in which parties will choose to represent themselves, and seeks to improve the resources available to those parties and the fairness and efficiency of the overall administrative process.

The recommendation is not intended to be one-size-fits-all, and not every recommendation will be appropriate for every administrative agency. To the extent that this recommendation requires additional expenditure of resources by agencies, innovations are likely to pay dividends in increased efficiency and consistency of outcome in the long term.<sup>9</sup> The goals of this recommendation are to improve both the ease with which cases involving self-represented parties are processed and the consistency of the outcomes reached in those cases.

## RECOMMENDATION

### *Agency Resources*

1. Agencies should consider investigating and implementing triage and diagnostic tools to direct self-represented parties to appropriate resources based on both the complexity of their case and their individual level of need. These tools can be used by self-represented parties themselves for self-diagnosis or can be used by agency staff to improve the consistency and accuracy of information provided.
2. Agencies should strive to develop a continuum of services for self-represented parties, from self-help to one-on-one guidance, that will allow parties to obtain assistance by different methods depending on need. In particular, and depending on the availability of resources, agencies should:
  - a. Use websites to make relevant information available to the public, including self-represented parties and entities that assist them, to access and expand e-filing opportunities;
  - b. Continue efforts to make forms and other important materials accessible to self-represented parties by providing them at the earliest possible stage in the proceeding in plain language, in both English and in other languages as needed, and by providing effective assistance for persons with special needs; and
  - c. Provide a method for self-represented parties to communicate in “real-time” with agency staff or agency partners, as appropriate.
3. Subject to the availability of resources and as permitted by agency statutes and regulations, agencies should provide training for adjudicators for dealing with self-represented parties, including providing guidance for how they should interact with self-represented parties during administrative proceedings. Specifically, training should address interacting with self-represented parties in situations of limited literacy or English proficiency or mental or physical disability.

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<sup>9</sup>. See generally GREACEN, *supra* note 6.

### *Data Collection and Agency Coordination*

4. Agencies should strive to collect the following information, subject to the availability of resources, and keeping in mind relevant statutes including the Paperwork Reduction Act, where applicable. Agencies should use the information collected to continually evaluate and revise their services for self-represented parties. In particular, agencies should:
  - a. Seek to collect data on the number of self-represented parties in agency proceedings. In addition, agencies should collect data on their services for self-represented parties and request program feedback from agency personnel.
  - b. Seek to collect data from self-represented parties about their experiences during the proceeding and on their use of self-help resources.
  - c. Strive to keep open lines of communication with other agencies and with civil courts, recognizing that in spite of differences in procedures, other adjudicators have important and transferable insights in working with self-represented parties.

### *Considerations for the Future*

5. In the long term, agencies should strive to re-evaluate procedures with an eye toward accommodating self-represented parties. Proceedings are often designed to accommodate attorneys and other trained professionals. Agencies should evaluate the feasibility of navigating their system for an outsider, and make changes—as allowed by their organic statutes and regulations—to simplify their processes accordingly. Although creation of simplified procedures would benefit all parties, they would be expected to provide particular assistance to self-represented parties.





APPENDIX E  
ADMINISTRATIVE CONFERENCE  
Recommendation 2014-7

**Best Practices for Using  
Video Teleconferencing for Hearings**

**Adopted December 5, 2014**

Agencies conduct thousands of adjudicative hearings every day, but the format of the hearing, whether face-to-face or by video, has not been analyzed in any systematic way. Some agencies have provided hearings by video teleconferencing technology (VTC) for decades and have robust VTC programs. These programs strive consistently to provide the best hearing experience, even as technology changes. Other agencies have been reluctant to depart from traditional formats. Some are skeptical that hearings may be conducted as effectively via VTC as they are in person. Others are uncertain about how to implement VTC hearings. But all could benefit from an impartial look at the available technologies for conducting adjudications.

The varied agency experiences and concerns reflect the tension between long-established values and technological innovations. Adjudicative hearings must be conducted in a manner consistent with due process and the core values of fairness, efficiency, and participant satisfaction reflected in cases like *Goldberg v. Kelly*<sup>1</sup> and *Mathews v. Eldridge*.<sup>2</sup> At the same time, agencies that have explored the use of technological alternatives have achieved benefits in the effective use of decisionmaking resources and reduction in travel expenses.<sup>3</sup> Upholding core values and making the best use of technology—both in hearings and related proceedings such as initial

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1. 397 U.S. 254 (1970).

2. 424 U.S. 319 (1976); *see also infra* note 9.

3. In fact, agencies have been directed to increase efficiency through their use of technology. *See* Exec. Order No. 13,589, 76 Fed. Reg. 70,861 (Nov. 15, 2011) (directing agencies to “devise strategic alternatives to Government travel, including . . . technological alternatives, such as . . . video conferencing” and to “assess current device inventories and usage, and establish controls, to ensure that they are not paying for unused or underutilized information technology (IT) equipment, installed software, or services”).

appearances, pre-hearing conferences, and meetings—is the challenge this recommendation seeks to meet.<sup>4</sup>

In 2011, the Administrative Conference adopted Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*.<sup>5</sup> Recommendation 2011-4 had two main purposes. First, it identified factors for agencies—especially agencies with high volume caseloads—to consider as they determined whether to conduct VTC hearings.<sup>6</sup> Second, it offered several best practices agencies should employ when using VTC hearings.<sup>7</sup> The recommendation concluded by encouraging agencies that have decided to conduct VTC hearings to “[c]onsult the staff of the Administrative Conference of the United States . . . for best practices, guidance, advice, and the possibilities for shared resources and collaboration.”<sup>8</sup>

This recommendation builds on Recommendation 2011-4 by providing practical guidance regarding how best to conduct VTC hearings. The Administrative Conference is committed to the principles of fairness, efficiency, and participant satisfaction in the conduct of hearings. When VTC is used, it should be used in a manner that promotes these principles, which form the cornerstones of adjudicative legitimacy.<sup>9</sup> The Conference recognizes that VTC is not suitable for every kind of hearing, but believes greater familiarity with existing agency practices and awareness of the improvements in technology will encourage broader use of such technology.<sup>10</sup> This recommendation aims to ensure that, when agencies choose to offer VTC hearings, they are able to provide a participant experience that meets or even exceeds

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4. While this recommendation refers primarily to adjudication, it may apply to other proceedings as well.

5. See 76 Fed. Reg. 48,795 (Aug. 9, 2011), available at <http://www.acus.gov/recommendation/agency-use-video-hearings-best-practices-and-possibilities-expansion>.

6. Such factors include whether (1) the agency’s statute permits use of VTC; (2) the agency’s proceedings are conducive to VTC; (3) VTC may be used without affecting case outcomes; (4) the agency’s budget allows adequate investment in VTC; (5) the use of VTC would result in cost savings; (6) the use of VTC would result in a reduction in wait time; (7) the participants (e.g., judges, parties, representatives, witnesses) would find VTC beneficial; (8) the agencies’ facilities and administration would be able to support VTC hearings; and (9) the use of VTC would not adversely affect either representation or communication. See *id.*

7. Best practices include (1) offering VTC on a voluntary basis; (2) ensuring that the use of VTC is outcome-neutral and meets the needs of users; (3) soliciting feedback from participants; (4) implementing VTC via a pilot program and evaluating that program before establishing it more broadly; and (5) providing structured training and ensuring available IT support staff. *Id.*

8. *Id.*

9. See EF Int’l Language Schools, Inc., 2014 N.L.R.B. 708 (2014) (admin. law judge recommended decision) (finding “that the safeguards utilized at hearing [to take witness testimony by VTC] amply ensured that due process was not denied to” the party).

10. For greater detail about how to implement VTC hearings, see Center for Legal and Court Technology, *Best Practices for Using Video for Hearings and Related Proceedings* (Nov. 6, 2014), available at <http://www.acus.gov/report/best-practices-using-video-teleconferencing-final-report>.

the in-person hearing experience.<sup>11</sup> This recommendation does not take a position on when parties should be entitled to, or may request, an in-person hearing.

## RECOMMENDATION

### *Foundational Factors*

1. Agencies should consider the various physical and logistical characteristics of their hearings, including the layout of the hearing room(s) and the number and location(s) of hearing participants (i.e., judge, parties, representatives, and witnesses) and other attendees, in order to determine the kind of video teleconferencing (VTC) system to use. These general principles should guide agencies' consideration:
  - (a) Video screens should be large enough to ensure adequate viewing of all participants;
  - (b) Camera images should replicate the in-person hearing experience, including participants' ability to make eye contact with other participants and see the entire hearing room(s). If interpreters are involved, they should be able to see and hear the participants clearly;
  - (c) Microphones should be provided for each participant who will be speaking during the hearing;
  - (d) The speaker system should be sufficient to allow all participants to hear the person speaking. If a participant has a hearing impairment, a system that complies with the Americans with Disabilities Act and other applicable laws should be used to connect to the VTC system;
  - (e) The record should be adequately captured, either by ensuring that the audio system connects with a recording system, or by ensuring that the court reporter can clearly see and hear the proceeding;
  - (f) Sufficient bandwidth should be provided so that the video image and sound are clear and uninterrupted; and
  - (g) Each piece of equipment should be installed, mounted, and secured so that it is protected and does not create a hazardous environment for participants or staff.
  
2. Agencies should ensure that the hearing room conditions allow participants to see, be seen by, and hear other participants, and to see written documents and screens, as well as, or better than, if all of the participants were together in person. These general principles should guide agencies' consideration in creating the best hearing room conditions:
  - (a) Lighting should be placed in a way to create well-dispersed, horizontal, ambient light throughout all rooms used in the proceeding;

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11. This recommendation does not take a position on when parties should be entitled to, or may request, an in-person hearing.

- (b) Noise transference should be kept to a minimum by:
    - (i) Locating hearing rooms in the inner area of the office and away from any noise or vibration-producing elements (e.g., elevator shafts, mechanical rooms, plumbing, and high-traffic corridors); and
    - (ii) Installing solid doors with door sweeps, walls that run from floor to ceiling, and sound absorption panels on the walls.
  - (c) Room décor, including colors and finishes of walls and furniture, should allow for the camera(s) to easily capture the image(s).
3. Agencies should retain technical staff to support VTC operators and maintain equipment.

#### *Training*

4. Agencies should provide training for agency staff, especially judges, who will operate the VTC equipment during the hearing. Agencies should also provide a reference chart or “cheat sheet” to keep with each VTC system that provides basic system operation directions that operators can easily reference, as well as a phone number (or other rapid contact information) for reaching technical staff.
5. Agencies should provide advanced training for technical support staff to ensure they are equipped to maintain the VTC equipment and provide support to operators, including during a proceeding if a problem arises.

#### *Financial Considerations*

6. The capabilities and costs of VTC systems vary widely. Before purchasing or updating their VTC systems, agencies should first consider their hearing needs (e.g., the needs of hearings conducted by judges at their desks with a single party will be different than the needs of hearings conducted in full-sized federal courtrooms with multiple participants and attendees present at several locations) both now and in the future (e.g., the bandwidth needed today may be different than the bandwidth needed tomorrow).
7. Once agencies have identified their hearing needs, they should consider the costs and benefits of implementing, maintaining, and updating their VTC systems to suit those needs.
- (a) Costs to be considered include those associated with purchasing, installing, and maintaining the VTC system; creating and maintaining the conditions necessary to allow participants to see and hear each other clearly; and providing training to staff.
  - (b) Benefits to be considered include better access to justice by increased accessibility to hearings, more efficient use of time for judges and staff, reduced travel costs and delays, and backlog reductions.

### *Procedural Practices*

8. Judges should consider how to establish and maintain control of the hearing room, such as by wearing robes as a symbol of authority, appearing on the screen before the other participants enter the room(s), requiring parties and representatives to use hand signals to indicate that they would like to speak, and reminding representatives that they are officers of the court.
9. Agencies should install VTC equipment so that judges can control the camera at the other location(s), if possible.
10. Agency staff should ensure that the hearing will run as smoothly as possible by removing any obstacles blocking lines-of-sight between the camera and participants and testing the audio on a regular basis.

### *Fairness and Satisfaction*

11. Agencies should periodically assess their VTC hearings program to ensure that the use of VTC produces outcomes that are comparable to those achieved during in-person hearings.
12. Agencies should maintain open lines of communication with representatives in order to receive feedback about the use of VTC. Post-hearing surveys or other appropriate methods should be used to collect information about the experience and satisfaction of participants.

### *Collaboration Among Agencies*

13. Agencies should consider sharing VTC facilities and expertise with each other in order to reduce costs and increase efficiency, while maintaining a fair and satisfying hearing experience.
14. Agencies that conduct hearings should work with the General Services Administration (GSA) in procuring and planning facilities that will best accommodate the needs of VTC hearings.

### *Development of a Video Conferencing Hearings Handbook*

15. The Office of the Chairman of the Administrative Conference of the United States should create a handbook on the use of VTC in hearings and related proceedings that will be updated from time to time as technology changes. The handbook should reflect consultation with GSA and other agencies with VTC hearings expertise. It should be made publicly accessible online to agencies, and include specific guidance regarding equipment, conditions, training that meets industry standards, and methods for collecting feedback from participants.



**APPENDIX F**  
**ADMINISTRATIVE CONFERENCE**  
**Recommendation 86-3**

**Agencies' Use of Alternative Means  
of Dispute Resolution**

**Adopted June 20, 1986**

Federal agencies now decide hundreds of thousands of cases annually—far more than do federal courts. The formality, costs and delays incurred in administrative proceedings have steadily increased, and in some cases now approach those of courts. Many agencies act pursuant to procedures that waste litigants' time and society's resources and whose formality can reduce the chances for consensual resolution. The recent trend toward elaborate procedures has in many cases imposed safeguards whose transaction costs, to agencies and the public in general, can substantially outweigh their benefits.

A comprehensive solution to reducing these burdens is to identify instances where simplification is appropriate. This will require a careful review of individual agency programs and the disputes they involve. A more immediate step is for agencies to adopt alternative means of dispute resolution, typically referred to as "ADR," or to encourage regulated parties to develop their own mechanisms to resolve disputes that would otherwise be handled by agencies themselves. ADR methods have been employed with success in the private sector for many years, and when used in appropriate circumstances, have yielded decisions that are faster, cheaper, more accurate or otherwise more acceptable, and less contentious. These processes include voluntary arbitration, mandatory arbitration, factfinding, minitrials, mediation, facilitating, convening and negotiation. (A brief lexicon defining these terms is included in the Appendix to this recommendation.) The same forces that make ADR methods attractive to private disputants can render them useful in cases which a federal agency decides, or to which the government is a party. For these methods to be effective, however, some aspects of current administrative procedure may require modification.

It is premature to prescribe detailed procedures for a myriad of government activities since the best procedure for a program, or even an individual dispute, must grow out of its own needs. These recommendations therefore seek to promote increased, and thoughtful, use of ADR methods. They are but a first step, and ideally should be supplemented with further empirical research, consultation with experts and interested parties, and more specific Conference proposals.

## RECOMMENDATION

### *A. General*

1. Administrative agencies, where not inconsistent with statutory authority, should adopt the alternative methods discussed in this recommendation for resolving a broad range of issues. These include many matters that arise as a part of formal or informal adjudication, in rulemaking,<sup>1</sup> in issuing or revoking permits, and in settling disputes, including litigation brought by or against the government. Until more experience has been developed with respect to their use in the administrative process, the procedures should generally be offered as a voluntary, alternative means to resolve the controversy.

2. Congress and the courts should not inhibit agency uses of the ADR techniques mentioned herein by requiring formality where it is inappropriate.

### *B. Voluntary Arbitration*

3. Congress should act to permit executive branch officials to agree to binding arbitration to resolve controversies. This legislation should authorize any executive official who has authority to settle controversies on behalf of the government to agree to arbitration, either prior to the time a dispute may arise or after a controversy has matured, subject to whatever may be the statutory authority of the Comptroller General to determine whether payment of public funds is warranted by applicable law and available appropriations.

4. Congress should authorize agencies to adopt arbitration procedures to resolve matters that would otherwise be decided by the agency pursuant to the Administrative Procedure Act ("APA") or other formal procedures. These procedures should provide that—

(a) All parties to the dispute must knowingly consent to use the arbitration procedures, either before or after a dispute has arisen.

(b) The parties have some role in the selection of arbitrators, whether by actual selection, by ranking those on a list of qualified arbitrators, or by striking individuals from such a list.

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1. See ACUS Recommendations 82-4 and 85-5, "Procedures for Negotiating Proposed Regulations," 1 CFR 305.82-4 and 305.85-5.



- (c) Arbitrators need not be permanent government employees, but may be individuals retained by the parties or the government for the purpose of arbitrating the matter.
- (d) Agency review of the arbitral award be pursuant to the standards for vacating awards under the U.S. Arbitration Act, 9 U.S.C. 10, unless the award does not become an agency order or the agency does not have any right of review.
- (e) The award include a brief, informal discussion of its factual and legal basis, but neither formal findings of fact nor conclusions of law.
- (f) Any judicial review be pursuant to the limited scope-of-review provisions of the U.S. Arbitration Act, rather than the broader standards of the APA.
- (g) The arbitral award be enforced pursuant to the U.S. Arbitration Act, but is without precedential effect for any purpose.

5. Factors bearing on agency use of arbitration are:

- (a) Arbitration is likely to be appropriate where—
  - (1) The benefits that are likely to be gained from such a proceeding outweigh the probable delay or costs required by a full trial-type hearing.
  - (2) The norms which will be used to resolve the issues raised have already been established by statute, precedent or rule, or the parties explicitly desire the arbitrator to make a decision based on some general standard, such as "justice under the circumstances," without regard to a prevailing norm.
  - (3) Having a decisionmaker with technical expertise would facilitate the resolution of the matter.
  - (4) The parties desire privacy, and agency records subject to disclosure under the Freedom of Information Act are not involved.
- (b) Arbitration is likely to be inappropriate where—
  - (1) A definitive or authoritative resolution of the matter is required or desired for its precedential value.
  - (2) Maintaining established norms or policies is of special importance.
  - (3) The case significantly affects persons who are not parties to the proceeding.
  - (4) A full public record of the proceeding is important.
  - (5) The case involves significant decisions as to government policy.

6. Agency officials, and particularly regional or other officials directly responsible for implementing an arbitration or other ADR procedure, should make persistent efforts to increase potential parties' awareness and understanding of these procedures.

### *C. Mandatory Arbitration*

7. Arbitration is not in all instances an adequate substitute for a trial-type hearing pursuant to the APA or for civil litigation. Hence, Congress should consider

mandatory arbitration only where the advantages of such a proceeding are clearly outweighed by the need to (a) save the time or transaction costs involved or (b) have a technical expert resolve the issues.

8. Mandatory arbitration is likely to be appropriate only where the matters to be resolved—

- (a) Are not intended to have precedential effect other than the resolution of the specific dispute, except that the awards may be published or indexed as informal guidance;
- (b) May be resolved through reference to an ascertainable norm such as statute, rule or custom;<sup>2</sup>
- (c) Involve disputes between private parties; and
- (d) Do not involve the establishment or implementation of major new policies or precedents.

9. Where Congress mandates arbitration as the exclusive means to resolve a dispute, it should provide the same procedures as in Paragraph 4, above.

#### *D. Settlement Techniques*

10. In many situations, agencies already have the authority to use techniques to achieve dispute settlements. Agencies should use this authority by routinely taking advantage of opportunities to:

- (a) Explicitly provide for the use of mediation.
- (b) Provide for the use of a settlement judge or other neutral agency official to aid the parties in reaching agreement.<sup>3</sup> These persons might, for instance, advise the parties as to the likely outcome should they fail to reach settlement.
- (c) Implement agreements among the parties in interest, provided that some means have been employed to identify other interested persons and afford them an opportunity to participate.
- (d) Provide for the use of minitrials.
- (e) Develop criteria that will help guide the negotiation of settlements.<sup>4</sup>

11. Agencies should apply the criteria developed in ACUS Recommendations 82-4 and 85-5, pertaining to negotiated rulemaking,<sup>5</sup> in deciding when it may be

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2. For example, the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136 *et seq.*, provides for mandatory arbitration with respect to the amount of compensation one company must pay another and yet provides no guidance with respect to the criteria to be used to make these decisions. The program has engendered considerable controversy and litigation.

3. *See, e.g.*, the procedure used by the Federal Energy Regulatory Commission.

4. *See* ACUS Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties," 1 CFR 305.79-3.

5. *See also* ACUS Recommendation 84-4, "Negotiated Cleanup of Hazardous Waste Sites Under CERCLA," 1 CFR 305.84-4.

appropriate to negotiate, mediate or use similar ADR techniques to resolve any contested issue involving an agency. Settlement procedures may not be appropriate for decisions on some matters involving major public policy issues or having an impact on persons who are not parties, unless notice and comment procedures are used.

12. Factors bearing on agency use of minitrials as a settlement technique are:

(a) Minitrials are likely to be appropriate where—

(1) The dispute is at a stage where substantial additional litigation costs, such as for discovery, are anticipated.

(2) The matter is worth an amount sufficient to justify the senior executive time required to complete the process.

(3) The issues involved include highly technical mixed questions of law and fact.

(4) The matter involves materials that the government or other parties believe should not be revealed.

(b) Minitrials are likely to be inappropriate where—

(1) Witness credibility is of critical importance.

(2) The issues may be resolved largely through reference to an ascertainable norm.

(3) Major questions of public policy are involved.

13. Proposed agency settlements are frequently subjected to multiple layers of intra-agency or other review and therefore may subsequently be revised. This uncertainty may discourage other parties from negotiating with federal officials. To encourage settlement negotiations, agencies should provide means by which all appropriate agency decisionmakers are involved in, or regularly apprised of, the course of major negotiations; agencies should also endeavor to streamline intra-agency review of settlements. These efforts should serve to ensure that the concerns of interested segments of the agency are reflected as early as possible in settlement negotiations, and to reduce the likelihood that tentative settlements will be upset.

14. In cases where agencies must balance competing public policy interests, they should adopt techniques to enable officials to assess, in as objective a fashion as possible, the merits of a proposed settlement. These efforts might include establishing a small review panel of senior officials or neutral advisors, using a minitrial, publishing the proposed settlement in the Federal Register for comment, securing tentative approval of the settlement by the agency head or other senior official, or employing other means to ensure the integrity of the decision.

15. Some agency lawyers, administrative law judges, and other agency decisionmakers should be trained in arbitration, negotiation, mediation, and similar ADR skills, so they can (a) be alert to take advantage of alternatives or (b) hear and resolve other disputes involving their own or another agency.

### *E. Private Sector Dispute Mechanisms*

16. Agencies should review the areas that they regulate to determine the potential for the establishment and use of dispute resolution mechanisms by private organizations as an alternative to direct agency action. Where such use is appropriate, the agency should—

- (a) Specify minimal procedures that will be acceptable to qualify as an approved dispute resolution mechanism.
- (b) Oversee the general operation of the process; ordinarily, it should not review individual decisions.
- (c) Tailor its requirements to provide an organization with incentives to establish such a program, such as forestalling other regulatory action, while ensuring that other interested parties view the forum as fair and effective.

### *Appendix—Lexicon of Alternative Means of Dispute Resolution*

*Arbitration.* Arbitration is closely akin to adjudication in that a neutral third party decides the submitted issue after reviewing evidence and hearing argument from the parties. It may be binding on the parties, either through agreement or operation of law, or it may be non-binding in that the decision is only advisory. Arbitration may be voluntary, where the parties agree to resolve the issues by means of arbitration, or it may be mandatory, where the process is the exclusive means provided.

*Factfinding.* A "factfinding" proceeding entails the appointment of a person or group with technical expertise in the subject matter to evaluate the matter presented and file a report establishing the "facts." The factfinder is not authorized to resolve policy issues. Following the findings, the parties may then negotiate a settlement, hold further proceedings, or conduct more research.

*Minitrial.* A minitrial is a structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case. A neutral adviser sometimes presides over the proceeding and will render an advisory opinion if asked to do so. Following the presentations, the officials seek to negotiate a settlement.

*Mediation.* Mediation involves a neutral third party to assist the parties in negotiating an agreement. The mediator has no independent authority and does not render a decision; any decision must be reached by the parties themselves.

*Facilitating.* Facilitating helps parties reach a decision or a satisfactory resolution of the matter to be addressed. While often used interchangeably with "mediator," a facilitator generally conducts meetings and coordinates discussions, but does not become as involved in the substantive issues as does a mediator.

*Convening.* Convening is a technique that helps identify issues in controversy and affected interests. The convenor is generally called upon to determine whether direct negotiations among the parties would be a suitable means of resolving the issues, and if so, to bring the parties together for that purpose. Convening has proved valuable in negotiated rulemaking.

*Negotiation.* Negotiation is simply communication among people or parties in an effort to reach an agreement. It is used so routinely that it is frequently overlooked as a specific means of resolving disputes. In the administrative context, it means procedures and processes for settling matters that would otherwise be resolved by more formal means.



**APPENDIX G**  
**ADMINISTRATIVE CONFERENCE**  
**Recommendation 86-2**

**Use of Federal Rules of Evidence in  
Federal Agency Adjudications**

**Adopted June 20, 1986**

Federal agencies have adopted hundreds of different sets of rules governing admission of evidence in formal adjudications. While those rules vary in their details, they can be placed in three general categories: (1) Rules that reflect the wide open standard of APA section 556(d); (2) rules that require presiding officers to apply the Federal Rules of Evidence (FRE) "so far as practicable"; and (3) rules that permit presiding officers to use the FRE as a source of guidance in making evidentiary rulings. In a few instances, Congress has required the agency to adopt a standard that refers to the FRE; in other cases the agency voluntarily adopted such a standard.

Presiding officers vary substantially in the extent of their use of the FRE as a source of guidance in making evidentiary rulings. Presiding officers at agencies whose rules refer to the FRE rely on the FRE as a source of guidance much more frequently than presiding officers at agencies whose rules reflect only the APA standard. Presiding officers at agencies with rules that refer to the FRE are more satisfied with the rule they apply than presiding officers at agencies with rules that reflect only the APA standard. The relative dissatisfaction expressed by many presiding officers in the latter group seems to be based on their perception that the APA standard does not accord them sufficient discretion to engage in responsible case management. Because they perceive that they do not have the discretion to exclude evidence they consider clearly unreliable, they must devote valuable hearing and opinion-writing time to reception and consideration of such evidence.

Because the APA evidentiary standard is broadly permissive, courts routinely decline to reverse agencies that have adopted this standard on the basis of alleged erroneous admission of evidence. However, courts seem confused by the FRE "so far as practicable" evidence standard. Some courts apparently interpret it to accord near

total discretion to agencies. Other courts interpret it as a mandate to comply with the FRE except in unusual circumstances. Still others apparently view the standard as a mandate to admit evidence inadmissible under the FRE except when unusual circumstances require application of the FRE.

Independent of the evidentiary standard adopted by the agency, reviewing courts apply three general rules: (1) An agency must respect evidentiary privileges; (2) an agency can be reversed if it declines to admit evidence admissible under the FRE; and (3) an agency will be reversed if it bases a finding on unreliable evidence.

The FRE “so far as practicable” standard has four significant disadvantages: (1) Courts seem confused as to what it means or how to enforce it; (2) instructing presiding officers to exclude evidence based on the standard forces them to undertake a difficult and hazardous task; (3) excluding evidence on the basis that it is inadmissible in a jury trial is totally unnecessary to insure that agencies act only on the basis of reliable evidence; and (4) agencies, like other experts, should be permitted to rely on classes of evidence broader than those that can be considered by lay jurors. Yet the APA standard alone has the disadvantage that presiding officers perceive it as an inadequate tool for effective case management, despite the fact that it permits presiding officers to use relevant parts of the FRE and scholarly texts as sources of general guidance in making evidentiary rulings in formal adversarial adjudications. Federal Rule 403 can be particularly valuable to presiding officers in discharging their case management responsibilities. That rule authorizes exclusion of evidence the probative value of which is substantially outweighed by other factors, including the consideration of undue delay. In addition, under any set of evidentiary rules, an agency can assist presiding officers in their evidentiary decision making by specifying, insofar as they can be foreseen, the factual issues the agency considers material to the resolution of various classes of adjudications and the types of evidence it considers reliable and probative with respect to recurring factual issues.

## RECOMMENDATION

1. Congress should not require agencies to apply the Federal Rules of Evidence, with or without the qualification “so far as practicable,” to limit the discretion of presiding officers to admit evidence in formal adjudications.<sup>1</sup>

2. Agencies should adopt evidentiary regulations applicable to formal adversarial adjudications that clearly confer on presiding officers discretion to exclude unreliable evidence and to use the weighted balancing test in Rule 403 of the Federal Rules of Evidence, which allows exclusion of evidence the probative value of which is substan-

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1. The term “formal adjudications” refers to adjudications required by statute to be determined on the record after opportunity for an agency hearing in accordance with the Administrative Procedure Act, U.S.C. 554, 556 and 557, and also includes agency adjudications which by regulation or by agency practice are conducted in conformance with these provisions. The recommendation does not apply to nonadversarial hearings, e.g., many Social Security disability proceedings.



tially outweighed by other factors, including its potential for undue consumption of time.

3. To facilitate the efficient and fair management of the proceeding, when otherwise appropriate, an agency should announce in advance of a formal adjudication as many of the factual issues as the agency can foresee to be material to the resolution of the adjudication.



# APPENDIX H

## ADMINISTRATIVE CONFERENCE

### Recommendation 86-1

## Nonlawyer Assistance and Representation

Adopted June 20, 1986

A substantial number of individuals involved in Federal “mass justice”<sup>1</sup> agency proceedings need and desire assistance<sup>2</sup> in filling out forms, filing claims, and appearing in agency proceedings, but are unable to afford assistance or representation by lawyers. A lack of assistance or representation reduces the probability that an individual will obtain favorable results in dealing with an agency. Further, unassisted individuals are more likely than those who are assisted to cause a loss of agency efficiency by requiring more time, effort, and help from the agency.

Federal agencies currently provide help to persons involved in agency proceedings through information given by agency personnel and through funding of legal aid programs and approval or payment of attorney fee awards. This recommendation does not deal with whether government aid may be needed for persons who cannot afford any form of assistance. This recommendation focuses on the potential for increasing the availability of assistance by nonlawyers. Federal agency experience and statistics indicate that qualified persons who are not lawyers generally are capable of providing effective assistance to individuals in mass justice agency proceedings.

While it is recognized that no established privilege protects the confidentiality of communications between nonlawyers and their clients, agencies may adopt some

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1. The term “mass justice” is used here to categorize an agency program in which a large number of individual claims or disputes involving personal, family, or personal business matters come before an agency; e.g., the Old Age Survivors and Disability Insurance program administered by the Social Security Administration. To the extent that principles incorporated in this Recommendation may be applicable to other programs in which nonlawyer assistance or representation is (or could be made) available, the Conference recommends the consideration of these principles by the agencies involved.

2. The term “assistance” is used here to indicate all forms of help, including representation, that may be beneficial to a person in dealing with an agency. The term “representation” is used whenever the most likely form of assistance involves such activities as making an appearance, signing papers, or speaking for the assisted individual. Neither term is meant to be exclusive.

protections covering their own proceedings. The possible limitation of such protections does not outweigh the benefits of increased assistance and representation.

Agency practices do not currently maximize the potential for free choice of assistance, and, in some instances, may hinder the availability of qualified, low-cost assistance by nonlawyers. Agencies should take the steps necessary to encourage—as well as eliminate inappropriate barriers to—nonlawyer assistance and representation.

Agencies generally have the authority to authorize any person to act as a representative for another person having business with the agency. Where an agency intends to permit nonlawyers to assist individuals in agency matters, the agency needs to state that intention affirmatively in its regulations for two reasons. First, an affirmative statement is essential, under existing case law, to protect a nonlawyer from prosecution—under state “unauthorized practice of law” prohibitions—for assisting and advising a Federal client preparatory to commencing agency proceedings, as well as for advertising the availability of services. Second, an affirmative agency position is needed to overcome a common assumption of nonlawyers that agencies welcome only lawyers as representatives, and thereby to encourage an increase in the provision of nonlawyer services.

## **RECOMMENDATION**

1. The Social Security Administration, the Immigration and Naturalization Service, the Veterans Administration, the Internal Revenue Service, and other Federal agencies that deal with a significant number of unassisted individuals who have personal, family, or personal business claims or disputes before the agency, should review their regulations regarding assistance and representation. The review should be directed toward the goals of authorizing increased assistance by nonlawyers, and of maximizing the potential for free choice of representative to the fullest extent allowed by law.

2. If an agency determines that some subject areas or types of its proceedings are so complex or specialized that only specially qualified persons can adequately provide representation, then the agency may need to adopt appropriate measures to ensure that nonlawyers meet specific eligibility criteria at some or all stages of representation. Agencies should tailor any eligibility requirements so as not to exclude nonlawyers (including nonlawyers who charge fees) as a class, if there are nonlawyers who, by reason of their knowledge, experience, training, or other qualification, can adequately provide assistance or representation.

3. Agencies should declare unambiguously their intention to authorize assistance and representation by nonlawyers meeting agency criteria. Where a declaration by an agency may have the effect of preempting state law (such as “unauthorized practice of law” prohibitions), then the agency should employ the procedures set out in Recommendation 84-5 with regard to notification of and cooperation with the states and other affected groups.

4. Agencies should review their rules of practice that deal with attorney conduct (such as negligence, fee gouging, fraud, misrepresentation, and representation when there is a conflict of interest) to ensure that similar rules are made applicable to non-lawyers as appropriate, and should establish effective agency procedures for enforcing those rules of practice and for receiving complaints from the affected public.



# APPENDIX I

## Administrative Conference

### Recommendation 70-4

## Discovery in Agency Adjudication

Adopted June 2-3, 1970

Prehearing discovery in agency adjudication insures that the parties to the proceeding have access to all relevant, unprivileged information prior to the hearing. Its primary objectives include the more expeditious conduct of the hearing itself, the encouragement of settlement between the parties, and greater fairness in adjudication. Agencies that conduct adjudicatory proceedings generally enjoy broad investigatory powers, and fairness requires that private parties have equal access to all relevant, unprivileged information at some point prior to the hearing.

### RECOMMENDATION

It is therefore recommended that each agency recognize the following minimum standards for discovery in adjudicatory proceedings subject to sections 5, 7 and 8 of the Administrative Procedure Act, now codified as 5 U.S.C. 554, 556 and 557. Individual agencies may permit additional discovery where appropriate and may tailor the recommended standards to meet the needs of particular types of proceedings where special or less elaborate discovery procedures will accomplish the same basic objectives or where the protective measures here recommended will be inadequate to achieve the ends sought. Each agency should undertake to train its hearing examiners in the application of the rules it promulgates to implement these standards. This training should draw upon the experience of other agencies, the Federal Courts, private practitioners, and bar associations.

The recommended minimum standards include the following procedures:

1. *Prehearing Conferences.* The presiding officer should have the authority to hold one or more prehearing conferences during the course of the proceeding on his own motion or at the request of a party to the proceeding. The presiding officer should normally hold at least one prehearing conference in proceedings where the issues are

complex or where it appears likely that the hearing will last a considerable period of time. The presiding officer at a prehearing conference should have the authority to direct the parties to exchange their evidentiary exhibits and witness lists prior to the hearing. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, their evidentiary exhibits and witness lists.

2. *Depositions.* A party to the proceeding should be able to take depositions of witnesses upon oral examination or written questions for purposes of discovering relevant, unprivileged information, subject to the following conditions:

(1) the taking of depositions should normally be deferred until there has been at least one prehearing conference;

(2) the party seeking to take a deposition should apply to the presiding officer for an order to do so;

(3) the party seeking to take a deposition should serve copies of the application on the other party or parties to the proceeding, who should be given an opportunity, along with the deponent, to notify the presiding officer of any objections to the taking of the deposition;

(4) the presiding officer should not grant an application to take a deposition if he finds that the taking of the deposition would result in undue delay;

(5) the presiding officer should otherwise grant an application to take a deposition unless he finds that there is not good cause for doing so; and

(6) the deposing of an agency employee should only be allowed upon an order of the presiding officer based on a specific finding that the party applying to take the deposition is seeking significant, unprivileged information not discoverable by alternative means. Any such order should be subject to an interlocutory appeal to the agency.

An order to take a deposition should be enforceable through the issuance of a subpoena ad testificandum.

3. *Witnesses— (a) Prior Statements.* At the prehearing conference or at some other reasonable time prior to the hearing the attorney or employee appearing on behalf of the agency in the proceeding should make available to the other parties to the proceeding any prior statements of agency witnesses which are in the possession of the agency or obtainable by it from any other Federal agency and which relate to the subject matter of the expected testimony. "Statement" is defined to include only a written statement signed or adopted by the witness or a recording or transcription which is a substantially verbatim recital of an oral statement made by the witness to an agent of the Federal government.

(b) *Narrative Summaries of Expected Testimony.* At the prehearing conference or at some other reasonable time prior to the hearing each party to the proceeding should make available to the other parties to the proceeding the names of the witnesses he expects to call and a narrative summary of their expected testimony. The attorney or employee appearing on behalf of the agency in the proceeding should have the



authority to designate any prior statement or statements of an agency witness which he makes available to the other parties under Recommendation 3 (a) as all or part of the narrative summary of that witness' expected testimony. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, the list of names of the witnesses they plan to call and the narrative summaries of the expected testimony of those witnesses.

4. *Written Interrogatories to Parties—(a) Availability.* A party to the proceeding should be able to serve written interrogatories upon any other party for purposes of discovering relevant, unprivileged information. A party served with interrogatories should be able, before he must answer the interrogatories, to apply to the presiding officer for the holding of a prehearing conference for the mutual exchange of evidentiary exhibits and other information. Each interrogatory which requests information not previously supplied at a prehearing conference should be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection should be stated in lieu of answer. The party upon whom the interrogatories have been served should serve a copy of the answers and objections within a reasonable time upon the party submitting the interrogatories. The party submitting the interrogatories may move the presiding officer for an order compelling an answer to an interrogatory or interrogatories to which there has been an objection or other failure to answer.

(b) *Interrogatories Directed to the Agency.* Each agency should designate an appropriate official on whom other parties to the proceeding may serve written interrogatories directed to the agency. That official should arrange for agency personnel with knowledge of the facts to answer and sign the interrogatories on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to interrogatories served upon the agency. Interrogatories directed to the agency which seek information available only from the agency head, member, or members should only be allowed upon an order of the agency based on a specific finding that the interrogating party is seeking significant, unprivileged information not discoverable by alternative means.

5. *Requests for Admissions—(a) Availability.* A party to the proceeding should be able to serve upon any other party a written request for the admission, for purposes of the pending proceeding, of any relevant, unprivileged facts, including the genuineness of any document described in the request.

(b) *Requests Directed to the Agency.* Each agency should designate an appropriate official on whom other parties to the proceeding may serve requests for admissions directed to the agency. That official should arrange for agency personnel with knowledge of the facts to respond to the requests on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to requests for admissions served upon the agency. Requests directed to the agency which seek admissions obtainable only from

the agency head, member or members should only be allowed upon an order of the agency based on a specific finding that the requesting party is seeking significant, unprivileged information not discoverable by alternative means.

6. *Production of Documents and Tangible Things*—(a) *From Non-Parties*. A party to the proceeding should be able to obtain in accordance with agency rules a subpoena duces tecum requiring a non-party to produce relevant designated documents and tangible things, not privileged, at a prehearing conference, at the taking of the non-party's deposition, or at any other specific time and place designated by the issuing officer.

(b) *From Parties*. A party to the proceeding should be able to apply to the presiding officer for an order requiring any other party to produce and to make available for inspection, copying or photographing, at a prehearing conference or other specific time and place, any designated documents and tangible things, not privileged, which constitute or contain relevant evidence. The party seeking production should serve copies of the application on the other party or parties to the proceeding, who should be given an opportunity to notify the presiding officer of any objections. The presiding officer should order the production of such designated documents and tangible things unless he finds that there is not good cause for doing so.

(c) *From the Agency*. For the purposes of paragraph 6, the agency conducting the proceeding should be considered a party to the proceeding whether or not the agency staff participates as a party to the proceeding.

7. *Role of the Presiding Officer*—(a) *Control over Discovery*. The presiding officer should have the authority to impose schedules on the parties to the proceeding specifying the periods of time during which the parties may pursue each means of discovery available to them under the rules of the agency. Such schedules and time periods should be set with a view to accelerating disposition of the case to the fullest extent consistent with fairness.

(b) *Interlocutory Appeals*. Except as provided by paragraph 2 (6) above, an interlocutory appeal from a ruling of the presiding officer on discovery should be allowed only upon certification by the presiding officer that the ruling involves an important question of law or policy which should be resolved at that time by the appropriate review authority. Notwithstanding the presiding officer's certification, the review authority should have the authority to dismiss summarily the interlocutory appeal if it should appear that the certification was improvident. An interlocutory appeal should not result in a stay of the proceedings except in extraordinary circumstances.

8. *Protective Orders*—(a) *Authority of Presiding Officer in General*. The presiding officer should have the authority, upon motion by a party or by the person from whom discovery is sought, and for good cause shown, to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the

discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the presiding officer; (6) that a deposition after being sealed be opened only by order of the presiding officer; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

(b) *Names of Witnesses.* The presiding officer should have the authority upon motion by a party or other person, and for good cause shown, by order (a) to restrict or defer disclosure by a party of the name of a witness, a narrative summary of the expected testimony of a witness or, in the case of an agency witness, any prior statement of the witness, and (b) to prescribe other appropriate measures to protect a witness. Any party affected by any such action should have an adequate opportunity, once he learns the name of a witness and obtains the narrative summary of his expected testimony or, in the case of an agency witness, his prior statement or statements, to prepare for cross-examination and for the presentation of his case.

(c) *In Camera Proceedings.* The presiding officer should have the authority to permit a party or person seeking a protective order to make all or part of the showing of good cause in camera. A record should be made of such in camera proceedings. If the presiding officer enters a protective order following a showing in camera, the record of such showing should be sealed and preserved and made available to the agency or court in the event of an appeal.

9. *Subpoenas.* The presiding officer should have the power to issue subpoenas ad testificandum and duces tecum at any time during the course of the proceeding. Agencies affected by this Recommendation that do not have the statutory authority to issue subpoenas should seek to obtain any necessary authority from the Congress.

Note: Recommendation No. 71-1 supersedes section 5 of Recommendation No. 70-3 and paragraphs 2 (6) and 7 (b) of Recommendation No. 70-4, adopted June 2-3, 1970, insofar as they deal with interlocutory appeals.







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