# BEST PRACTICES FOR EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT

*Michael Asimow*[*]

## INTRODUCTION

Federal administrative agencies conduct a vast number of evidentiary hearings outside the Administrative Procedure Act ("APA").[1] These non-APA evidentiary hearings have often been described as "informal adjudication" and consigned to a black hole, perhaps guarded by the motto "abandon hope, all ye who enter here." The unfortunate victims of such administrative schemes can rely only on a few meager provisions in sections 555 and 558 of the APA, the barebones and sporadic protection of constitutional due process, and whatever procedural crumbs might be tossed to them by agency-specific statutes.

What is wrong with this picture? Quite a lot. In fact, it is almost completely false. Evidentiary hearings outside the APA are *not* "informal adjudication." Indeed, many of them are quite as formal, and often more formal, than APA hearings. They are surrounded by ample procedural protections provided by regulations and manuals. These regulations are an excellent example of what is known as "internal" administrative law.[2] Non-APA evidentiary hearings are different from APA hearings only because they are presided over by administrative judges ("AJs") rather than administrative law judges ("ALJs").

The threefold mission of this Article is to persuade the reader to stop calling non-APA evidentiary hearings "informal adjudication," to bring into focus the rich network of protections for such hearings provided by procedural regulations, and to provide a catalog of best practices for such regulations.

---

[*] Senior Fellow, Santa Clara Law School; Professor of Law Emeritus, UCLA School of Law. asimow@law.ucla.edu. J.D. 1964, Berkeley School of Law; B.S. 1961, UCLA. I wish to acknowledge the unwavering support of Paul Verkuil, former chair of the Administrative Conference of the United States ("ACUS"), and acting chair Matt Weiner, as well as former ACUS staff members Amber Williams and Frank Massaro. A large number of present and former federal agency staff members assisted me with this research. They have my heartfelt appreciation. They are too numerous to name here, and many requested anonymity.

[1] For the numbers, see *infra* Table 2. *See also* 5 U.S.C. §§ 554, 556, 557 (2012).

[2] On the subject of internal administrative law, see generally Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017); Nicholas R. Parrillo, *Introduction* to ADMINISTRATIVE LAW FROM THE INSIDE OUT 1–38 (Nicolas R. Parrillo ed. 2017).

This Article originated in a study I performed for the Administrative Conference of the United States ("ACUS").[3] In preparation for that study, ACUS assembled a database of information about most federal evidentiary hearings.[4] The study led to ACUS Recommendation 2016-4, concerning best practices for non-APA evidentiary hearings (what will be called "Type B adjudication" in this Article).[5] This work turned into a book entitled *Federal Administrative Adjudication Outside the Administrative Procedure Act* (the "*Sourcebook*") which was published by ACUS in September 2019.[6] The book provides a more detailed treatment of the best-practice recommendations that are summarized in Part III of this Article. The book also contains a lengthy appendix setting forth data about the practices of a dozen agencies that conduct Type B evidentiary hearings. Finally, the book contains a chapter about true informal adjudication (what will be called "Type C adjudication") and a tentative approach to defining best practices for that sector.[7]

## I. TYPE B ADJUDICATION

Part I of this Article introduces Type B adjudication and defends the proposition that it should not be referred to as "informal adjudication." This Part also provides some essential definitions that limit the scope of its recommendations. Finally, it summarizes prior and current research on evidentiary hearings outside the APA.

---

[3] MICHAEL ASIMOW, ADMIN. CONFERENCE OF THE U.S., EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (2016) [hereinafter ASIMOW, EVIDENTIARY HEARINGS], https://acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report.

[4] Construction of this database was jointly funded by ACUS and Stanford Law School. ACUS staff did enormous amounts of work gathering, inputting, and verifying information in the database, which I gratefully acknowledge. I also express my thanks to Stanford Law School Dean Elizabeth Magill for helping to fund the database and to database professionals Irina Zachs and Alex Shor for their tremendous technical efforts in building it. The database is accessible to the public at: STANFORD UNIVERSITY, *Adjudication Research: Joint Project of ACUS and Stanford Law School*, https://acus.law.stanford.edu (last visited Jan. 21, 2019).

[5] Recommendation 2016-4, Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,312, 94,314–15 (Admin. Conference of U.S. Dec. 23, 2016) [hereinafter ACUS Recommendation 2016-4].

[6] MICHAEL ASIMOW, ADMIN. CONFERENCE OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (2019) [hereinafter SOURCEBOOK], https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20-%20Final.pdf. Material from the *Sourcebook* is used in this Article with the permission of ACUS.

[7] *Id.* ch. 5.

### A. *Type B Adjudication as Formal Adjudication*

In this Article, the term "Type A adjudication" refers to adjudicatory systems governed by the formal adjudication sections of the federal APA.[8] With a few exceptions, Type A hearings are presided over by an administrative law judge.[9] 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).[10]

The term "Type B adjudication" refers to systems of federal agency adjudication that employ *evidentiary hearings* required by statutes, regulations, or executive orders, but are *not* governed by the formal adjudication provisions of the APA. Administrative judges (or occasionally the agency heads), rather than ALJs, preside over evidentiary hearings in Type B adjudication.

The term "Type C adjudication" means adjudication by federal administrative agencies that does not occur through legally required evidentiary hearings. Type C adjudication is true "informal adjudication."[11]

At this point, I freely concede that the title of this Article, *Best Practices for Evidentiary Hearings Outside the Administrative Procedure Act*, is not precisely accurate. The Article concerns Type B adjudication, which by definition is not subject to the formal adjudication provisions of the APA.[12] However, Type B adjudication *is* subject to sections 555 and 558 of the APA as well as the judicial review provisions of the APA.[13] A more precise title would have been too cumbersome. So, my apologies to readers who are annoyed by the imprecision.

As mentioned above, the hearings in schemes of Type B adjudication are not "informal," but contain most or all of the same formal elements and protections for private parties as Type A adjudication (aside from the requirement that ALJs preside).[14] Indeed, in some cases, Type B adjudication is even

---

[8] 5 U.S.C. §§ 554, 556, 557 (2012). The APA is cited hereinafter without the prefatory "5 U.S.C." or the succeeding year parenthetical.

[9] APA § 556(b)(3).

[10] Under a 2018 Executive Order, agencies will have much greater control over the hiring of ALJs than they had in the past. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018).

[11] SOURCEBOOK, chapter 5 discusses many examples of Type C adjudication; itemizes the protection of due process, APA § 555, and APA § 558; and contains a set of tentative best practices. *See* SOURCEBOOK, *supra* note 6, at 89–103.

[12] That is, APA §§ 554, 556, and 557, as well as to the various provisions protecting the independence of ALJs. *See, e.g.*, 5 U.S.C. § 7521.

[13] APA §§ 555 (ancillary matters); 558 (imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses); 701–06 (judicial review).

[14] *See* Recommendation 2017-1, Adjudication Materials on Agency Websites, 82 Fed. Reg. 31,039, 31,039 (Admin. Conference of U.S. 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. *Id.* Its recommendations for Type A and Type B adjudication are the same. *Id.* The underlying report, however, refers to Type B proceedings as "semi-formal." DANIEL J. SHEFFNER, ADMIN.

*more* formal than Type A. For example, proceedings conducted by the Patent Trial and Appeal Board are based on discovery under the Federal Rules of Civil Procedure and employ the Federal Rules of Evidence.[15] The direct testimony and cross-examination of witnesses both occur in the form of depositions.[16] These proceedings are as formal as those conducted in patent cases before federal district courts except that they do not involve juries.[17]

In contrast, 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 Type B and Type C adjudication together as "informal adjudication,"[18] 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. 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.[19] Moreover, 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 Part III. In contrast, schemes of Type C adjudication, which are vastly more numerous than Type B schemes, lack any unifying procedural element.

The U.S. Supreme Court has made it clear that Type B adjudication is properly described as formal rather than informal adjudication. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[20] reviewing courts must accept a permissible and reasonable agency interpretation of an ambiguous statute. *Chevron* deference applies to statutory interpretations occurring in adjudication as well as rulemaking.[21] In *United States v. Mead Corp.*,[22] 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

---

CONFERENCE OF THE U.S., ADJUDICATION MATERIALS ON AGENCY WEBSITES 2–3 (2017), https://acus.gov/report/adjudication-materials-agency-websites-final-report-0.

15 37 C.F.R. §§ 2.116(a), 2.122(a), 42.62 (2019).

16 *Id.* § 42.53.

17 *Id.* § 42.62.

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

19 *See* discussion at *supra* note 2.

20 467 U.S. 837 (1984).

21 *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 230 (2001).

22 533 U.S. 218 (2001).

> 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*.[23]

The term "formal adjudication," as used by the Supreme Court in *Mead*, clearly refers to Type B as well as Type A adjudication. For example, the Board of Immigration Appeals ("BIA") conducts Type B adjudication. Numerous BIA decisions have qualified for *Chevron* deference.[24]

## B. *Definitions*

This Section introduces several definitions that will be helpful in reading the balance of this Article.

### 1. Adjudication

The term "adjudication" (or "administrative adjudication") means (i) a decision by federal government officials, (ii) made through an administrative process, (iii) to resolve a claim or dispute between a private party and the government or between two private parties, (iv) arising out of a government program.[25]

This definition excludes adjudication by state or local officials even in cases where the adjudication arises under a federal program and is governed by federal regulations. It also excludes adjudicatory decisions by nongovernmental federal contractors.

The definition of "adjudication" excludes a broad category of federal decision-making that might generally be called "policy implementation" and which is sometimes referred to as "informal adjudication."[26] Policy implementation decisions are not adjudication because they do not resolve a claim or dispute between the government and a private party (or between two

---

23 *Id.* at 230 (emphasis added) (citations and footnote omitted).

24 *See* Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018) (saying *Chevron* was inapplicable because statute is clear); *id.* at 2121 (Alito, J., dissenting) (saying *Chevron* should apply); Negusie v. Holder, 555 U.S. 511, 521 (2009) (declining to apply *Chevron* deference because agency incorrectly thought itself bound by distinguishable prior precedent); INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999) (declaring immigration cases particularly appropriate subjects for *Chevron* deference because of the Attorney General's wide statutory discretion); INS v. Cardoza-Fonseca, 480 U.S. 421, 448–49 (1987) (saying *Chevron* deference did not apply because the statute was unambiguous); Shruti Rana, Chevron *Without the Courts? The Supreme Court's Recent* Chevron *Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 316 (2012) ("[T]he Supreme Court is clearly revising *Chevron* within the immigration context.").

25 SOURCEBOOK, *supra* note 6, at 8.

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

private parties).[27] Nor are they rulemaking because they do not produce a rule that individuals are required to comply with.[28] Policy implementation decisions often are limited by substantive standards and include required procedures;[29] and they are sometimes judicially reviewable.[30] A well-known instance of policy implementation was the Department of Transportation's decision selecting the route of an interstate highway.[31] The chosen route took the highway through a park in Memphis, in apparent violation of a federal statute.[32] This decision was found to be reviewable in the famous and pivotal case, *Citizens to Preserve Overton Park, Inc. v. Volpe*.[33]

### 2. Decision

The term "decision" means an agency action of *specific applicability*, as distinguished from an action of *general applicability*, such as rulemaking.[34] The term "decision" does not include a "front-line" decision by agency staff even if the staff member provides an informal oral hearing to the affected private party. For this purpose, a front-line decision constitutes an initial agency determination about whether to deny an application, issue a complaint, or impose a tax or regulatory sanction when that determination could be challenged through a subsequent de novo proceeding—which could be a Type A, B, or C adjudicatory process before an agency or through a de novo judicial challenge.

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.[35] Similarly, the decision to reject a patent application can be challenged in a de novo proceeding before the Patent Trial and Appeal Board.[36]

---

27 APA § 555, 558; *see Izaak Walton League*, 655 F.2d at 361–62 n.37; Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 124–25 (2003).

28 APA § 553; *see, e.g.*, *Izaak Walton League*, 655 F.2d at 361–62 n.37; Rubin, *supra* note 27, at 124–25.

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. Rubin, *supra* note 27, at 173–81.

31 Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 404–05 (1971).

32 *Id.* at 406.

33 401 U.S. 402 (1971). The *Overton Park* Court 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. *Id.* at 420–21. For additional examples of policy implementation, see SOURCEBOOK, *supra* note 6, at 9–10.

34 *See* APA § 557.

35 *Id.*

36 35 U.S.C. § 134(a) (2012).

The term "decision" also excludes 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. Evidentiary Hearing

The term "evidentiary hearing" means an adjudicatory proceeding at which the parties make evidentiary submissions to a neutral decisionmaker, have an opportunity to rebut testimony and arguments made by the opposition, and to which the *exclusive record principle* applies.[37] The exclusive record principle means that the decisionmaker is confined to considering evidence and arguments from the parties during the hearing process (as well as matters officially noticed) when determining factual issues. The term "evidentiary hearing" excludes a variety of agency adjudicatory proceedings that might be described as "hearings," but that lack a neutral decisionmaker, an opportunity to make evidentiary submissions and rebuttals, or an exclusive record.

The term "evidentiary hearing" does not require orality; in some Type B hearings, the decisionmaker considers only written documents (with or without an oral argument). Nor does the term "evidentiary hearing" require that a particular case involve a dispute about adjudicative or legislative facts. Even if a particular case centers on a dispute over legal interpretation of a statute or regulation or involves 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.

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.[38] Consequently, due process may call only for Type C rather than Type B adjudication. Sometimes, due process is satisfied by judicial rather than administrative proceedings.[39] Of course, in many situations, due process does

---

37 ASIMOW, EVIDENTIARY HEARINGS, *supra* note 3, at 4.

38 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, 573–74 (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, 16–18 (1978).

39 Ingraham v. Wright, 430 U.S. 651, 678–80 (1977) (holding that no agency hearing was required in a case of corporal punishment because state tort law provided a remedy); Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189, 196–98 (2001) (holding that no agency hearing was required when government breached a contract because court remedies were sufficient).

require evidentiary hearings, and the best-practice recommendations set forth in Part III might be appropriate for such cases.[40]

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.[41]

* 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 as an appeal of an initial decision to the agency heads.[42]

4. The APA's Definitions of "Rulemaking" and "Adjudication"

The federal APA contains a set of definitions of "rulemaking" and "adjudication," but these definitions are flawed and do not describe actual practice.[43] 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."[44] And, critically, the APA defines the term "rule" as agency action "of general *or particular* applicability and future effect."[45]

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

---

40 *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 269–71 (1970) (holding that pre-termination hearings in welfare cases require elaborate procedural protections).

41 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) (2012).

42 Most agencies provide for some sort of intra-agency appeal or review of initial adjudicatory decisions. *See infra* Best Practice Recommendation, Section III.D.4.u. This review is based on the record made at the initial decision phase, not a de novo consideration of the case. The higher-level-reconsideration function is not treated as a separate Type B proceeding to which the best-practice recommendations would apply.

43 *See generally* Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule"*, 56 ADMIN. L. REV. 1077, 1077–78 (2004) (proposing a definition of "rule" based on generality rather than prospectivity).

44 APA § 551(6).

45 *Id.* § 551(4) (emphasis added).

cease-and-desist order would be treated as rulemaking. However, in practice, everyone regards the FTC's order as adjudication rather than rulemaking.[46] Because the APA's definitions are defective, they are not used in this Article. Instead, the Article relies on the distinction between general and specific agency action. As discussed *supra* Section B.1, adjudication is agency action of specific application, and rulemaking is agency action of general application.[47]

### C. *Literature Summary*

For the reader's convenience, this subsection summarizes the prior research on which I drew in writing the ACUS study of Type B adjudication. It also summarizes recent research on Type B and Type C adjudications.

A massive 1992 ACUS study, "The Federal Administrative Judiciary,"[48] described and analyzed Type A and B adjudications. It did extensive research into the status of the AJs who conduct Type B adjudication.[49] The 1992 ACUS report questioned the existing allocation of adjudicatory schemes between Type A and Type B.[50]

Former ACUS Chair Paul Verkuil analyzed many schemes involving Type B and Type C adjudication.[51] Verkuil assessed the degree to which these schemes complied with the due-process requirements sketched by *Goldberg v. Kelly*,[52] the leading procedural due-process case at that time.[53] He discussed the appropriateness of various forms of procedural protection in the context of particular substantive schemes.[54]

Studies by ALJ John Frye and Director of the Office of Administrative Law Judges in the Office of Personnel Management Ray Limon sought to

---

46 *See Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1073–74 (1967) (discussing FTC cease-and-desist orders in the context of adjudication).

47 *See* Safari Club Int'l v. Zinke, 878 F.3d 331–33 (D.C. Cir. 2017) (since agency action had generalized rather than particularized application it must be treated as rulemaking); Neustar, Inc. v. FCC, 857 F.3d 886, 895 (D.C. Cir. 2017) (decision of particular applicability and future effect must be treated as informal adjudication rather than rulemaking).

48 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, Fed. Admin. Judiciary, 57 Fed. Reg. 61,759, 61,759 (Dec. 29, 1992) [hereinafter Rec. 92-7].

49 1992 ACUS Study, *supra* note 48, Ch. III, at 843–73.

50 *Id.* Recommendation 92-7 urged that adjudications that impose serious sanctions should be decided by ALJs as Type A adjudication. Fed. Admin. Judiciary, 57 Fed. Reg. at 61,760–64.

51 *See generally* Paul R. Verkuil, *A Study of Informal Adjudication Procedure*, 43 U. CHI. L. REV. 739, 742 (1976).

52 397 U.S. 254 (1970).

53 Verkuil, *supra* note 51, at 739.

54 *Id.* at 742.

map the world of Type B adjudication as it existed in 1992 and 2002.[55] These studies gathered statistical data on the caseload of the various Type B schemes and the judges who decided them.[56]

The American Bar Association's ("ABA") Section of Administrative Law and Regulatory Practice published a guide to Type A adjudication.[57] The Section also sponsored a resolution adopted by the ABA's House of Delegates urging Congress to extend the APA's Type A provisions to Type B adjudication (but without requiring ALJs).[58] I published an article supporting this resolution.[59]

Several works identify best practices for Type C adjudication[60] or consider the criteria for the study of Type C decision-making.[61] Another paper produced a comparative analysis of high-volume adjudicatory systems (both Types A and B).[62]

An ACUS study by Kent Barnett, Logan Cornett, Malia Reddick, and Russell Wheeler (the "Barnett study") broadly surveyed the subject of non-ALJ adjudicators in a variety of "oral hearing" schemes.[63] The Barnett study was based on survey instruments sent to numerous federal agencies that conduct adjudications.[64] 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 from employment, physical separation, and direct supervision.[65] The Barnett study makes a number of recommendations relating to integrity of the decision-

---

55 RAYMOND LIMON, OFFICE OF ADMIN. LAW JUDGES, THE FEDERAL ADMINISTRATIVE JUDICIARY: THEN AND NOW—A DECADE OF CHANGE 1992–2002, at 1–2 (2002); John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 263 (1992).

56 LIMON, *supra* note 55, at 2; Frye, *supra* note 55, at 263–64.

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

58 Am. Bar Ass'n, *Federal Administrative Adjudication in the 21st Century*, Resolution 114 (ABA Admin. L. and Reg. Prac., Feb. 2005) [hereinafter ABA Resolution 114].

59 Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1005 (2004).

60 *See, e.g.*, Warner W. Gardner, *The Procedures by Which Informal Action is Taken*, 24 ADMIN. L. REV. 155, 158–66 (1972) (describing the considerations that draftsmen should take into account when developing procedures for Type C adjudication).

61 *See, e.g.*, William J. Lockhart, *The Origin and Use of "Guidelines" for the Study of Informal Action in Federal Agencies*, 24 ADMIN. L. REV. 167, 173–203 (1972) (providing commentary for different potential considerations).

62 Daniel L. Skoler, *The Many Faces of High-Volume Administrative Adjudication: Structure, Organization, and Management*, 16 J. NAT'L ASS'N ADMIN. L. JUDGES 43, 45–48 (1996).

63 KENT BARNETT, LOGAN CORNETT, MALIA REDDICK & RUSSELL WHEELER, ADMIN. CONFERENCE OF THE U.S., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL 2 (2018), https://www.acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal.

64 *Id.*

65 *Id.*

making process that are broadly consistent with the best-practice recommendations discussed in Part III. Barnett followed up the study with an article suggesting that agencies conducting non-ALJ adjudication be required to disclose to litigants information about the extent to which their hearing officers enjoy impartiality protection.[66]

The Barnett study and article classify a large number of federal officials as non-ALJs, which this Article does not treat as AJs.[67] These include 7,856 patent examiners, 714 Internal Revenue Service Appeals Officers, and about 550 Veterans Administration regional office personnel. I regard all these officials as making front-line determinations because their decisions are subject to de novo reconsideration at the administrative level. The decisions of these officers can be challenged de novo before the Patent Trial and Appeal Board, the Tax Court, and the Board of Veterans Appeals.[68]

In addition, Barnett's definition of "oral hearings" is not limited to those subject to the exclusive record principle.[69] As a result, the recommendations in the Barnett study and in Barnett's article could be applied to potentially very large numbers of federal officials who allow someone who is being investigated, regulated, or benefitted a chance to present his case orally, but not in the form of an evidentiary hearing.[70]

### D. *Statistical Data on Important Type B Adjudication Schemes*

This Section supplies recent statistical data about the world of Type B adjudication, usually for federal government fiscal year ("FY") 2016 for the dozen Type B agencies studied in the *Sourcebook*.

The tables use the following abbreviations:

ALJ—Administrative Law Judge

AJ—Administrative Judge

---

66 Kent Barnett, *Some Kind of Hearing Officer*, 94 WASH. L. REV. 515, 523 (2019).

67 *See infra* Table 2.

68 Inclusion of these personnel swelled the number of non-ALJ hearing officers from about 1,600 to about 10,800. *See infra* Tables 1 and 2.

69 Barnett, *supra* note 66, at 538.

70 The Barnett study led to a proposed ACUS Recommendation that was ultimately withdrawn from consideration by ACUS. PROPOSED RECOMMENDATION FROM COMMITTEE ON ADJUDICATION, ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE JUDGES 1–2 (2018). That proposed recommendation departed from the terminology used in the Barnett survey. Instead, the ACUS Adjudication Committee rewrote the survey's proposals by using the Type A-B-C methodology of ACUS Rec. 2016-4 (and of this article) as a way to limit the scope of the proposed recommendation. *See generally* ACUS Recommendation 2016-4, *supra* note 5.

APJ—Administrative Patent Judge

BIA—Board of Immigration Appeals

BVA—Board of Veterans' Appeals

CBCA—Civilian Board of Contract Appeals

DOE—Department of Energy

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

IJ—Immigration Judge

MSPB—Merit Systems Protection Board

OHA—Office of Hearing and Appeals, Department of Energy

PRRB—Provider Reimbursement Review Board

SDO—Suspension and Disbarment Officer

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

Table 1 concerns the workload of these Type B adjudication schemes. The final column supplies data on the agency's backlog of undecided cases, but this information is incomplete.

For those schemes for which current data and comparable 1992 or 2002 data are obtainable, Table 1 shows a significant increase in workload. For example, EOIR's caseload increased from 152,372 (1992) and 254,070 (2002) to about 306,000 (combining IC and BIA cases) and its backlog increased enormously. 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 and backlogs of Type B adjudicating agencies are growing steadily.

In the following tables, a blank cell means information is not available. The symbol "~" means the number is approximate.

**TABLE 1: WORKLOAD OF TYPE B ADJUDICATING AGENCIES FY 2016**

| Agency/ Scheme | Frey (1992 caseload)[71] | Limon (2002 caseload)[72] | Current Caseload | Pending Cases |
|---|---|---|---|---|
| USDA PACA | 255 | | 24 | |
| CBCA | | | 423 | |
| Debarment & Suspension | | | 4,249 | |
| DOE Security Clearance | | 65 | 106 | |
| DOE Whistleblowers | | | ~20 | |
| EPA-EAB | | | ~60 | |
| EEOC | 6,227 | See note[73] | 8,086 | 10,363 |
| EOIR | 152,372 | IC 254,070 | IC 273,390<br>BIA 33,240 | IC~ 600,000<br>BIA 13,930 |
| HHS-DAB (Grants) | | | ~20[74] | |
| MSPB | 7,124 | 7,174 | 8,602 AJ; 1,180 Board | 4,586 |
| PRRB | | | 3,907[75] | 7,124 |

71 *See* Frye, *supra* note 55, at 349–52.

72 *See* LIMON, *supra* note 55, app. C.

73 Limon gives a figure of 21,734 for the EEOC workload. *See id.* The figure does not seem comparable to current data. Limon may be counting nongovernment employees whose cases are investigated and mediated by the EEOC rather than the government employees whose cases EEOC adjudicates.

74 DAB resolves around 60 cases per year, and about one-third are Type B grant cases; the balance are appeals from ALJ decisions and thus are Type A.

75 These figures are for FY 2013. Current information is not available.

| | | | | |
|---|---|---|---|---|
| USPTO-PTAB | 5,782 APJ | 5,319 APJ | ~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.[76] It also makes a rough estimate of the current annual caseload per AJ (cases 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).

**TABLE 2: NUMBER OF AJS AND CASELOAD PER AJ FY 2016**

| Agency/Scheme | # AJs Frey Study (1992) | # AJs Limon Study (2002) | Number of AJs (2016) | Est. Caseload per AJ per year (2016) |
|---|---|---|---|---|
| USDA PACA | 86 | | | |
| CBCA | | | 14 | 60 |
| Debarment & Suspension | | | See note[77] | |
| DOE (Security & Whistleblowers) | | 19 | 12 OHA | 21 OHA |
| EPA-EAB | | 4 | 4 | 45 (panels of 3) |
| EEOC | 79 | See note[78] | 110 | 65 |
| EOIR | 76 | 228 | 334 IJs; 17 BIA | >1,000 IJs; 1750 BIA |
| HHS-DAB | | | See note[79] | |

[76] The numbers of AJs given in Table 2 do not exactly match those given in the Barnett study, *supra* note 63, at 17, and article, *supra* note 66, at 542–44, though the numbers are roughly similar for the schemes that are discussed both by Barnett and this article. The Barnett survey drew its information from responses by agencies to survey instruments sent to agencies (some of whom did not respond to the request). Barnett, *supra* note 66, at 539–41. My figures are based in most cases on agency annual reports and other data posted online. The difference in AJ numbers may, therefore, reflect that AJ populations are being measured at different dates.

[77] Because debarment and suspension decisions are distributed over the entire government, it is not known how many SDOs are employed. *See* SOURCEBOOK, *supra* note 6, app. A-3 at 119–25.

[78] Figures not comparable.

[79] DAB cases are heard by panels of the full Board. It does not use AJs. *See* SOURCEBOOK, *supra* note 6, app. A-5 at 135.

| | | | | |
|---|---|---|---|---|
| MSPB | 66 | 62 | 60 | 143 |
| PRRB | | | See note[80] | |
| USPTO-PTAB APJs | 58 | 62 | 225 | 132 (panels of 3) |
| USPTO-TTAB ATJs | 9 | 15 | 25 | 96 (panels of 3) |
| VA BVA | 44 | 56 | 72 | 660 |

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

This Part discusses the problem of distinguishing between Type A, B, and C adjudications. This is a necessary exercise since the best-practice recommendations in Part III apply only to Type B adjudication.

### A. *The Border Between Type A and Type B Adjudication*

The "gateway" provision of the APA defines which adjudicatory schemes are Type A proceedings.[81] 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."[82]

Some statutes explicitly declare whether the adjudicatory proceedings authorized by the statute are governed by the adjudicatory provisions of the APA.[83] Unfortunately, statutes that call for agencies to provide evidentiary hearings often do not make clear whether Congress intended that the agencies conduct Type A adjudication.[84] As a result, courts must decide whether the statute explicitly calls for a determination "on the record."[85]

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 normal assumption is that this record is "exclusive."[86] This means that the adjudicator is limited to that "record" in deciding factual issues in the case. Because this kind of "record" is maintained at both Type A and Type B proceedings, the

---

80 PRRB has no AJs and decides all cases by the full five-member board. *See id.* app. A-11 at 174. PRRB issues about twenty-five substantive decisions and hundreds of jurisdictional decisions per year. *See id.* at 176.

81 SOURCEBOOK, *supra* note 6, at 15.

82 APA § 554(a) (emphasis added). This section contains six exceptions. *Id.*

83 SOURCEBOOK, *supra* note 6, at 15.

84 *Id.*

85 *Id.*

86 *Id.* at 15–16.

term "on the record" fails to distinguish between the two types of 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.[87] Statutes calling for a "hearing," a "public hearing," or an "appeal" (but not using the magic words "on the record") are "ambiguous," so a reviewing court must defer to an agency's reasonable interpretation that the APA does not apply.[88] Numerous authors have questioned this approach.[89] *Chevron* presumes that Congress intended to delegate interpretive authority to an agency by passing an ambiguous statute; it seems unlikely, however, 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 wanted the APA to apply to adjudicatory hearings involving serious issues of public policy. However, the leading authority to that effect has been overruled.[90]

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."[91]

Finally, a fourth approach to the problem has recently emerged. These cases hold that the APA applies to statutes that call for evidentiary hearings 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")[92] applies to decisions by the National Appeals Division ("NAD") of the Department of Agriculture ("USDA").[93] The Supreme Court has made it clear

---

87 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). Under *Chevron*, if a statute is "ambiguous," the court must accept an agency's reasonable interpretation of the statute. *See id.* at 843–44. *Chevron* is currently under attack both at the Supreme Court level and in Congress. *See* SOURCEBOOK, *supra* note 6, at 16 n.54. If *Chevron* is judicially or legislatively overruled, that might also change the prevailing methodology for identifying Type A adjudication.

88 *See, e.g.*, Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 18–19 (1st Cir. 2006); Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1485 (D.C. Cir. 1989).

89 *See, e.g.*, William Funk, *Slip Slidin' Away: The Erosion of APA Adjudication*, 122 PENN. ST. L. REV. 141, 150–52 (2017); Cooley R. Howarth, Jr., *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 ADMIN. L. REV. 1043, 1051–54 (2004).

90 *See* Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876–77 (1st Cir. 1978), *overruled by Dominion Energy*, 443 F.3d at 17. Arguably, *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1263–64 (9th Cir. 1977), stands for the same proposition as *Seacoast* and has not been overruled.

91 *See* City of West Chicago v. NRC, 701 F.2d 632, 641 (7th Cir. 1983).

92 The 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 was not "substantially justified." APA § 504 (agency adjudication); 28 U.S.C. § 2412(d) (federal court case).

93 *See* Five Points Rd. Joint Venture v. Johanns, 542 F.3d 1121, 1124 (7th Cir. 2008); Aageson Grain & Cattle v. USDA, 500 F.3d 1038, 1041 (9th Cir. 2007); Lane v. USDA, 120 F.3d 106, 108 (8th

that EAJA is applicable only to hearings governed by the APA's adjudication provisions—that is, Type A proceedings.[94] NAD resolves disputes arising under numerous statutory provisions relating to agricultural grants, loans, or insurance.[95] The statute calls for evidentiary hearings that are conducted by AJs appointed by the Secretary of USDA, but the statute does not use the magic words "on the record."

USDA interpreted the statute not to require NAD to follow the APA.[96] Several decisions rejected USDA's position and held that the APA applies to NAD hearings, because the statutory provisions relating to those hearings contain most of the elements of Type A adjudication.[97] As a result, prevailing plaintiffs are entitled to EAJA attorney fee awards.[98] After losing in three circuits, USDA conceded the issue and now applies the APA and EAJA to NAD hearings.[99]

A second line of cases, all decided by the Federal Circuit, holds that Patent Trial and Appeal Board ("PTAB") inter partes trial cases[100] are "formal adjudication." As a result, these decisions mean that the APA's provisions on notice, right to rebuttal, and findings and reasons[101] apply directly to PTAB decision-making.[102] These cases are dubious, since none of them analyzes the existing body of law concerning whether a statute calling for a "hearing" is sufficient to trigger the APA.

Still another unresolved issue concerning APA applicability arises when an evidentiary hearing is required by due process but not by a statute. In the

---

Cir. 1997); St. Louis Fuel & Supply Co. v. FERC, 890 F.2d 446, 447 (D.C. Cir. 1989); Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. (forthcoming 2019) (manuscript at 33–38), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3136793.

94 *See* Ardestani v. INS, 502 U.S. 129, 139 (1991).

95 SOURCEBOOK, *supra* note 6, at 17.

96 *Id.*

97 *Id.*

98 *See Five Points Rd. Joint Venture*, 542 F.3d at 1129; *Aageson Grain & Cattle*, 500 F.3d at 1047; *Lane*, 120 F.3d at 108. *But see St. Louis Fuel & Supply Co.*, 890 F.2d at 447 (holding that the fact that statutory procedures were approximate those of the APA was not sufficient to make EAJA applicable).

99 *See* 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. SOURCEBOOK, *supra* note 6, at 17 n.62. 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. *Id.* The APA permits statutes to designate types of presiding officers other than ALJs. *See* APA § 556(b).

100 See SOURCEBOOK, *supra* note 6, app. A-10 at 165–67, for discussion of PTAB trial cases.

101 *See* APA §§ 554(b)–(c), 557(c).

102 *See* 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); Synopsys, Inc. v. Mentor Graphics Corp., 814 F.3d 1309, 1322 (Fed. Cir. 2016); Belden Inc. v. Berk-Tek 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. 141, 162– 65 (2019).

famous *Wong Yang Sung v. McGrath*[103] decision from 1950, just a few years after the APA was adopted, the Supreme Court interpreted the APA to apply to evidentiary hearings required by due process (but not required by statute).[104]

The *Wong Yang Sung* decision has been mostly ignored in subsequent decades because it is impracticable.[105] Beginning in the 1970s, the Supreme Court avoided using a fixed template to determine what process was due.[106] Instead, the nature of procedural protections in a hearing governed by due process depends on the specific context.[107] A court must balance three factors: the strength of the private interest involved in the case, the extent to which the amended procedure is likely to affect the accuracy of the process, and the strength of the government's interest in avoiding an altered or substituted procedure.[108] This balancing analysis often calls for much less formality than the APA requires. Consequently, applying the APA will 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 Article 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 Article assumes that its evidentiary hearings are Type B proceedings.

### 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 and the APA's formal adjudication provisions are inapplicable. In contrast, a Type C

---

103 339 U.S. 33 (1950).

104 The Court said:

> 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.* at 50–51.

105 *See* 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); Robert E. Zahler, Note, *The Requirement of Formal Adjudication Under Section 5 of the Administrative Procedure Act*, 12 HARV. J. ON LEGIS. 194, 236–37 (1975). *But see* Funk, *supra* note 89, at 149–52 (urging that *Wong Yang Sung* be followed). *Wong Yang Sung* appears to be alive in the Ninth Circuit, which applied it to require the government to pay attorneys' fees of prevailing parties in mining claim disputes. Collord v. U.S. Dep't of Interior, 154 F.3d 933, 936–37 (9th Cir. 1998).

106 *See* Funk, *supra* note 89, at 149.

107 Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976).

108 *Id.* at 334–35.

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 discussed in Section I.B.3, the term "evidentiary hearing" means one in which both parties have an opportunity to offer testimony to a neutral decisionmaker 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.

In the end, a certain degree of judgment is called for in deciding whether a legally required adjudicatory procedure is an evidentiary hearing. Statutes calling for a "hearing" or some other proceeding like an "appeal" are seldom explicit about whether the exclusive record principle applies.

Fortunately, however, that boundary line need not be marked with precision, because this Article does not 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. 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.

## III. BEST PRACTICES IN TYPE B ADJUDICATION

This Part proposes a set of best practices that should be spelled out in the procedural regulations of agencies engaged in Type B adjudication. This menu of best 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 since some of the older regulations do not incorporate many of the practices.

### A. *Methodological Cautions in Prescribing Best Practices*

The project of compiling "best practices" raises the question of how one should determine that a particular practice is best. Necessarily this is a judgmental decision and 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.[109] "Accuracy" refers to correct determination of the facts, law, or agency policy; "efficiency" refers to minimizing cost and delay; and "acceptability" refers to the perception by private parties of the fairness of the procedure.[110] 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.[111]

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.[112]

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 AJ, rather than an ALJ, 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.[113]

A word of caution is in order: the world of Type B adjudication is wildly diverse. The types of matters considered are all over the map—deportation, civil penalties for violation of agency rules, government contracts, hospital Medicare claims, veterans' benefits, intellectual property disputes, employment disputes with the federal government, agriculture, and environmental

---

109 *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 51, at 740 (balancing fairness, efficiency, and party satisfaction).

110 *See* Cramton, *supra* note 109, at 592–93.

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

112 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, 271 (2009). Robbins criticizes best-practice proposals for legal education since there are no commonly shared goals, no objective standards for measuring what is "best," a lack of supportive research, and no methodology for putting such proposals into practice. *See id.* at 286–88. 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.

113 ABA Resolution 114, discussed *supra* note 58, 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 also* Asimow, *The Spreading Umbrella*, *supra* note 59, at 1013–15. The best practices discussed here follow that approach, but they also recommend a number of practices that are not specified in the APA.

permitting—just to mention those I have studied in detail.[114] Some of these involve disputes between the federal government and a private party; others involve disputes between two private parties.[115] Some of the Type B agencies have the classic combined function structure—they investigate, prosecute, and adjudicate.[116] Others are adjudicatory tribunals, meaning they perform no function other than adjudication.[117]

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).[118] Others are quite informal, and some are purely in writing.[119] Some programs are in the mass-justice category with heavy caseloads and rushed proceedings.[120] Others have much lower caseloads and call for leisurely and thorough consideration.[121] Some have huge backlogs and long delays; others are relatively current.[122] Some proceedings are highly adversarial; others are inquisitorial.[123] The structures for internal appeal also vary.[124] 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 menu that follows applies to every Type B scheme, nor should every provision in procedural regulations that implements a best practice take the same form.[125]

The presumption that an item is a "best practice" for a particular adjudicatory scheme is rebuttable. If a persuasive case can be made that a particular practice is inappropriate, then the agency should not 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

---

114 These dozen adjudicatory schemes are discussed in detail in Appendix A of the SOURCEBOOK, *supra* note 6, at 107.

115 *Id.* at 1.

116 *Id.* at 1, 185.

117 *Id.* at 1.

118 ASIMOW, EVIDENTIARY HEARINGS, *supra* note 3, at 18–19.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 ASIMOW, EVIDENTIARY HEARINGS, *supra* note 3, at 18–19.

125 *See id.* ACUS is currently working on revision of the Model Adjudication Rules ("MARs"). *See* ADMIN. CONF. OF 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). MARs consist of detailed administrative adjudication procedural rules for both Type A and Type B schemes. Drafters of procedural regulations implementing the best-practice proposals suggested in this Article (or writing manuals for AJs) may wish to consult MARs. However, the rigidity and detail of MARs are inappropriate for generalized best-practice proposals for the highly diverse world of Type B adjudication.

balance of the conflicting variables involved in choosing optimal procedures—accuracy, efficiency, and acceptability to the parties.

Clearly the best practices for Type B adjudication cannot be applied to the even more diverse world of Type C adjudication—individualized decision-making where no evidentiary hearing is legally required. The *Sourcebook* suggests some barebones best practices for Type C adjudication, inspired by APA sections 555 and 558 and by due process, but even these modest proposals will not work for all Type C schemes.[126]

## B. *Procedural Legitimacy*

As mentioned in Section III.A., 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 establishes that people find an administrative process acceptable if they believe they have been dealt with fairly, even though they disagree with the outcome.[127] 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 considered in making the decision;

* Whether the person had an opportunity to hear and rebut the opponent's evidence;

* Whether the decisionmaker made a good-faith effort to reach the right result; and

* Whether that result was consistent with outcomes in other cases.

---

126 SOURCEBOOK, *supra* note 6, at 98–99.

127 The literature is vast, but a good place to start is TOM R. TYLER, WHY PEOPLE OBEY THE LAW 107–08 (2006).

The best practices proposed here are guided by that conception of procedural justice.

### C. *Administrative Law Judges*

The major difference between Type A and Type B adjudication is obviously that the presiding officers in Type B adjudication are AJs rather than ALJs. Consequently, the set of statutory protections enjoyed by ALJs are not applicable to the Type B world. These protections apply to the discharge of ALJs as well as to the performance of their judicial function (particularly the requirement that ALJs are assigned no tasks other than judging and are exempt from any form of performance evaluation).[128]

No doubt the procedural legitimacy of the Type B adjudicating process would be enhanced if a statute applied some or all of these independence protections to AJs or shifted important Type B programs to Type A status.[129] However, such legislative action will not occur within the foreseeable future. Agencies now conducting Type B agencies would vigorously resist it for reasons of additional cost and lost flexibility. On the theory that the best is the enemy of the good, this Article proposes incremental improvements in Type B adjudication through refinement of procedural regulations, since they are far more achievable than turning the existing corps of AJs into ALJs.

### D. *Best Practices for Type B Adjudication*

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

(1) Integrity of the decision-making process;

(2) Prehearing practices;

(3) Hearing practices; and

(4) Post-hearing processes.

---

128 *See* 5 U.S.C. §§ 3105, 5372, 7521 (2012).

129 *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1649 (2016) (urging agencies to interpret their statutes so that their hearings become Type A). The 1992 ACUS Study and ACUS Rec. 92-7 urged legislative conversion of numerous Type B adjudications to Type A. *See* Rec. 92-7, *supra* note 48, at 61,759; 1992 ACUS Study, *supra* note 48, at 1058–59. The proposals for merit selection, physical separation of functions, and ethics rules contained in the withdrawn ACUS recommendation (based on the Barnett study) would also be useful steps to improve the procedural legitimacy of Type B decision-making. *See* BARNETT ET AL., *supra* note 63, at 4–5.

These best-practice recommendations are similar to those set forth in ACUS Recommendation 2016-4 and are described in greater detail in the *Sourcebook*.[130] Some practices recommended below were not covered in Recommendation 2016-4.

1. Integrity of the Decision-Making Process

a. *Exclusivity of the Record*

Type B adjudication, by definition, means that the decision resulting from a legally required evidentiary hearing must be based on an exclusive record.[131] Procedural regulations should spell out this requirement. The APA imposes the exclusive record requirement for Type A adjudication.[132] This requirement means that a decisionmaker (either an AJ or reviewing authority) is limited to considering information about facts presented in testimony or documents received by the decisionmaker before, at, or after the hearing, to which all parties had access.[133] The decision can also be based on matters officially noticed (a procedure that entails a rebuttal opportunity).[134] 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 them a chance to rebut it) nor base a judgment on a personal inspection or test (again 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 factfinder of his or her personal knowledge about facts in issue and the decisionmaker's proper

---

130 *See* SOURCEBOOK, *supra* note 6, at 62–87.

131 *Id.* at 63. Note to the reader: The recommendations are listed from *a* to *u*. The letters are not restarted within each of the four categories of recommendations. This makes reference to the recommendations easier.

132 "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 § 556(e). *See* ABA Guide, *supra* note 57, § 7.08.

133 *See* APA § 556(e).

134 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." *Id.* 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, e.g.*, Rowe v. Gibson, 798 F.3d 622, 626–27 (7th Cir. 2015) (concerning a case where a court of appeals judge determined facts about a medication from reputable internet sources where the litigant was a pro se prisoner claiming inadequate medical care).

use of expertise to evaluate the information submitted into evidence by the parties.

b. *Separation of Functions*

Separation of functions means that the agency internally separates 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). Separation of functions is a fundamental principle of fair adjudication—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.

The separation of functions principle precludes an adversary from serving as a decisionmaker (either as an AJ or as a member of the agency's 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, as discussed in recommendation *d*.[135]

In addition, the APA contains a command-influence rule. An ALJ "may 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."[136] While a command influence provision is desirable, it may not be feasible in smaller agencies.

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.[137]

---

135 The APA requires separation of functions. *See* APA § 554(d); ABA Guide, *supra* note 57, § 7.06. The APA separation of functions rule does not apply "(A) in determining applications for initial licenses; (B) to proceedings involving the validity of rates, facilities, or practices of public utilities or carriers; or (C) to the agency or a member or members 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. *See* Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 766–68 (1981). Best practices would not prohibit agency heads from taking part in making decisions to prosecute.

136 APA § 554(d)(2).

137 For example, CBCA, EEOC, MSPB, PRRB, as well as 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, the agencies combine investigatory and adjudicatory roles and should implement separation of functions. SOURCEBOOK, *supra* note 6, at 64 n.281.

It is also desirable that AJs be full-time decisionmakers, so that the same person does not serve as prosecutor or investigator in similar cases.[138] 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 sufficiently large adjudicatory caseload to keep its AJs employed full time as adjudicators.

c. *Outsider Ex Parte Communications*

Best practices include a provision that prohibits ex parte communication relevant to the merits of the case between outsiders and adjudicatory decisionmakers.[139] The provision should also prohibit ex parte communication between outsiders and staff decisional advisers. Outsider ex parte communications offend basic notions of adjudicatory fairness because they may influence the decisional process through 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 purpose of this recommendation, 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 decisional advisers should occur only on the record. If oral or written ex parte communications occur, they should be immediately placed on the record.

d. *Non-Adversarial Staff Advice to Decisionmakers*

Ex parte advice to decisionmakers by *non-adversarial* agency staff members[140] 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).

---

138 This recommendation was not part of ACUS Recommendation 2016-4, discussed *supra* at note 5. It was proposed in the withdrawn ACUS recommendation based on the Barnett study. *See* BARNETT ET AL., *supra* note 63, at 63–65 (urging that AJs perform no activities other than judging and recommending physical separation of AJs from employees engaged in other functions).

139 APA § 557(d) prohibits ex parte communication. APA § 557(d); *see also* ABA Guide, *supra* note 57, § 7.04. The Barnett study similarly recommends that adjudicating agencies prohibit outsider ex parte communications. BARNETT ET AL., *supra* note 63, at 45–48.

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

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 decision-making. Such advice may not be necessary or appropriate in many situations, such as mass-justice adjudications, adjudications turning largely on credibility determinations, or those with no impact on the general public. Procedural regulations should spell out which non-adversarial staff members can give ex parte advice and which agency decisionmakers can receive such advice and should prohibit advisers from introducing factual material not in evidence into their advisory communications.

e. *Bias*

Type B decisionmakers (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. Impartiality is required both by the APA[141] and by due process.[142]

For this purpose, the term "bias" includes three different types of disqualifying mindsets[143]:

(1) A financial or other personal conflict of interest in the decision;

(2) Personal animus against the private party or the group to which that party belongs, or against an agency or its attorney; or

(3) Prejudgment of the adjudicative facts at issue in the proceeding (meaning facts specific to the parties).

---

141 *See* APA § 556(b)(3) ("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.").

142 *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Cinderella Career & Finishing Sch., Inc. v. FTC, 425 F.2d 583, 592 (D.C. Cir. 1970).

143 *See* Kuehn, *supra* note 18, at 971–92; ABA Guide, *supra* note 57, § 7.02. Both references discuss the different types of mindsets that might disqualify adjudicatory decisionmakers.

Procedural regulations and manuals should spell out the bias standard (as well as conflict-of-interest rules[144]) and explain how and when parties should raise bias claims and seek disqualification of adjudicators. Some Type B procedural regulations do not contain explicit provisions concerning bias nor explain how and when bias claims should be raised.[145] And none describe the different types of disqualifying bias.

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 this Article does not propose it as a best practice.

### f. *Complete Statement of Important Procedures*

Best practice is that agencies should set forth all important procedures and practices that affect persons outside the agency in procedural regulations. These regulations should be published in the Federal Register and the Code of Federal Regulations. The APA requires this.[146]

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. Manuals should be freely available to the public and conveniently accessible on the agency's website.[147]

---

144 The withdrawn ACUS proposed recommendation on standards for AJs, *see supra* note 70, called for agencies to provide guidance to AJs on existing sources of law regulating conflicts of interest, including both federal criminal conflict of interest provisions and Office of Governmental Ethics regulations. *See* 18 U.S.C. § 208 (2012); 5 C.F.R. § 2635.501–503 (2019); BARNETT ET AL., *supra* note 63, at 49–59, 66–68.

145 For example, I found no provisions concerning bias in the procedural regulations for EOIR, USPTO, or VA.

146 APA § 552(a)(1)(C). An agency cannot rely on an unpublished procedure. 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." *Id.* at (E).

147 At the time this Article was published, ACUS planned to begin a project that will provide guidance on procedural manuals and discuss their accessibility. Readers should check the ACUS website to find out about the progress of this project. *See* ADMIN. CONF. OF U.S., *Ongoing Projects*, https://www.acus.gov/current-projects (last visited Oct. 18, 2019).

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

g. *Notice*

Basic fairness to litigants requires that they receive proper and timely notice of the issues in the case.[148] 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).[149]

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, the applicable legal standard, and remedies the agency seeks. 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:

* How a party can request a hearing;

* Discovery options;

* Who the AJ 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;

* 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;

---

148 *See* APA § 554(b).

149 The APA requires that "[p]ersons entitled to notice shall be timely informed of—(1) the time, place and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted." *Id.*; *see also* ABA Guide, *supra* note 57, § 4.02.

* Subpoena practices;

* Whether the agency offers an opportunity for reconsideration of the initial decision at a higher agency level; and

* Availability of judicial review.

### h. *Self-Representation and Lay Representation*

#### i. Self-Represented Parties

In many cases, private parties involved in agency adjudication cannot afford lawyers and must represent themselves.[150] In some instances, they are assisted only by non-expert family or friends, which amounts to self-representation.[151] Self-represented parties are often at a considerable disadvantage in confronting the agency adjudication process.[152] In addition, the presence of unrepresented litigants causes many problems for agency adjudicators whose procedures were designed for represented parties.[153] Most agency procedural regulations make no explicit provision for assisting self-represented parties.

Best practices include provisions that are designed to assist self-represented parties. ACUS Recommendation 2016-6[154] 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 online. Agencies should provide

---

150 Depending on how proceedings are classified, between thirty-seven percent and fifty-five percent of respondents appearing before the Immigration Court in removal proceedings are represented by counsel. *See* SOURCEBOOK, *supra* note 6, at 153 n.725. Although most Social Security disability applicants are represented by lawyers, about twenty percent are self-represented (Social Security hearings are Type A rather than Type B adjudication). *Id.* at 70 n.310. Additional numbers of applicants have representation for only a portion of the disability hearing process. *Id.* About seventy-five percent of litigants before the USDA National Appeals Division represent themselves, or are assisted by a family member or friend. CONNIE VOGELMANN, ADMIN. CONFERENCE OF THE U.S., SELF-REPRESENTED PARTIES IN ADMINISTRATIVE HEARINGS 46 (draft report Sept. 7, 2016), https://www.acus.gov/sites/default/files/documents/Self-Represented-Parties-Administrative-Hearings-Draft-Report.pdf.

151 VOGELMANN, *supra* note 150, at 1 n.1.

152 Self-represented litigants may trigger a bias against the validity of their legal claims. *See id.* at 6. This bias may explain why they fare poorly in the litigation process when other factors are held constant. *See* Victor D. Quintanilla et al., *The Signaling Effect of Pro Se Status*, 42 LAW & SOC. INQUIRY 1091, 1093–94 (2017).

153 *See* VOGELMANN, supra note 150, at 55–56.

154 *See generally* Recommendation 2016-6, Self-Represented Parties in Administrative Proceedings, 81 Fed. Reg. 94,312 (Admin. Conference of U.S. Dec. 14, 2016).

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.[155] For parties who cannot afford or cannot obtain a lawyer, having the assistance of a knowledgeable lay representative is far better than self-representation.[156] In Recommendation 86-1, ACUS urged agencies that dispense mass justice to explicitly recognize lay representation.[157] 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."[158]

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.[159] Obviously, lay representation may be inappropriate in cases in which the subject matter of the dispute is highly technical and requires specialized knowledge.[160]

---

155 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 SOURCEBOOK, *supra* note 6, at 41.

156 *See* DEBORAH L. RHODE, ACCESS TO JUSTICE 90–91 (2004); Anne E. Carpenter et al., *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 LAW & SOC. INQUIRY 1023, 1023–24 (2017); Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429, 429 (2016); Paul R. Tremblay, *Surrogate Lawyering: Legal Guidance,* sans *Lawyers*, 31 GEO. J. LEGAL ETHICS 377, 379 (2018).

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

158 *Id.* at 25,642.

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

160 TTAB permits representation only by lawyers. PTAB (but not TTAB) allows representation by registered nonlawyer patent agents. *See* SOURCEBOOK, *supra* note 6, app. A-10 at 164. CBCA permits self-representation but not lay representation. *See id.* app. A-2 at 116. These agencies have concluded that the complexity of the subject matter of the cases before them precludes participation of lay representatives.

i. *Alternative Dispute Resolution*

The Administrative Dispute Resolution Act ("ADRA") applies to both Type A and Type B adjudication. ADRA broadly validates and encourages adjudicating agencies to use all available ADR tools, including mediation and arbitration.[161] ACUS has consistently sought to promote ADR by federal agencies.[162] 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 some 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.

j. *Prehearing Conferences*

Prehearing conferences are a common feature of modern litigation because they can shorten and simplify the hearing and promote settlement discussions.[163] Prehearing conferences should play a role in administrative litigation as well. Thus, best practices should enable an AJ to require the parties to participate in a pretrial conference (in person or by telephone or videoconference), if the AJ believes that the conference would simplify the hearing or promote settlement.[164] 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.

---

161 *See* 5 U.S.C. §§ 571(3), 572(a) (2012). 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.

162 *See* Recommendation 86-3, 51 Fed. Reg. 25,641, 25,641 (Admin. Conference of U.S. July 16, 1986) (urging agencies to use all forms of ADR); Recommendation 88-5, Agency Use of Settlement Judges, 53 Fed. Reg. 26,025, 26,025–26 (Admin. Conference of U.S. July 11, 1988) (discussing the use of settlement judges); Recommendation 95-7, Use of Mediation under the Americans with Disabilities Act, 60 Fed. Reg. 43,108, 43,109 (Admin. Conference of U.S. Aug. 18, 1995); Recommendation 2014-1, Resolving FOIA Disputes Through Targeted ADR Strategies, 79 Fed. Reg. 35,988, 35,988 (Admin. Conference of U.S. June 25, 2014).

163 *See* Edward A. Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89, 95 (1971).

164 *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. Recommendation 70-4, Discovery in Agency Adjudication, 38 Fed. Reg. 19,786, 19,786–87 (Admin. Conference of U.S. July 23, 1973); *see also* Tomlinson, *supra* note 163, at 97–98.

### k. *Electronic Document Filing*[165]

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.[166] Electronic filing has significant efficiency benefits for both the agency and outside parties. Most agencies now permit or require electronic document filing.[167]

### l. *Discovery*

Pretrial discovery is commonplace in the world of court litigation, and it should be considered in administrative litigation as well. 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). Requiring AJ permission for discovery should avoid the problem of costly excess discovery (including unnecessary depositions or detailed interrogatories) that plagues the court system. Because of the caseload pressures on AJs, discovery provisions are probably not appropriate in mass-adjudication situations, but they may have a useful role in Type B adjudication involving larger disputes and lengthier hearings.

PTAB and TTAB conduct their trial proceedings (that is, disputes between patentees and challengers) entirely through discovery or affidavits.[168] Evidence, including witness statements, is received in deposition form and the depositions are then introduced at the hearing.[169] No additional testimony is permitted at the hearings.[170] This is an interesting model that may work for other agencies in which cases seldom involve credibility disputes.

---

165 ACUS Recommendation 2016-4 does not contain a recommendation concerning electronic document filing. *See* ACUS Recommendation 2016-4, *supra* note 5.

166 Recommendation 2018-3, Electronic Case Management in Federal Administrative Adjudication, 83 Fed. Reg. 30,683, 30,686 (Admin. Conference of U.S., adopted June 15, 2018), deals with electronic case management systems (ECMS) for administrative adjudication. 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. Recommendation 2018-3 observes that there are substantial costs and benefits associated with ECMS. It 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.

167 *See id.* (discussing how an ECMS satisfies agencies' obligation to reduce paperwork).

168 *See* SOURCEBOOK, *supra* note 6, app. A-10 at 164.

169 *Id.*

170 *Id.* at 165.

m. *Subpoena Power*[171]

Best practices for Type B adjudication provides parties with subpoena power.[172] 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.[173] Procedural regulations should explain an agency's subpoena practice in detail.

3. Hearing Practices

n. *Open Hearings*

Type B adjudicating agencies should open their hearings to the public.[174] 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.[175] However, agencies should be permitted to close a hearing due to heightened confidentiality and privacy concerns—for example, protecting law-enforcement or national-security information, the confidentiality of business documents, or the privacy of parties to the hearing.

o. *Use of AJs*

Agencies conducting Type B adjudication should use AJs both to conduct hearings and to provide initial decisions if the agencies have a substantial caseload, as opposed to having the agency heads decide the cases

---

171 *See* Recommendation 90-4, Social Security Disability Program Appeals Process: Supplementary Recommendation, 55 Fed Reg. 34,213, 34,215 (Admin. Conference of U.S. Aug. 22, 1990) (concerning subpoena power in Social Security disability adjudication).

172 *See* ABA Guide, *supra* note 57, § 4.04.

173 *See* APA § 555(c)–(d).

174 *See* ABA Guide, *supra* note 57, § 5.03.

175 *See* N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 298 (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, 693 (6th Cir. 2002) (holding that the First Amendment requires open deportation hearings involving persons suspected of terrorist involvement unless agency establishes compelling interest for closing the hearing). *But see* N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 209 (3d Cir. 2002). Cases establishing constitutional rights to open hearings are based on *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (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.

initially. As discussed below,[176] initial AJ decisions are 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.[177] HHS DAB hears grant-making cases in panels of three; most cases are decided on written materials and the DAB is current in its caseload.[178] The five-member PRRB board conducts its hearings en banc.[179] PRRB has a large inventory of pending cases.[180] The use of en banc hearings by the PRRB seems to be an inefficient use of resources and substantially reduces the number of hearings that can be provided.

### p. *Hearings by Video Conference*

Best practices for Type B adjudication include the ability to hold hearings through video conferencing, rather than in-person. Agencies and parties alike can achieve substantial economies by using 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 agency 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.[181]

Video conferencing is not always appropriate.[182] The potential efficiency savings 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 Rec. 2014-7. A key point is that the video equipment and facilities must be of sufficiently good quality to ensure that the participants can see and hear each other clearly.

---

176 *See infra* Section III.D.4.u.

177 *See* SOURCEBOOK, *supra* note 6, apps. A-5 at 135, A-11 at 174.

178 *Id.* app. A-5 at 135.

179 *Id.* app. A-11 at 174.

180 *See id.* at 176.

181 ACUS recently studied the video conference procedure and suggested best practices. *See* Recommendation 2014-7, Best Practices for Using Video Teleconferencing for Hearings, 79 Fed. Reg. 75,114 75,119–75,120 (Admin. Conference of U.S., adopted Dec. 5, 2014); Recommendation 2011-4, Agency Use of Video Hearings: Best Practices and Possibilities for Expansion, 76 Fed. Reg. 48,789 (Admin. Conference of U.S. Aug. 9, 2011).

182 *See* SOURCEBOOK, *supra* note 6, at 79 n.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.").

Video conferencing is obviously superior to conducting hearings on the telephone since video allows the AJ and the parties and their representatives to see and hear the witnesses and to see documents.[183] Nevertheless, agencies with substantial caseloads consisting of cases involving smaller stakes or cases that do not present credibility issues should be able to conduct hearings by phone, with or without the consent of the parties.

### q. *Written-Only Hearings*

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.[184] Numerous agencies employ a written summary judgment practice when affidavits reveal there is no disputed issue of material fact.[185] 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. Cases not involving credibility 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 specifics 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.

### r. *Evidentiary Rules*

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 should otherwise admit

---

183 *See* EF Int'l Language Sch., Inc. v. NLRB, 673 Fed. App'x 1, 3–4 (D.C. Cir. 2017) (unpublished opinion) (affirming NLRB's use of videoconference equipment and distinguishing case that disapproved telephonic hearings).

184 The APA explicitly permits written-only hearings in certain circumstances. *See* APA § 556(d) ("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.").

185 *See* Bettor Racing, Inc. 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).

any oral or documentary evidence.[186] 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. However, this type of unclear formulation is likely to cause confusion and time-consuming evidentiary disputes about whether specific FRE rules should be applied. There are situations in which agencies should follow the FRE. PTAB and TTAB provide such examples. Administrative patent judges ("APJs") and administrative trademark judges ("ATJs") apply the FRE (along with all of the discovery rules) in trial cases.[187] 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 disproved alleged facts.[188]

### s. *Opportunity for Rebuttal*

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 also permits excluding cross-examination in appropriate circumstances.[189]

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 rebuttal right would take the form of additional written evidence and oral argument.

---

186 APA § 556(d) ("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.").

187 *See* 37 C.F.R. § 2.122(a) (2019) (concerning TTAB); *id.* § 42.62 (concerning PTAB).

188 *See id.* § 41.30.

189 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 also* ABA Guide, *supra* note 57, § 5.09.

Agencies appropriately limit or preclude cross-examination if it might jeopardize national security or might reveal the identity of a confidential informant. 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.[190] Instead, the employee receives a summary or description of the information.[191] Similarly, in EOIR hearings, the IJ must permit a reasonable opportunity for cross-examination,[192] but the respondent cannot examine national security information that the government introduces in opposition to admission or discretionary relief.[193] The AJ should consider the effect on removing the opportunity to cross examine.[194]

4. Post-Hearing Practices

t. *Written Decisions*

Best practices require Type B decisionmakers to furnish a written or transcribable opinion. The decision should set forth findings of fact and explain how the AJ resolved credibility conflicts. The opinion should also furnish conclusions of law and explain the AJ's legal interpretations of statutes or regulations. Finally, the opinion should state the AJ's reasons for discretionary choices.[195] In some mass-justice situations, the written opinion requirement 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 decision-making 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.

u. *Higher-Level Review and Precedent Decisions*

Best practice is that agencies should furnish an opportunity for a higher-level review of an initial adjudicatory decision. The ability to obtain an

---

190 *See* 10 C.F.R. § 710.26(l).

191 *See id.* § 7.10.26(m).

192 OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL § 4.16(d) (2016), https://www.justice.gov/eoir/file/1205666/download.

193 *See* 8 U.S.C. § 1229a(b)(4)(B) (2012).

194 *See* 10 C.F.R. § 710.26(m) (2019).

195 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." APA § 557(c)(3)(A); *see also* ABA Guide, *supra* note 57, § 6.02.

administrative review of an adverse decision is useful to correct the inevitable errors made by AJs, to enhance consistency of AJ decisions,[196] 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.

PTAB and TTAB do not provide for higher-level review of decisions by APJs or ATJs.[197] 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.[198]

Best practices also include regulations that allow and encourage the reviewing body to designate its important decisions as precedential. Precedent decisions must be followed in subsequent cases unless they have been formally overruled. Using 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 and predictability of lower-level decisions by staff or AJs.

Best practices also include compliance with the Freedom of Information Act ("FOIA") provision that requires agencies to make available in electronic form final adjudicatory decisions and orders as well as an index of such decisions.[199] Under ACUS Recommendation 89-8,[200] this obligation should extend to final decisions of the agency's reviewing authority, regardless of whether the decisions have been designated as precedential. ACUS also urges that agencies create a subject-matter index to these adjudicatory

---

196 *See* David Hausman, *Consistency and Administrative Review*, SSRN 2816538, 41–42 (July 31, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2816538.

197 *See* Walker & Wasserman, *supra* note 102, at 174–87. Professors Walker and Wasserman strongly criticize the failure of PTAB to provide for higher-level reconsideration of APJ decisions, thus ensuring inconsistent case law. *See id.* The lack of agency head review is particularly problematic because PTAB lacks substantive rulemaking authority. *Id.* at 136. The Patent Office director can order a rehearing before an expanded APJ panel, but this procedure has been questioned as a possible violation of due process. *See id.* 182–87.

198 *See id.* at 172.

199 APA § 552(a)(2).

200 *See* Recommendation 89-8, Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions, 54 Fed. Reg. 53,493, 53,493 (Admin. Conference of U.S. Dec. 29, 1989) (codified in 1 C.F.R. pts. 305 & 310).

decisions. Recommendation 2017-1[201] 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.

Table 3, which follows, indicates which of the best-practice recommendations are actually set forth in agency procedural regulations or manuals. It illustrates that most agencies have already adopted most of the recommended practices.

**TABLE 3.1: BEST PRACTICES REFLECTED IN AGENCY PROCEDURAL REGULATIONS**[202]

| TYPE B SCHEMES ⇒ | USDA-PACA | CBCA | Debarment & Suspension[203] | DOE | EPA-EAB | EEOC |
|---|---|---|---|---|---|---|
| RECOMMENDATIONS | | | | | | |
| INTEGRITY OF PROCESS | | | | | | |
| a. Exclusivity of the record | N | Y | Y | Y | Y | Y |
| b. Separation of functions | N | NA | N | *[204] | Y | NA |
| c. Ex parte communications | N | Y | N | Y | Y | N |
| e. Bias | Y | N | N | N | Y | Y |
| f. Complete statement | Y | Y | N | Y | Y | Y |
| PREHEARING | | | | | | |
| g. Notice | Y | Y | Y | Y | Y | Y |
| h. Self- & lay representation | Y | N | Y | Y | Y | Y |
| i. ADR | Y | Y | N | Y | Y | Y |
| j. Prehearing conference | N | Y | Y | Y | Y | N |
| k. Electronic document filing | N | Y | N | Y | Y | N |
| l. Discovery | Y | Y | N | Y | Y | Y |
| m. Subpoena power | Y | Y | N | Y | Y | N |
| n. Open hearings | N | Y | N | N | Y | N |
| HEARING | | | | | | |
| p. Video conference | Y | N | N | N | Y | N |

201 Recommendation 2017-1, Adjudication Materials on Agency Websites, 82 Fed. Reg. 31,039, 31,039 (Admin. Conference of U.S. July 5, 2017).

202 The table does not include recommendation *d* (staff advice to decisionmakers), since none of the agencies studied have such a provision. Additionally, it does not include recommendation *o* (use of administrative judge), since all agencies studied used AJs except HHS, DDAB, and PRRB.

203 *See, e.g.*, Nonprocurement Debarment and Suspension, 2 C.F.R. § 1125 (2019); SOURCEBOOK, *supra* note 6, app. A-3 at 123 ("The regulations adopted by the Department of Defense are more detailed than those adopted by other agencies.").

204 It is unclear whether separation of functions is required in security clearance cases, but it is required in whistleblower cases. *See* SOURCEBOOK, *supra* note 6, app. A-4 at 129–33.

| | | | | | | |
|---|---|---|---|---|---|---|
| q Written-only hearings | Y | Y | Y | Y | Y | N |
| r. Evidentiary rules | N | Y | Y | Y | Y | Y |
| s Opportunity for rebuttal | Y | Y | Y | Y | Y | Y |
| POST HEARING | | | | | | |
| t. Written decisions | Y | Y | Y | Y | Y | Y |
| u. Higher-level review | Y | N | N | Y | Y | Y |
| | | | | | | |
| NUMBER OF Ys | 12 | 16 | 8 | 13 | 19 | 12 |

**TABLE 3.2: BEST PRACTICES REFLECTED IN AGENCY PROCEDURAL REGULATIONS, CONT.**

| TYPE B SCHEMES ⇒ | EOIR | HHS-DAB | MSPB | PRRB | PTAB | TTAB | BVA |
|---|---|---|---|---|---|---|---|
| RECOMMENDATIONS | | | | | | | |
| INTEGRITY OF PROCESS | | | | | | | |
| a. Exclusivity of the record | Y | Y | Y | Y | Y | Y | N |
| b. Separation of functions[205] | Y | NA | NA | NA | N appeal NA trial | N appeal NA trial | N |
| c. Ex parte communications | Y | Y | Y | Y | Y trial N appeal | Y trial N appeal | N |
| e. Bias | Y | Y | Y | Y | N | N | N |
| f. Complete statement | N | Y | Y | Y | N | Y | Y |
| PREHEARING | | | | | | | |
| g. Notice | Y | Y | Y | Y | Y | Y | Y |
| h. Self- and lay representation | Y | Y | Y | Y | N | N | Y |
| i. ADR | N | Y | Y | Y | N | N | N |
| j. Prehearing conference | Y | Y | Y | Y | Y | Y | Y |
| k. Electronic document filing | N | Y | Y | Y | Y | Y | N |
| l. Discovery | Y | Y | Y | Y | Y | Y | N |
| m. Subpoena power | Y | N | Y | Y | Y | Y | N |
| n. Open hearings | Y | Y | Y | N | Y | Y | N |
| HEARING | | | | | | | |
| p. Video conference | Y | Y | Y | Y | Y | Y | Y |
| q. Written-only hearings | N | Y | Y | Y | Y | Y | Y |
| r. Evidentiary rules | N | Y | Y | Y | Y | Y | N |
| s. Opportunity for rebuttal | Y | Y | Y | Y | Y | Y | Y |

[205] Adjudicatory tribunals that have no prosecuting or investigating staff members have no need for a separation of functions provision. *See id.* at 64.

| POST HEARING | | | | | | | |
|---|---|---|---|---|---|---|---|
| t. Written decisions | Y | Y | Y | Y | Y | Y | Y |
| u. Higher-level review | Y | N | Y | N | N | N | N |
| | | | | | | | |
| NUMBER OF Ys | 14 | 16 | 18 | 16 | 12.5 | 13.5 | 8 |

## CONCLUSION

This Article concludes where it began. Type B adjudication (meaning legally required evidentiary hearings) should not be swept into the dustbin of informal adjudication. Instead, Type B adjudication should be recognized as an important species of administrative adjudication that is as formal as, and often more formal than, Type A adjudication (meaning adjudicatory hearings whose format is prescribed by the APA). The procedural regulations applicable to most Type B adjudication provide procedural protections equivalent to those provided in Type A adjudication, with the significant exception that Type B presiding officers are AJs rather than ALJs. The goal of law reformers should be to encourage Type B agencies of the present and those yet to be created to incorporate the best practices suggested in this Article into their procedural regulations when those practices are appropriate for the administrative process in question.