

UCLA

UCLA Public Law & Legal Theory Series

Title

The Last Frontier: Fair Procedure in Informal Administrative Adjudication

Permalink

<https://escholarship.org/uc/item/899750h0>

Journal

Michigan Journal of Environmental and Administrative Law, 14(1)

Author

Asimow, Michael

Publication Date

2024

Michigan Journal of Environmental & Administrative Law

Volume 14 | Issue 1

2024

The Last Frontier: Fair Procedure in Informal Administrative Adjudication

Michael Asimow
UCLA Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjeal>



Part of the [Administrative Law Commons](#), [Courts Commons](#), [Environmental Law Commons](#), and the [Jurisdiction Commons](#)

Recommended Citation

Michael Asimow, *The Last Frontier: Fair Procedure in Informal Administrative Adjudication*, 14 MICH. J. ENV'T. & ADMIN. L. 1 (2024).

Available at: <https://repository.law.umich.edu/mjeal/vol14/iss1/2>

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Environmental & Administrative Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE LAST FRONTIER: FAIR PROCEDURE IN INFORMAL ADMINISTRATIVE ADJUDICATION

*Michael Asimow**

Abstract

The federal government engages in massive amounts of informal adjudication — a process that resolves a dispute between the government and a private party by making an individualized and legally binding decision without being required to conduct an evidentiary hearing if the dispute is not settled. This article sketches the highly diverse world of federal informal adjudication and surveys the procedural requirements imposed on it by due process and federal statutes. It proposes a set of best practices for conducting and improving informal adjudication that are rooted in those legal requirements. Agencies should adapt these practices to their individual circumstances and then adopt them as procedural regulations. The process by which federal agencies engage in informal adjudication should be accurate, efficient, and perceived by stakeholders to be fair.

TABLE OF CONTENTS

INTRODUCTION.....	4
I. THE WORLD OF TYPE C ADJUDICATION.....	4
A. Three Types of Administrative Adjudication	4
1. Types A, B and C Adjudication	4
2. Differences between Types A, B and C Adjudication.....	6
3. Variations in Type C Decision Making.....	8
4. Statutory Protections for Parties in Informal Adjudication.....	9

* Professor of Law Emeritus, UCLA Law School, Dean's Executive Professor of Law, Santa Clara Law School. My thanks to Nicholas Bagley, Kent Barnett, Jack Beermann, Emily Bremer, Jill Family, Eric Goldman, Deep Gulasekaram, Dan Ho, Michelle Layser, Jeff Lubbers, Nina Olson, Todd Phillips, Shalini Ray, Zachary Price, Peter Strauss, William Simon, Bijal Shah, Sid Shapiro, David Sloss, Chris Walker, Matt Wiener, and Tseming Yang, all of whom provided helpful comments on drafts of this Article. I want to acknowledge with gratitude the assistance of Administrative Conference of the United States (ACUS) staff members Matthew Gluth and Jeremy Graboyes and ACUS intern Hannah Shepherd. I also express appreciation to the staff members of agencies who furnished interview data about informal agency procedures described in Part II. I have protected their anonymity. A research study prepared by the author for the Administrative Conference of the United States (ACUS) preceded this article. Michael Asimow, *Fair Procedure in Informal Adjudication*, <https://www.acus.gov/document/final-report-best-practices-adjudication-not-involving-evidentiary-hearing>. That study formed the basis for ACUS Recommendation 2023-5, 89 Fed. Reg. 1509 (Jan. 10, 2024).

5. The Best Practice Approach to Type C Adjudication	9
B. <i>Definitions and Distinctions</i>	10
1. Adjudication	10
2. Evidentiary Hearing	11
3. Type C Adjudication and De Novo Judicial Review	12
II. DISPARATE TYPE C ADJUDICATION SCHEMES	12
A. <i>Licensing and Permitting</i>	13
1. Licensing of National Banks	13
2. Licensing of New Drugs and Tobacco Products	14
3. Choice of Portability Administrator	14
4. Protection of Wild Animals	15
5. Authorizations for Use of National Forest System Lands	15
B. <i>Grants, Benefits, and Loans</i>	17
1. Research Grant Applications Denied for Programmatic Reasons	17
2. Insurer Benefit Decisions	18
3. Discrimination in Loan and Grant Programs	18
C. <i>Immigration and Naturalization</i>	20
1. Asylum Claims at the Border	20
2. Non-Immigrant Visa Applications	21
3. Voluntary Expatriation	22
D. <i>Foreign Policy and National Security</i>	22
1. Economic Sanctions	22
2. Prevention of Foreign Investment that Might Impair National Security	23
3. Watch Lists	25
E. <i>Inspections, Grading, and Testing</i>	26
1. Bank supervision	26
2. Processed Fish Inspections	27
3. Approvals for Pilots with Medical Conditions	28
4. Adulterated Food	28
F. <i>Land Use Approvals</i>	28
G. <i>Orders Subject to De Novo Judicial Review</i>	31
1. Retailer Disqualification	31
2. Freedom of Information Act Requests	32
H. <i>Tariffs and Taxation</i>	33
1. Tariff Classification Rulings	33
2. Collection Due Process	34
3. Denial of Passports for Persons with Tax Debts	36
I. <i>Waivers and Exemptions</i>	37
J. <i>Other Discretionary Actions</i>	37
1. Decisions to Deny Parole	38

2. Whistleblower Awards	38
III. LEGAL PROTECTIONS FOR PRIVATE PARTIES ENGAGED IN TYPE C	
ADJUDICATION.....	39
A. Consultative Due Process	40
B. Government Ethics	42
C. Right to Counsel	43
D. APA § 555	45
1. Right to Appear.....	45
2. Reasons for Denial of Applications	46
E. Executive Order 13,892	48
F. APA § 558(c)–Withdrawal of Licenses	48
G. Ombuds	49
H. Freedom of Information Act (FOIA) Pro-Active Disclosure.....	51
I. Judicial Review	52
IV. THE BEST PRACTICES APPROACH TO PROVIDING PROCEDURAL	
PROTECTION IN INFORMAL ADJUDICATION	53
A. Public Administration and Best Practices.....	53
1. Infeasibility of Judicial Review	53
2. Infeasibility of Statutory Solutions	55
3. Public Administration and Internal Administrative Law	56
B. Best Practice Methodology	58
1. Best Practices as Raw Material	58
2. Factors that Agencies Should Balance in Designing	
Administrative Procedure.....	59
3. Criticisms of Best Practice Methodology.....	61
C. Sources for Best Practices in Type C Adjudication	62
V. PROPOSALS FOR BEST PRACTICES IN INFORMAL ADJUDICATION	62
A. Notice.....	62
B. Opportunity to Submit Evidence and Argument.....	64
C. Representation.....	65
D. Decision Maker Neutrality.....	66
E. Statement of Reasons	68
F. Administrative Review.....	69
G. Ombuds	70
H. Procedural Regulations	71
I. Quality Assurance Systems	72
CONCLUSION	73

INTRODUCTION

What do administrative lawyers talk about when they talk about administrative adjudication?¹ They'll probably discuss the well-known system of formal adjudication described in sections 554, 556 and 557 of the Administrative Procedure Act (APA) — referred to in this article as “Type A” adjudication. Many important federal agencies employ Type A adjudication, including the Federal Trade Commission, the National Labor Relations Board, and the Social Security Administration. They might also talk about adjudication conducted by agencies that are not covered by the APA adjudication provisions, but that still conduct similar formal evidentiary hearings. This article refers to these schemes as “Type B.” Type B adjudication schemes include the Immigration Court, the Patent Trial and Appeal Board, the Board of Veterans’ Appeals, and the Environmental Appeals Board. It’s unlikely they’ll talk or think much about agency adjudication that doesn’t rely on evidentiary hearings at all. This article refers to adjudicatory schemes that lack evidentiary hearings as “Type C” adjudication. The world of Type C adjudication is enormous and extremely diverse, but it is understudied and seldom discussed. Yet it is critical to the functioning of modern government and to the people or entities that have disputes with the government. This article introduces the reader to that world. Because federal statutory reforms or ex post judicial review are unlikely to achieve the objective of providing fair procedure in most Type C adjudication schemes,² this article takes a different tack. It proposes that agencies adopt procedural regulations that adhere to a set of best practices for Type C adjudication, and that agencies tailor those practices to the particular scheme of informal adjudication in question.

I. THE WORLD OF TYPE C ADJUDICATION

A. *Three Types of Administrative Adjudication*

1. Types A, B and C Adjudication

Recent scholarship classifies federal administrative adjudication into Types A, B and C.³ Type A adjudication is the subject of the formal adjudication provisions

1. This question was suggested by Raymond Carver's short story "What Do We Talk About When We Talk About Love?" from his 1981 collection of the same name, and by Jessica M. Silbey, *What We Do When We Do Law and Popular Culture*, 27 LAW & SOC. INQUIRY 139 (2002).

2. See Part III.

3. An ACUS report introduced the A-B-C typology. Michael Asimow, *Adjudication Outside the Administrative Procedure Act* (March 24, 2016) (hereinafter 2016 ACUS Report), <https://www.acus.gov/article/evidentiary-hearings-outside-administrative-procedure-act-final-article>. That report was implemented by ACUS Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016), which suggested best practices for Type B adjudication. The 2016 report was expanded and published as a book. MICHAEL ASIMOW,

of the APA.⁴ An agency must conduct Type A adjudication only if a statute outside the APA requires it to do so.⁵ Type A entails a trial-type evidentiary hearing presided over by an Administrative Law Judge (ALJ) and subjected to a variety of procedural constraints, including prohibition of *ex parte* communications, separation of functions, and the exclusive record principle.

Type B adjudication occurs when due process, a statute (other than the APA), an executive order, or a regulation requires an agency to conduct an evidentiary hearing, but that hearing is not subject to the APA's formal adjudication provisions.⁶ The procedures employed in Type B adjudication are prescribed by agency-specific statutes and procedural regulations as well as by due process. Type B hearings are often just as "formal" or even more "formal" than Type A proceedings (especially considering that the great majority of Type A hearings are inquisitorial Social Security disability cases). Therefore, it is imprecise to refer to Type B adjudication as "informal adjudication," as the literature frequently does.⁷ The

FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (ACUS 2019) (herein 2019 ACUS SOURCEBOOK). See also Michael Asimow, *Best Practices for Evidentiary Hearings Outside the Administrative Procedure Act*, 26 GEO. MASON L. REV. 923 (2019). Other scholars have employed the A-B-C typology. See e.g. Ben Harrington & Daniel J. Sheffner, CONG. RSCH. SERV., INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW 5 (2021); Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 21-22 (2023); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 153-57 (2019); Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749, 1760-61 (2020); Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WISC. L. REV. 1351, 1405-09 (2019); Christopher J. Walker, Melissa Wasserman & Matthew Lee Wiener, *Precedential Decision Making in Agency Adjudication* 11 n. 45 (report to the Administrative Conference) (Dec. 6, 2022) (hereinafter Walker et al.).

4. 5 U.S.C. §§ 554, 556-57. The APA is cited herein without the prefatory 5 U.S.C.

5. APA § 554(a). The issue of what sort of statutory language triggers the obligation to conduct Type A adjudication is the subject of controversy and conflicting authority. It is outside the scope of this article.

6. Most research on adjudication outside the APA focuses on Type B adjudication. See, e.g., 2016 ACUS Report, *supra* note 3; 2019 ACUS Sourcebook, *supra* note 3; Aaron L. Neilson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication*, (U. Mich. Pub. L. Research Paper, Paper No. 24-001, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4563879; Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 430-36 (2021) (hereinafter Bremer, *Rediscovered Stages*); Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight & Removal*, 53 GA. L. REV. 1 (2018); Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643 (2016); Model Adjudication Rules Working Group, ACUS, Model Adjudication Rules 75-85 (rev. 2018); Walker et al., *supra* note 3; Christopher J. Walker & Matthew Lee Wiener, *Agency Appellate Systems* (Dec. 14, 2020) ACUS Report, <https://www.acus.gov/article/final-article-agency-appellate-systems>; Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021); Paul R. Verkuil, *A Study of Informal Adjudication Procedure*, 43 U. CHI. L. REV. 739 (1976) (studying 42 examples of non-APA adjudication, including both Types B and C).

7. See, e.g., Aaron L. Neilson, *Three Wrong Turns in Agency Adjudication*, 28 GEO. MASON L. REV. 657, 666 (2021); Harrington & Sheffner, *supra* note 3 at 8; Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1605-06 (2013); Gordon G. Young, *Judicial Review of Informal Agency Action*, 10 ADMIN. L. J. 179, 199-203 (1996).

Administrative Conference of the United States (ACUS) recommended a set of best practices for agencies that conduct Type B adjudication. These practices closely resemble the protections available under Type A (other than the requirement that an ALJ preside over the hearing) and conform to most existing Type B practices.⁸

Type C adjudication occurs when an agency is not required by due process or by a statute or regulation to conduct an evidentiary hearing in order to resolve a particular class of adjudicatory disputes, because neither Congress nor the agency itself determined that evidentiary hearings were necessary or efficient methods for making these decisions.⁹ Type C adjudication is true “informal adjudication.” Every Type C scheme employs different procedures from the others. This article describes the wildly heterogeneous Type C world and proposes a set of best practices for Type C decisionmaking. These practices would provide procedural protections that can substitute, in some degree, for the protective provisions embodied in Types A and B evidentiary hearings but that are lacking in Type C. Type C adjudication is indeed the “last frontier” of administrative adjudication, terra incognita to most administrative lawyers. It is a mostly unexplored Wild West of disparate adjudicative practices. This article aspires to bring a rudimentary system of law and order to this frontier world.

2. Differences between Types A, B and C Adjudication

Type C adjudication differs from Types A and B adjudication in fundamental ways. Conceptually, all three types of agency adjudication can be divided into three phases and three decisions—frontline, primary, and review. The vast majority of administrative adjudicatory disputes settle during one of the three phases, but if no settlement occurs, and if the private party persists rather than acquiesces in a frontline or primary decision, the parties proceed to the next phase.

In the first or frontline phase,¹⁰ agency staff members consider whether to grant an application for a government benefit or license or to impose a sanction or some other remedy on private parties. The staff then issues a frontline decision. If the frontline decision is adverse to the private party, that party often acquiesces or agrees to a settlement, and the adjudication process ends. If, however, the private party wishes to challenge the frontline decision, the best opportunity to do so arrives

8. ACUS Recommendation 2016-4, *supra* note 3.

9. For discussions of Type C adjudication, see Harrington & Sheffner, *supra* note 3 at 20-24; 2019 ACUS Sourcebook, *supra* note 3; ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 35-42 (1941) (hereinafter Final Report); Ronald C. J. Krotoszynski Jr., *Taming the Tail that Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication*, 56 ADMIN. L. REV. 1057 (2004); Verkuil, *supra* note 6; Henry J. Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267 (1975); Warner W. Gardner, *The Procedures By Which Informal Action is Taken*, 24 ADMIN. L. REV. 155 (1972); William J. Lockhart, *The Origin and Use of Guidelines for the Study of Informal Action in Federal Agencies*, 24 ADMIN. L. REV. 167 (1972).

10. The frontline decision making phase is discussed in *Adjudication Guidebook*, *infra* note 168, at 257-66.

in the second or primary decision phase.

In the primary decision phase, the private party has an opportunity to introduce evidence and argument to overturn the frontline decision. In Types A and B adjudication, the primary decision phase entails an evidentiary hearing. This hearing is presided over by a neutral decisionmaker (called an ALJ in the case of Type A and an administrative judge, immigration judge, hearing officer, or similar title in Type B). The neutral decisionmaker was not involved in the frontline process.

An evidentiary hearing usually includes oral testimony by witnesses and cross-examination but sometimes is conducted entirely in writing. The evidentiary hearing is usually adversarial in nature (meaning that the parties or their lawyers control the presentation of evidence), but it can be inquisitorial (meaning that the decisionmaker controls the presentation of evidence, such as in Social Security cases). The neutral decisionmaker is not permitted to receive *ex parte* communications and cannot be advised by staff members who were engaged in the frontline process. The decisionmaker can consider only evidence introduced during the evidentiary hearing or evidence that has been officially noticed. The decisionmaker then issues a primary decision. The primary decision might be called a proposed decision, an initial decision, a recommended decision, or some similar title.

In Type C adjudication, however, the primary decision phase does not consist of an evidentiary hearing. Instead, it offers an opportunity for the private party to introduce evidence and argument in opposition to the frontline decision. Agencies conducting Type C adjudication employ various informal dispute resolution methodologies, such as document exchanges and submission of research studies, as well as oral argument, public hearings, conferences with decisionmakers, interviews, negotiations, mediation, or re-inspections. Of course, agencies engaged in Type A or B adjudication also make use of these informal dispute resolution methodologies in the process of investigation and attempted settlement.¹¹ In contrast, agencies conducting Type C adjudication employ these informal procedures to generate legally binding decisions *without recourse to an evidentiary hearing* at any point in the administrative process.

In Types A and B adjudication, as in criminal law, the frontline and primary decision phases are sharply separated, but this is often not true in Type C. Frequently, the same staff member or members who performed the frontline process and made the frontline decision also conduct the primary decision process and ultimately make the primary decision. In Type C, the transition from the frontline process to the primary decision process may be seamless. Primary decisionmakers are

11. See Bremer, *Rediscovered Stages*, *supra* note 6, at 402–12, pointing out that most A and B adjudications include both informal and formal stages. APA § 554(c) makes clear that informal stages precede formal hearings. It provides: “The agency shall give all interested parties opportunity for—(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.”

free to rely on information obtained during the frontline process in making the primary decision. They often receive *ex parte* communications and can be advised by staff who participated in the frontline decision (indeed they may be the same people).

The third phase of adjudicatory decisionmaking might be called the “administrative review” process and it leads to a review decision. The review process occurs within the agency (and precedes judicial review). It may either be discretionary with the reviewer or provided as a matter of right. In Types A and B adjudication, review decision making is often conducted by the agency head and may be used as a vehicle to make or change agency policy. Agency review may also be performed by a panel of staff reviewers (such as the Social Security’s Appeals Council) or by a judicial officer.¹² In Type C adjudication, however, there is sometimes no review process. If there is a review process, it is usually performed by an agency staff member who is different from (and often superior to) the staff member or members who made the frontline and primary decisions. This type of review might be described as putting a second set of eyes on the primary decision.

3. Variations in Type C Decision Making

As will be discussed in detail in Part II, every Type C scheme is different from the others. The schemes have in common only that they involve resolution of individualized disputes between the government and private parties or entities and do not employ evidentiary hearings at any point in the process.

The stakes in disputes resolved through Type C adjudication range from relatively trivial to extremely consequential. At the consequential end of the spectrum lie many of the disputes discussed in Part II, such as National Science Foundation grantmaking, approval of applications to construct hydropower projects, or denial of applications for bank charters, grazing permits on national forest land or marketing approval for new drugs.

On the trivial end of the spectrum, consider a U.S. forest ranger’s decision about who gets the last campsite, a postal clerk’s decision to refuse to accept an improperly wrapped package, or a government agency’s assignment of an undesirable parking space to an employee. Each of these decisions resolve disputes between a government agency and a private party or a government employee. The decisions are legally binding but are too trivial to merit adoption of elaborate procedures. As described in Part V, the form of procedures adopted in Type C adjudication should vary depending on several factors, including the stakes in the dispute. Even when Type C adjudication involves trivial stakes, however, the decisionmaker should afford the private party an opportunity to argue against the frontline decision and should furnish a brief explanation of the primary decision. If, for example, you’re the

12. *United States v. Arthrex, Inc.*, 594 U.S. 1 (2021), holds that the Constitution requires some form of review of Administrative Patent Judge decisions by a principal officer, meaning an officer appointed by the President and confirmed by the Senate. See further discussion of *Arthrex* in text accompanying note 326.

one denied the campsite, you should be able to argue to the ranger that you were there first and the ranger should explain courteously why you're not getting the site.

Whether the stakes are high or low, each Type C adjudicatory decision matters greatly to the non-agency party. Decision making in such cases, as in all administrative adjudication,¹³ should be accurate, efficient, and perceived to be fair, regardless of the stakes.

4. Statutory Protections for Parties in Informal Adjudication

Informal adjudication is sometimes described as a procedure-free black hole, but this is an exaggeration. As discussed in Part III, numerous federal statutes specify procedures that agencies must observe in conducting Type C adjudication. Such statutes include several provisions of the APA,¹⁴ statutes concerning the ethics of federal employees and rights to legal representation,¹⁵ ombuds statutes,¹⁶ and statutes specific to particular regulatory schemes that prescribe procedures. The judicial review process generates procedural constraints on the way in which an agency conducts informal adjudication.¹⁷ Agencies conducting Type C adjudication are sometimes constrained by due process requirements.¹⁸ Finally, and most importantly, agencies are bound by their own voluntarily adopted regulations that prescribe the procedures for conducting informal adjudication.

5. The Best Practice Approach to Type C Adjudication

No uniform set of procedures applies to Type C adjudication. Nor could there be. As Warner Gardner remarked in his brief but incisive treatment of informal adjudication: "The United States Government carries out by informal means many thousands of functions. Each is different from all others. No generalization can be true, and no proposal can be practicable, if it reflects the circumstances of one informal activity and is applied without reexamination to another."¹⁹ Rather than proposing a legally binding code of Type C procedures, this article advocates a set of procedural best practices imposed by the agencies themselves. These practices are grounded in numerous sources of law that constrain Type C decision making.²⁰ These

13. 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); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIG. L. REV. 595, 633–34 (2009).

14. See *infra* Part III.C. and D.

15. See *infra* Part III.B. and C.

16. An ombuds is an official with authority to investigate complaints and recommend resolution of these complaints. See *infra* Part III.G. for discussion of ombuds.

17. See *infra* Part III.H.

18. See *infra* Part III.A.

19. Gardner, *supra* note 9 at 157. .

20. See *infra* Part III.

best practices serve as defaults that could be incorporated in procedural regulations or guidance documents. Of course, they are only defaults. These practice proposals should be adopted, structured, and revised only after a careful situation-specific analysis of the costs and benefits of a particular procedural device in a particular administrative process as well as consideration of available resources and of the effect of adopting a particular procedural device on other agency priorities. What is a “best practice” for some agencies might be suboptimal for others. There is no “procedure fetish” here — no clumsy straitjackets compelled by legislation and motivated by anti-regulatory politics; no procedure imposed for its own sake.²¹ This is emphatically not an area where one size fits all.

B. Definitions and Distinctions

1. Adjudication

The term “adjudication” refers to agency resolution of an *individualized dispute* that has a *legally binding effect* on individual persons or entities. Adjudication is distinguished from rulemaking, which involves agency action of *generalized* application.²²

This definition of “adjudication” is intended to exclude a wide variety of government activity that is better classified as management or policy implementation, because these functions do not involve resolution of disputes between individuals and government that result in decisions that are legally binding on individuals. For example, agency decisions involving the construction or operation of federal facilities, approval of proposals by state or local government, management of hospitals or prisons, or advice-giving do not fall within this definition of “adjudication.” Similarly, “adjudication” does not include the process of negotiation between the staff and a private party of a contract since contract-making does not resolve a dispute. But disputes about existing government contracts would fall within the definition of adjudication.

21. For detailed discussion of this “procedure fetish,” see Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 351-52 (2019).

22. This definition does not track the definitions of adjudication and rulemaking contained in the APA because those definitions are defectively drafted. The APA defines “rule” as “an agency statement of general or particular applicability and future effect.” APA § 551(4). It defines “adjudication” as the process for formulating an “order,” and defines “order” as a “final disposition... of an agency in a matter other than rule making but including licensing.” APA §§ 551(6), (7). These definitions would treat a Federal Trade Commission cease and desist order to an individual respondent as a “rule,” because it is of particular applicability and future effect. However, the universal custom is to treat them as orders that are the product of adjudication, not as rules. See 2019 ACUS SOURCEBOOK, *supra* note 3 at 10-11; JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 51-57 (6th ed. 2018); Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of “Rule,”* 56 ADMIN. L. REV. 1077 (2004); Young, *supra* note 7 at 183-84. Then-professor Antonin Scalia wrote: “[T]he only responsible judicial attitude toward this central APA definition is one of benign disregard.” *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 383.

The definition of “adjudication” includes a broad category of agency action that is difficult to classify because it falls between polar models of adjudication and rulemaking. This category involves decisions to approve or disapprove applications by particular parties that have a broad impact on the general public. Examples of this type of action include approval of new drug applications or approval of dams, pipelines, or power plants. Such decisions are adjudicatory because they respond to individualized applications and meet the APA’s definition of “license” and “licensing.”²³ However, they entail environmental, public health, and economic impacts that fall on the general public.²⁴

This article considers only disputes in which agencies render a decision that has legal effect, but in which the agencies do not offer an opportunity for an evidentiary hearing at any stage of the administrative proceedings. For that reason, the article excludes discussion of schemes like patent and trademark examination, despite the presence of procedural protections, since parties who lose at the informal stage have recourse to de novo Type A or B administrative adjudication procedures further down the line.

2. Evidentiary Hearing

The term “evidentiary hearing” means a proceeding leading to a primary decision that is separate from the investigation phase that led to the frontline decision.²⁵ An “evidentiary hearing” usually consists of a trial conducted by a neutral decisionmaker at which evidence is offered orally and witnesses are subject to cross examination. However, evidentiary hearings can consist of exclusively written presentations.²⁶ Evidentiary hearings are usually adversarial in nature, meaning that the presentation of evidence is controlled by the parties and the decisionmaker is

23. Under the APA, a “license” is an “agency permit, certificate, approval, registration, charter, membership, statutory exemption, or other form of permission.” APA § 551(8). “Licensing” includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.” APA § 551(9).

24. See *infra* Part II.F.

25. These terms were defined in Part I.A.2.

26. The Federal Communications Commission (FCC) adopted a system of all-written Type B evidentiary hearings (except when resolution of factual issues requires live testimony). The FCC will not provide Type A hearings unless a statute explicitly requires them. Many Type B cases are assigned to the Commission itself or to individual commissioners for decision on the written record, rather than to an ALJ or other hearing officer. In such cases, the proceedings are entirely in writing and the preparation of a written record is delegated to a staff case manager. The case manager is subject to separation of functions requirements and cannot engage in ex parte communication. The case manager does not prepare an initial decision. See 47 C.F.R. §§ 1.242, 1.370-77; *Procedural Streamlining of Administrative Hearings*, 35 F.C.C. REC. 10729 (Sept. 14, 2020). The FCC’s all-written procedure satisfies due process requirements. *China Telecom (Americas) Corp. v. FCC*, 57 F.4th 256, 268-271 (D.C. Cir. 2022). The *China Telecom* decision involved revocation of a license held by a Chinese entity to operate transmission lines because of national security concerns. See 47 U.S.C. § 214(a). See also *Pacific Networks Corp. v. FCC*, 77 F.4th 1160, 1166 (D.C. Cir. 2023).

relatively passive. However, evidentiary hearings can be inquisitorial (as in Social Security disability adjudication), meaning that the decisionmaker exercises greater control over the presentation of evidence than would be typical of a civil trial. Regardless of whether an evidentiary hearing is adversarial or inquisitorial, the decisionmaker in an evidentiary hearing must be neutral and unbiased. Decisionmakers must not play conflicting roles in the same case or receive *ex parte* communications from outsiders or from staff adversaries. The decisionmaker can consider only evidence that appears in the hearing record or evidence that is officially noticed (the exclusive record principle), as opposed to being allowed to consider non-record evidence or the decisionmaker's own investigation.

The distinction between Types B and C adjudication is sometimes difficult to apply. A statute or procedural regulation may require an agency to provide some elements of an evidentiary hearing but not require other elements. Fortunately, for purposes of this article, it is not necessary to describe the distinction between Types B and C adjudication with precise and judicially manageable definitions. The article calls only for agencies to observe a set of best practices in conducting Type C adjudication, not for enactment of a statute that prescribes such practices. ACUS Recommendation 2016-4 proposed a set of best practices for Type B adjudication that entail more formality than the practices this article recommends for Type C.²⁷ If an agency conducting Type C adjudication were to adopt practices more appropriate to Type B (such as a neutral decisionmaker or separation of functions), little harm would be done.

3. Type C Adjudication and De Novo Judicial Review

A number of Type C adjudications discussed in Part II can be followed by *de novo* judicial trials if the private party is dissatisfied with the agency's primary administrative decision. Indeed, administrative proceedings that can be followed by *de novo* trials often fit the Type C mold, since there may be less need for an evidentiary administrative hearing when a court will later provide one. However, fair informal adjudication procedures are important even if the agency's primary decision is subject to *de novo* judicial review, because judicial review of informal agency decisions is usually infeasible as a practical matter.²⁸

II. DISPARATE TYPE C ADJUDICATION SCHEMES

Part II is intended to give the reader a sense of the vast and disparate universe of federal Type C adjudication. It describes several dozen Type C adjudication schemes, roughly grouped into ten somewhat overlapping categories. Of course, the processes described in this part represent only a small fraction of the

27. ACUS Recommendation 2016-4, *supra* note 3.

28. See *infra* Part III.H.

total number of Type C schemes. Nobody has ever attempted to identify or count them all. The only element these adjudicatory schemes have in common is that none of them include an administrative evidentiary hearing. Most of them involve the exercise of administrative discretion. Several of the descriptions include interview data from agency staff members who administer these schemes. The article protects the anonymity of these interviewees.

A. Licensing and Permitting

The APA defines “license” broadly as “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.”²⁹ Agencies engaged in licensing and other permitting programs frequently resolve disputes through Type C adjudication, especially at the license application stage.³⁰

1. Licensing of National Banks

The Office of the Comptroller of the Currency (OCC) engages in a process similar to notice-and-comment rulemaking to determine whether to issue a bank charter, meaning a license to operate a national bank. OCC considers the bank’s business plan and the experience of its promoters as well as the adequacy of the bank’s capital, its likely profitability, and the needs of the community.³¹ OCC invites the public to submit comments on pending applications. Its decision is based on information discovered in its investigation, public comments, a non-evidentiary hearing that is held if OCC determines one is needed, or any other source of information, including information supplied in meetings with interested parties.³² The process ends with a concise order including a cursory explanation of the decision granting or denying the charter.³³

29. APA § 551(8).

30. See generally Eric Biber & J. B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 140 (2014).

31. See David Zaring, *Modernizing the Bank Charter*, 61 WM. & MARY L. REV. 1397, 1408-14, 1433 (2020).

32. 12 U.S.C. §§ 26, 27; 12 C.F.R. §§ 5.7 to 5.13; OFFICE OF COMPTROLLER OF THE CURRENCY, COMPTROLLER’S LICENSING MANUAL: CHARTERS 33-68 (2021); Todd Phillips, *In the Shadow of Litigation: Understanding Bank Supervision* (forthcoming, available at SSRN: <https://ssrn.com/abstract=4890460> or <http://dx.doi.org/10.2139/ssrn.4890460>, pp. 11-12); Zaring, *supra* note 31 at 1411-12. Judicial review of OCC’s bank charter decisions is available but highly deferential. Review is based on the administrative record and on OCC’s contemporaneous explanation of its decision. *Camp v. Pitts*, 411 U.S. 138 (1973) (upholding a “curt” statement of reasons).

33. Zaring, *supra* note 31 at 1433. A new bank must also secure approval from the Federal Deposit Insurance Corp. (FDIC) which employs a similar non-hearing process. *Id.* at 1410-11.

2. Licensing of New Drugs and Tobacco Products

The Food and Drug Administration (FDA) is responsible for pre-marketing drug licensing and numerous other market authorization schemes.³⁴ Ultimately, the FDA's decision to grant or deny market authorization for a new drug is based on striking a balance between the benefits and risks of the drug. The process for determining whether to grant market authorization is Type C adjudication. It is based on conferences with affected parties and scrutiny of experimental data concerning safety and efficacy by expert committees, but the process does not employ evidentiary hearings.³⁵

As an example of pre-market authorization, the FDA must decide whether to grant permission to an applicant that wants to introduce new tobacco products such as various forms of vaping. The FDA must determine whether the benefit of particular vaping products to adult users who are trying to stop smoking cigarettes outweighs the risk that young people may become addicted to nicotine. Its Type C procedure includes informal meetings and consultations with the applicant, administrative review of the application, and a detailed letter explaining why an application was granted or denied. There is no provision for an evidentiary hearing.³⁶

3. Choice of Portability Administrator

The Federal Communications Commission (FCC) assures portability of phone numbers, meaning that users can keep the same number when they switch local service providers. The FCC must appoint a private Local Number Portability Administrator (LNPA).³⁷ In a case involving this process, the FCC selected Telcordia to replace Neustar as an LNPA after utilizing an informal adjudication process that resembled notice-and-comment rulemaking. The Court described it as an “interactive public process.”³⁸ The Court decided that the FCC correctly used informal adjudication rather than rulemaking to make the selection, because the decision involved “licensing” and required a choice between two bidding parties.³⁹

34. See Adam I. Muchmore, *Marketing Authorization at the FDA: Paradigms and Alternatives*, 74 ADMIN. L. REV. 539 (2022); Daniel G. Aaron, *The Fall of FDA Review*, 22 YALE J. OF HEALTH POL'Y, L. & ETHICS 95 (2023).

35. Food & Drug Adm'n, Development and Approval Process/Drugs, <https://www.fda.gov/drugs/development-approval-process-drugs> (last updated Aug. 8, 2022).

36. 21 U.S.C. § 387j(c)(4); 21 C.F.R. §§ 1114.25-1114.33. See *Wages and White Lion Inv., LLC v. FDA*, 90 F.4th 357 (5th Cir. 2024) (en banc) (finding FDA arbitrarily changed the criteria for acceptance of pre-marketing applications for vaping products when confronted by 1,000,000 applications). Certiorari has been granted in this case. 144 S. Ct. 2714 (2024).

37. 47 U.S.C. § 251(e)(1).

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

39. See also text at *supra* note 26 which observes that the FCC now dispenses in most cases with oral adjudicatory hearings in favor of all-written Type B decisions. Under this practice, the FCC assigns cases to itself or to individual commissioners for decision with the aid of a staff case manager who manages

4. Protection of Wild Animals

The Fish and Wildlife Service (FWS) operates various permitting systems relating to the protection of endangered species, including permits for the import of wild animal trophies.⁴⁰ The regulations call for an all-written system for determining whether to grant applications, renewals, and amendments of such permits, as well as whether to suspend or revoke permits.⁴¹ The frontline decision is made by an “issuing officer.” In deciding whether to grant applications, the issuing officer is instructed to use any relevant available information and may make an independent investigation to verify information or substantiate qualifications asserted by the applicant.⁴²

In the case of suspension or revocation, the permittee must be notified of the proposed action in writing. This notice must include the reasons for the frontline decision, including the right to request reconsideration. Any person may request reconsideration of the frontline decision by the issuing officer, including the ability to furnish new information or facts pertinent to the issues raised.⁴³ The issuing officer notifies the applicant or permittee of the decision on reconsideration within forty-five days of the receipt of the request. The notification must be in writing, state the reasons for the decision, and contain a description of the evidence upon which the agency relied. The notification also provides information relating to further appeals.⁴⁴ If reconsideration is denied, the applicant or permittee may seek a review of that decision by the Regional Director. That official can permit oral argument if necessary to clarify the record.⁴⁵

5. Authorizations for Use of National Forest System Lands⁴⁶

The U.S. Forest Service (USFS) uses a multi-step informal adjudication process to resolve disputes concerning issuance, modification, suspension, or revocation of authorizations for special uses (such as a campground concession), mining, timbering, or grazing on National Forest System (NFS) lands.⁴⁷ Case law

the process of creating a written record but who does not write an initial decision.

40. See 50 C.F.R. §§ 13.11 for a list of conservation programs requiring permits. For example, a similar set of procedures applies to applications for permits to export endangered species. See *Phoenix Herpetological Society, Inc. v. U.S. Fish & Wildlife Serv.*, 998 F.3d 999, 1006 (D.C. Cir. 2021) (agency free to use common sense and predictive judgment even though its decision was not supported by the record).

41. 50 C.F.R. §§ 13.21-29.

42. 50 C.F.R. § 13.21(d).

43. 50 C.F.R. § 29(b)(3).

44. 50 C.F.R. § 29(d).

45. 50 C.F.R. § 13.29 (e) and (f).

46. Interviews with USFS 1, -2, and -3 provided data about USFS procedures and administrative appeals.

47. USFS uses different terminology in describing its authorization and dispute resolution

establishes that USFS informal adjudication procedure satisfies due process.⁴⁸

The first step in USFS informal adjudication is an investigation by USFS staff of an application for use of NFS lands or an investigation of possible violation of the terms of a permit. This investigation process may involve review of applications for compliance with applicable policies, visits to the site, audits, evaluation of competing applications, or other investigative tools. USFS staff then recommends whether USFS should grant or deny an application or whether it should modify or revoke an existing permit.⁴⁹ Step One generates this recommendation.

If USFS staff recommend denial of an application or action to modify or revoke a permit, the second step is consideration of the staff recommendation and issuance of a primary decision by a Responsible Official who might be a District Ranger or Forest Supervisor.⁵⁰ The Responsible Official often takes part in the Step One investigation personally or by supervising the staff members who perform the investigation.

The third step is a written appeal of the Responsible Official's decision by an Appeal Deciding Officer (ADO). The appeal must be filed within 45 days of the Responsible Official's decision. The ADO first decides whether an appeal states a claim over which the ADO has jurisdiction,⁵¹ whether the appellant has standing, and whether the appeal was filed within the deadline. The ADO also decides whether to permit intervention. The ADO can request further information to clarify the issues on appeal. During the Step Three process, the Responsible Official may meet informally with the applicant, permittee, or other holders of written authorization to resolve the issues in the appeal by means other than an appeal decision.

The parties to an appeal may make an informal oral presentation to the ADO to clarify or elaborate on the written materials filed in the appeal. These presentations may be summarized or transcribed. This presentation is not evidentiary and includes no examination of witnesses or cross-examination.⁵² The ADO may

procedures. It does not use the terms "dispute" or "adjudication." This article uses these terms to describe USFS processes in order to be consistent with usage in the rest of this article. For specific regulations relating to authorizing various uses, see 36 C.F.R. Part 228 (mining), Part 222 (grazing), Part 251, and Subpart B (special uses).

48. *2-Bar Ranch Ltd. Partnership v. U. S. Forest Serv.*, 996 F.3d 984, 993-95 (9th Cir. 2021) (holding that USFS administrative appeals are not "evidentiary hearings" and are ineligible for award of attorney's fees under the Equal Access to Justice Act); *Buckingham v. Secretary of Agriculture*, 603 F.3d 1073, 1081-84 (9th Cir. 2010) (informal consultation to resolve factual disputes arising out of cancellation of a grazing permit satisfied due process).

49. APA § 558(c) and USFS regulations require USFS to give written notice of noncompliance with a permit and to provide an opportunity for the permit holder to correct the noncompliance before suspending or revoking the permit.

50. See 36 C.F.R. § 214.7(a)(1). While the regulation labels the second step as an appeal, it can be considered the issuance of a primary decision.

51. Most decisions regarding written authorizations are not subject to appeal. See 36 C.F.R. § 214.4 (providing the limited circumstances in which the ADO has subject matter jurisdiction to hear an appeal). Prior to 2013 the regulations allowed appeals of many more frontline decisions.

52. 36 C.F.R. § 214.16(b)-(c). An aggrieved party may introduce evidence if there was no prior

consider only materials in the written record compiled at Step Two and the oral presentation. USFS staff who have not been involved in the appealable decision can furnish advice to the ADO. The ADO renders a written decision within 30 days after the record closes. USFS staff estimates that there are about 20-30 appeals each year.

The fourth step is a discretionary review.⁵³ The ADO sends a copy of the decisions by the Responsible Official and the ADO to the Discretionary Reviewing Officer (DRO). In determining whether to conduct a discretionary review, the DRO considers the degree of controversy surrounding the decision, the potential for litigation, and the extent to which the decision establishes precedent or new policy. The appellant or intervenors cannot trigger this review. The discretionary review is limited to the appeal record.⁵⁴ Ex parte communications are not permitted during Steps Three or Four. The DRO may affirm or reverse the appeal decision or remand the case to the Responsible Official for further action. If the DRO does not exercise discretionary review within 30 days, the ADO's appeal decision is the final administrative decision.

B. Grants, Benefits, and Loans

A vast number of federal benefit programs resolve disputes through Type C adjudication processes.

1. Research Grant Applications Denied for Programmatic Reasons

The National Science Foundation (NSF) uses an elaborate informal adjudication process to resolve disputes arising from frontline decisions that deny funding applications.⁵⁵ The applicant must first discuss the matter with the NSF Program Officer or Division Director and then request reconsideration within 90 days of declination. The reconsideration request is delegated to an NSF reviewer who had no part in making the frontline decision. The reviewer may request additional information and obtain additional peer reviews. The reviewer then makes NSF's primary decision. The applicant can request a further review by the Deputy Director of NSF, who again delegates the matter to a previously uninvolved staff

opportunity to do so or when it would be "unfair and prejudicial" to prevent the party from introducing new evidence.

53. 36 C.F.R. § 214.19.

54. See 36 C.F.R. § 214.19(e).

55. See NATIONAL SCIENCE FOUNDATION, PROPOSAL AND AWARD POLICIES AND PROCEDURES GUIDE Chapters III-F. 2. and IV-D (Oct. 4, 2021) (describing the appeals process for the discretionary denial of funding) (hereinafter PAPPG). See generally Thomas O. McGarity, *Peer Review in Awarding Discretionary Grants in the Arts and Sciences* (May 1993) (ACUS report); ACUS Recommendation 82-2, *Resolving Disputes Under Federal Grant Programs*, 47 Fed. Reg. 30,704 (July 15, 1982); ACUS Recommendation 71-4, *Minimum Procedures for Agencies Administering Discretionary Grant Programs*, 38 Fed. Reg. 19,789 (July 23, 1973). A different informal process is designed for review of applications that were declined for administrative or financial reasons rather than programmatic reasons.

member. The Deputy Director makes the final decision.⁵⁶

2. Insurer Benefit Decisions

Regulations adopted by the Health Care Financing Administration (HCFA) implement the Affordable Care Act (ACA). The regulations provide for a review of adverse benefit determinations by health insurers or group health plans based on medical judgments.⁵⁷ The process begins with an internal review at the insurer or group plan level, followed by an external review at the state level. If a state's external review procedure does not meet federal standards, a further federal review procedure comes into play.

The federal review is conducted by a private and unbiased "independent review organization" (IRO) rather than by government officials. The insurer must submit to the IRO any information considered in making the adverse determination. The IRO must inform the claimant that it may submit additional written information within ten business days. The IRO must consider this additional information and transmit it to the insurer to enable the insurer to reconsider its adverse decision. The IRO is permitted to consider non-record evidence, such as the report of its own clinical reviewer as well as practice guidelines developed by the federal government or by professional medical societies and clinical review criteria used by the plan. The IRO then makes the primary decision, including "a discussion of the principal reason or reasons for its decision, the rationale for its decision and any evidence-based standards that were relied on in making its decision." An ombuds is available to consider complaints arising under this process.⁵⁸

3. Discrimination in Loan and Grant Programs

The Department of Agriculture (USDA)⁵⁹ maintains a "15d procedure" that is intended to identify and remedy racial and other prohibited discrimination in its benefit programs. Persons who believe they were the victims of illegal discrimination in a loan program can seek judicial relief under the Equal Credit Opportunity Act (ECOA).⁶⁰ The USDA's 15d procedure serves as a low-cost alternative to ECOA litigation as well as to remedy forms of discrimination not covered by ECOA.

56. NSF maintains a similar all-written dispute resolution system for suspension or termination of grants or accounting issues. *See* PAPP, *supra* note 55, chap. XII B.

57. 45 C.F.R. § 147.136(d) which implements 42 U.S.C. § 300gg-19 and contains the details of this informal adjudication process.

58. For discussion of ombuds, see Part III.G.

59. 7 C.F.R. Pt. 15d.5. An interview with USDA 1 provided data about USDA's 15d procedure.

60. 15 U.S.C. §§ 1691-1691f. *See also* § 22007(e) of the Inflation Reduction Act, Pub. L. 117- 169, 136 Stat. 1878, appropriating \$250,000,000 for financial assistance to farmers who experienced racial discrimination in USDA farm lending programs prior to 2021. This appropriation recognizes the tragic history of racial discrimination in the administration of USDA loan programs.

The USDA's Office of the Assistant Secretary for Civil Rights (OASCR) administers the 15d procedure. A typical 15d complaint might allege that the rejection of a loan application to the Farm Services Agency (FSA) occurred because of prohibited discrimination. A complainant can initiate a 15d proceeding by filing a form within 180 days of the USDA's adverse action. OASCR's intake division determines whether the complaint was filed timely and alleges a form of discrimination it can remedy. If the dispute is not settled, the case is assigned to an investigator. The investigator gathers the relevant documents and contacts the complainant, the USDA staff involved in the rejection decision, and other witnesses. The investigator lacks subpoena power. Witnesses are not sworn but must attest to the truthfulness of their statements. The investigator considers demographic information and compares the facts to similar transactions. The complainant has an opportunity to rebut statements made by agency personnel. Complainants often represent themselves but can be assisted by lawyers and lay representatives.⁶¹

The investigator prepares the record of investigation (ROI) and transmits it to the Adjudication Division which assigns the matter to an adjudicator. The adjudicator determines whether the evidence will support an inference of discrimination by a preponderance of the evidence. The adjudicator does not conduct an evidentiary hearing and does not hear or see the witnesses but considers only information in the file. The Adjudicator's report is the primary decision. The losing party has no opportunity for a further appeal. If the alleged discrimination occurred in a USDA loan program, the complainant could obtain a *de novo* judicial trial under ECOA.⁶²

In FY 2022, 279 complaints were filed under the 15d program. OASCR issued eighty-two final decisions on the merits in 2022 and closed forty-four cases because of procedural defects.⁶³ Of the eighty-two merits decisions, only one was in the complainant's favor.⁶⁴ The reason for the low number of sustained complaints is the difficulty of proving discrimination without conducting trial-type hearings since discrimination can be subtle and seldom reveals itself in documents. Thus, the 15d program might be more effective if converted into a Type B adjudication scheme. That would enable complainants to attempt to prove discrimination in an evidentiary hearing by cross-examining agency officials.

There is no ombudsman to receive complaints about the 15d adjudicatory process. The USDA has instituted a quality assurance program for 15d cases. An auditor evaluates the process by considering a random sample of OASCR cases.

61. Interview with USDA 1, *supra* note 60.

62. The negative 15d decision does not give rise to issue preclusion in an ECOA action because the 15d proceeding is not sufficiently judicial. "The [15d] proceedings resemble what may be called executive procedure, that is, unilateral decision by an official on the basis of whatever information he deemed it appropriate to take into account." *Johnson v. Vilsack*, 833 F.3d 948, 953-58 (8th Cir. 2016) (internal quotation marks and citation deleted).

63. Interview with USDA 1, *supra* note 60..

64. *Id.*

C. Immigration and Naturalization

The immigration and naturalization processes, such as resolution of asylum claims at the border or deciding whether to grant non-immigrant visas, generate a high volume of Type C adjudication.⁶⁵

1. Asylum Claims at the Border

The immigration and enforcement officers of the Department of Homeland Security (DHS) determine whether undocumented individuals who have crossed the border should receive expedited removal.⁶⁶ Undocumented individuals subject to expedited removal cannot challenge the decision in evidentiary proceedings conducted by the Immigration Court.⁶⁷ This account of Type C adjudication of asylum claims at the border describes procedures as they existed before President Biden's action to close the border to most asylum claimants, a policy continued by President Trump.

Many undocumented immigrants who cross the border and are subject to expedited removal apply for asylum status. An asylum officer conducts a non-adversarial interview with such claimants. The asylum officer decides whether the claimant has established a "significant possibility" that the claimant qualifies for asylum, meaning the claimant has a "credible fear" of persecution or torture if returned to the claimant's home country. The claimant can be assisted at the interview by anyone of their choice, if such assistance does not unreasonably delay the process. Asylum officers consider the credibility of the claimant's statements and other facts known to the asylum officer. The asylum officer creates a written record including a summary of material facts stated by the claimant, any additional facts relied on by the asylum officer, and the asylum officer's determination of whether the claimant has established a credible fear. If an asylum officer rejects that claim, the officer's decision is reviewed by a supervisor. If the asylum officer accepts the undocumented immigrant's credible fear claim, U.S. Citizenship and Immigration Services (USCIS) can schedule a follow-up interview and issue a final decision on

65. In addition, the U. S. Citizenship and Immigration Service employs Type C procedure for determining whether a green card applicant has entered into a sham marriage. *See* *Mestaneck v. Jaddou*, 93 F.4th 164, 174-75 (4th Cir. 2024) (holding that USCIS Type C procedure satisfies due process).

66. *See* 8 C.F.R. §§ 208.20, 235.3; *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18,078 (March 29, 2022).

67. *See* Philip G. Shrag, Jaya Ramji-Nogales, & Andrew Schoenholtz, *The New Border Asylum Adjudication System: Speed, Fairness, and the Representation Problem*, 66 HOWARD L. J. 571, 585-600 (2023); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 SO. CALIF. L. REV. 181, 194-203 (2016). In addition to expedited removal, there are numerous other deportation disputes resolved through Type C adjudication such as consideration of waiver applications or other mechanisms to avoid deportation. *See* Family, *supra* note 13; Jill E. Family, *A Lack of Uniformity, Compounded, in Immigration Law*, 98 NOTRE DAME L. REV. 2115, 2135-39 (2023).

the merits of whether the claimant qualifies for asylum.

A claimant can appeal an asylum officer's credible fear decision to an immigration judge who decides whether there is a reasonable possibility that the asylum claim can be sustained. The immigration judge considers the interview record before the asylum officer as well as the asylum officer's decision. The immigration judge may receive into evidence any oral or written statements submitted by the claimant. The immigration judge may decide the case on the documentary evidence without an oral hearing if neither side wishes to present oral evidence or cross-examine. Interpreters are provided if necessary. The immigration judge determines whether the review is conducted in person or through telephone or video. The immigration judge provides a de novo determination of the "significant possibility" issue by considering the credibility of the claimant's statements and such other facts as are known to the judge.⁶⁸

2. Non-Immigrant Visa Applications

USCIS reviews visa applications through a Type C adjudicatory process.⁶⁹ If a consular official refuses to issue a non-immigrant visa, the consular officer must inform the applicant of the grounds of ineligibility and whether there is a mechanism (such as a waiver) to overcome the refusal.⁷⁰ The consular officer's supervisor reviews decisions to refuse to issue a non-immigrant visa, but the applicant plays no role in this review. If the reviewing officer disagrees with the consular officer's decision, the reviewing officer can assume responsibility and re-adjudicate the matter or forward it to the State Department for an advisory opinion. No hearing is provided.⁷¹ There

68. 8 C.F.R. § 1003.42(c), (d)(1), (e), (f). See *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103 (2020). The *Thuraissigiam* decision provides background information describing the asylum determination process. It holds that due process does not apply to summary asylum determinations and upholds preclusion of habeas relief. Claimants for asylum status are rebuttably presumed to be ineligible for asylum if they failed to schedule an appointment at the port of entry or fail to apply for asylum in a third country before entering the U.S. *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31,314 (May 16, 2023).

69. See Tatyana E. Delgado, *Leaving the Doctrine of Consular Absolutism Behind*, 24 GEO. IMMIG. L.J. 55, 56-57 (2009). In some other types of visa disputes, USCIS conducts Type B adjudication through its Administrative Appeals Office (AAO). AAO has jurisdiction over approximately 50 different immigration case-types, such as employment-based immigrant visa petitions. See Walker & Wiener, *supra* note 6 at Appendix D; *The Administrative Appeals Office (AAO)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/organization/directorates-and-program-offices/the-administrative-appeals-office-ao> (last updated Jan. 31, 2025).

70. 22 C.F.R. § 41.121(b).

71. 22 C.F.R. § 41.121(b) and (c). The State Department may request a consular official to submit a report if a visa has been refused. *Id.*, § 41.121(d). The department reviews each report and may furnish an advisory opinion to the consular officer for assistance in considering the case further. Rulings of the Department concerning a legal interpretation, as distinguished from an application of law to the facts, are binding on consular offices. The provisions relating to rejected applicants for immigrant visas are similar. 22 C.F.R. § 42.81.

is no judicial review of consular decisions to deny visas to non-citizens.⁷²

3. Voluntary Expatriation

A U.S. citizen can voluntarily expatriate by obtaining naturalization in a foreign state with the intention of relinquishing U. S. nationality.⁷³ In order to issue a certification of loss of nationality (CLN), the State Department requires that persons claiming expatriation present themselves to a consular officer for an interview and execute a form evidencing understanding of the consequences of expatriation. The consular officer issues a recommended decision.⁷⁴ There is no provision for any procedural protections other than this interview.⁷⁵

D. Foreign Policy and National Security

Various administrative programs in the foreign policy and national security space also administer systems of informal adjudication.⁷⁶

1. Economic Sanctions

The International Emergency Economic Powers Act (IEEPA) authorizes the President to impose economic sanctions to address threats to national security.⁷⁷ Pursuant to IEEPA, the President has imposed various measures ranging from comprehensive jurisdiction-based embargoes to targeted restrictions on persons engaged in specified activities. The Treasury Department's Office of Foreign Assets Control (OFAC) administers U.S. economic sanctions, often in consultation with the State Department. OFAC publishes lists that identify persons subject to sanctions. For example, the Specially Designated Nationals and Blocked Persons List (SDN List) identifies individuals and entities that OFAC has identified as being owned or controlled by targeted countries or that otherwise meet the criteria for

72. *Dep't of State v. Muñoz*, 144 S. Ct. 1812 (2024) (refusing to permit challenges by a U.S. citizen spouse of visa denial to non-citizen spouse). See Desiree C. Schmitt, *The Doctrine of Consular Nonreviewability in the Travel Ban Cases*, 33 *Geo. Immig. L. J.* 55 (2018).

73. 8 U.S.C. § 1401(a)(1).

74. DEPARTMENT OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1227(a).

75. These procedures (described as "informal adjudication") were upheld in *Farrell v. Blinken*, 4 F.4th 124 (D.C. Cir. 2021) (finding that denial of a CLN was arbitrary because the Foreign Service had given conflicting instructions about the procedures needed to obtain it).

76. See Elena Chachko, *Administrative National Security*, 108 *GEO. L. J.* 1063 (2020).

77. 50 U.S.C. §§ 1701 *et seq.* Interviews with OFAC-1 provided data on OFAC's delisting process. The provisions for economic sanctions generate a large volume of informal adjudication. See Chachko, *supra* note 76 at 1112; Allison Lofgren, *Balancing Liberty and Security: A Proposal for Amplified Procedural Due Process Protections in the U.S. Sanctions Regime*, 31 *WM. & MARY BILL RTS. J.* 235 (2022). The regulations provide for Type B evidentiary hearings when OFAC imposes a civil money penalty for violation of sanctions. 31 C.F.R. §§ 501.703, 704.

sanctions. The assets of persons on the SDN List are blocked, and U.S. persons are generally prohibited from dealing with them.

The addition of a person to the SDN List is referred to as a “designation.” OFAC typically provides public notice of a designation by publishing an SDN’s name and identifying information on its website and by publishing SDN designations in the Federal Register.⁷⁸ In addition, OFAC generally publishes a press release announcing a designation and describing the basis for the imposition of sanctions.

A listed person or entity (LP) may file a delisting request (sometimes called administrative reconsideration).⁷⁹ The LP submits evidence and arguments establishing that an insufficient basis existed for the designation or that the circumstances resulting in the designation no longer apply. The petition may also propose remedial measures that the LP believes would negate the basis for designation.

OFAC reviews material submitted by the LP as well as other information available to OFAC, much of which is classified. OFAC may consult with other government agencies, such as the State Department. If an LP requests the evidentiary record underlying its designation, OFAC prepares an unclassified version of the evidentiary record. A petitioner may request a meeting with OFAC prior to the decision on its delisting petition, but such meetings are not common.

OFAC staff prepares an evidentiary memorandum for the OFAC Director summarizing the basis for a recommendation to grant or deny a delisting request. The OFAC Director, under the general supervision of the Under Secretary for Terrorism and Financial Intelligence, determines whether to grant or deny the petition. Petitioners may resubmit a petition multiple times with additional evidence and argument if circumstances change. The Director’s determination is a final agency decision that is subject to judicial review. There is no ombudsman to whom designated persons can complain about the OFAC process. OFAC does not disclose the number of delisting petitions considered or the number of such petitions that are successful.

2. Prevention of Foreign Investment that Might Impair National Security

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee chaired by the Secretary of the Treasury. The other voting

78. The listing decision typically occurs without prior notice to the sanctioned person. Due process does not require OFAC to provide pre-deprivation notice and opportunity to be heard before a designation occurs in light of the government’s compelling national security and foreign policy interests and the need for prompt action to prevent asset flight. *See, e.g., Holy Land Foundation v. Ashcroft*, 219 F. Supp. 2d 57, 77 (D.D.C. 2002).

79. *See* 31 C.F.R. § 501.807; <https://ofac.treasury.gov/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list> (last consulted Jan. 31, 2025).

members are the heads of cabinet agencies and other high-level federal officials.⁸⁰ White House officials often participate as well. CFIUS investigates proposed or completed foreign investments in the U.S., including corporate acquisitions that might impair national security.⁸¹ CFIUS can recommend to the President that the investment be prohibited or subject to conditions.

Parties normally submit a written notice to CFIUS of a proposed transaction that contains detailed information about the investment and requires payment of a substantial fee. CFIUS can also initiate investigations of proposed or completed investment transactions on its own. Transaction parties often begin the process by informally consulting CFIUS before filing formally⁸² and may submit a written declaration to test the waters before filing a notice. The declaration triggers a 30-day assessment period, at the end of which the staff may require that a notice be filed. Submission of a declaration is mandatory for technology, infrastructure, and personal-data investments.⁸³

CFIUS has 45 days to review the notice of a proposed transaction and a further 45 days to investigate the transaction if it concludes that the investment is a covered transaction and the CFIUS members or staff believe it might impair U.S. national security. During these periods, the parties engage in informal meetings and negotiations with CFIUS staff and often work out settlements to mitigate risks to national security.⁸⁴ If it appears that CFIUS will prohibit the transaction, most parties abandon the investment and withdraw the notice. At the end of the investigation period, if the matter is not otherwise resolved, CFIUS transmits its recommendation to the President. Such presidential action is not subject to judicial review.⁸⁵

CFIUS determinations are highly discretionary. Terms like “national security” and “covered transaction” are not precisely defined and appear to be broadening. CFIUS’s work is highly secretive and those who work in this field consider its decisions to be unpredictable.⁸⁶ CFIUS does not explain its decisions to

80. See Vania Wang, *A New CFIUS: Refining the Committee's Multimember Structure with For-Cause Protections*, 90 GEO. WASH. L. REV. 1316 (2022) (criticizing this structure); Kristin E. Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549 (2023).

81. See 50 U.S.C. § 4565.

82. Eichensehr & Hwang, *supra* note 80 at 563.

83. See 31 C.F.R. §§ 301.401 to 601. These regulations concern the declaration and notice procedure. For discussion of these procedures, and an analysis of recent CFIUS decisions, see Philip Land, Katie Busbee, and Ashley Long, *FDI Oversight: Dawn of a New Era*, 10 NAT. SEC'Y L. REV. 1, 11-16 (2023).

84. See 31 C.F.R. § 800.501(g), encouraging parties to consult with CFIUS staff in advance of filing a notice or filing a draft notice; § 800.601(b), encouraging meetings during the review and investigation stages.

85. 50 U.S.C. § 4565(e)(1). For discussion of judicial review of CFIUS determinations, see Eichensehr & Hwang, *supra* note 80 at 583-96.

86. See Eichensehr & Hwang, *supra* note 80; Xingxing Li, *National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and U.S. Laws and Practices*, 13 BERK. BUS. L. REV. 255, 271-75 (2016).

the parties when it recommends that a transaction be prohibited. Courts have held that due process applies to CFIUS decisions.⁸⁷ As a result, the parties have the right to access unclassified evidence on which CFIUS relies and an opportunity to rebut that evidence.

3. Watch Lists

The FBI administers a multi-agency Terrorist Screening Center that manages the Terrorist Screening Database. The Database includes a “no fly list” and a “selectee list.”⁸⁸ The Transportation Security Administration (TSA) provides redress for persons who are prevented from boarding an aircraft or are unfairly or improperly delayed and believe they may be listed persons. The procedure is called Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP). Persons who believe they are listed persons may file an inquiry form through DHS TRIP. The TSA reviews the documentation and information requested from the inquirer, corrects any erroneous listing or other information, and provides a timely written response.⁸⁹ DHS TRIP review consists entirely of consideration of written materials. As originally adopted, the response did not confirm or deny that the inquirer is a listed person.

A number of cases applied due process analysis to the TSA’s no-fly determinations.⁹⁰ These decisions caused the TSA to revise DHS TRIP procedures.⁹¹ The agency now provides access to unclassified information that explains why a person is listed and enables the listed person to submit information to rebut the listing decision. The TSA Administrator sends a determination letter that states the basis for the decision “to the extent feasible in light of national security and law enforcement interests at stake.”⁹² The letter notifies a listed person of the ability to seek judicial review in the appropriate Court of Appeals.

87. *Ralls Corp. v. CFIUS*, 758 F.3d 296, 317-21 (D.C. Cir. 2014). See Li, *supra* note 87 at 275-77. The *Ralls* decision held that an informal opportunity to present evidence to CFIUS was not sufficient to satisfy due process, because the acquiring party had no opportunity to tailor its submission to the government’s concerns or rebut the factual premises underlying its action.

88. Persons on the selectee list encounter more rigorous screening than other passengers. See Chachko, *supra* note 76 at 1103-09 for discussion of the watchlist process.

89. 49 C.F.R. § 1560.205. A person may be represented by counsel at his or her own expense during the redress process. 49 C.F.R. §1560.203.

90. See *Latif v. Holder*, 28 F. Supp.3d 1134 (D. Or. 2014); Chachko, *supra* note 76 at 1106-07. A person is not deprived of liberty or property merely by being subjected to additional screening or boarding delays. *Abdi v. Wray*, 942 F.3d 1019, 1032 (10th Cir. 2019).

91. See <https://www.dhs.gov/dhs-trip> (last accessed Jan. 31, 2025); *Maniar v. Mayorkas*, 2023 WL 2709040 (D.D.C. 2023); Chachko, *supra* note 77 at 1108.

92. *Maniar v. Mayorkas*, *supra* note 91, at 3.

E. Inspections, Grading, and Testing

A large number of disputes between private parties and government agencies are resolved by inspections or tests rather than by hearings.⁹³

1. Bank supervision⁹⁴

Banks and bank holding companies are closely supervised by several federal agencies, depending on whether they are federal- or state-chartered. These agencies include the Office of Comptroller of the Currency (OCC), Federal Deposit Insurance Corp (FDIC), the National Credit Union Administration (NCUA), and the Board of Governors of the Federal Reserve System (FRS). Bank examiners raise issues about the institution's financial health and compliance with banking law in the form of Material Supervisory Determinations (MSDs). MSDs can lead to enforcement proceedings. The examiners also determine confidential ratings of bank soundness (called CAMELS).⁹⁵ A bad CAMELS score can lead to enforcement action and can increase the cost of deposit insurance and entail other negative business consequences. Bank supervision is a deeply discretionary process.⁹⁶

By statute, MSDs and CAMELS are subject to an independent intra-agency appellate process.⁹⁷ The four agencies have different approaches to conducting appeals, but none involve evidentiary hearings. The FRS, for example, makes use of a panel of three Reserve Bank or FRS employees called the Initial Review Panel (IRP), as well as an attorney to advise the panel.⁹⁸ The panel members and the attorney must not have been substantively involved in the dispute and must not directly or indirectly report to any persons who made the MSD under review. They may not be employees of the Reserve Bank that made the MSD and must have relevant experience. The IRP conducts an informal appeal meeting if the institution requests it or if the panel decides to hold the meeting. The institution may appear

93. *See* Final Report, *supra* note 9 at 35-38. The APA exempts from Type A requirements "proceedings in which decisions rest solely on inspections, tests, or elections." APA § 554(a)(3).

94. *See generally* Phillips, note 32, for a thorough account of bank supervision, which is often referred to as "prudential regulation."

95. CAMELS is an acronym standing for capital, assets, management, earnings, liquidity, and susceptibility to market risk. Julie Anderson Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 WASH. UNIV. L. REV. 1101, 1107 (2015).

96. *See* Phillips, note 32, at 27-35.

97. *See* 12 U.S.C. § 4806(a),(f)(2); *see* 12 U.S.C. § 4806(b)(1) (requiring federal banking agencies to hear and resolve appeals of "material supervisory determination[s] . . . expeditiously").

98. Hill, *supra* note 95, criticizes inconsistencies among the four agencies' practices, especially concerning scope of review and a lack of transparency. She also argues that the agencies underutilize appellate procedures. Details of this process are set forth in Internal Appeals Process for Material Supervisory Determinations and Policy Statement Regarding the Ombudsman for the Federal Reserve System, Docket No. OP-1696, [federalreserve.gov/supervisionreg/srletters/SR2028a1.pdf](https://www.federalreserve.gov/supervisionreg/srletters/SR2028a1.pdf) (2020), last accessed on January 31, 2025.

personally or through counsel to make an oral presentation. There is no cross-examination. The IRP does not follow formal rules of evidence or conduct discovery. It may conduct additional fact finding by soliciting views of outside parties including the staff who participated in making the MSD. The IRP's review is *de novo*. It must file a detailed written decision.⁹⁹ The institution may then request a final review conducted by a Final Review Panel (FRP). The FRP consists of at least two FRB employees, one of which must be an officer of the Board at the level of associate director or higher, and an assigned attorney to advise the FRP. The members of the FRP and the attorney must have no prior substantive involvement in the matter. The FRP can in its discretion conduct an informal appeal meeting, but no new facts may be introduced in this meeting. The FRP's decision is confined to the record made by the IRP and its standard of review is whether there has been a clear error of judgment.

The banking regulatory agencies also engage in stress testing of bank holding companies with assets in excess of \$250 billion. Stress testing is designed to determine the adequacy of a bank's capital.¹⁰⁰ This exercise calls for a discretionary multi-factor determination. Banks can request reconsideration of such determinations and can also request an informal hearing to resolve disputes regarding material facts. Regulators have discretion on whether to hold a hearing. The bank must be notified of the final decision within thirty days of the hearing.¹⁰¹

2. Processed Fish Inspections

A voluntary processed fish inspection program operated by the Department of Commerce depends entirely on inspections.¹⁰² Inspectors are not permitted to inspect any processed product in which they are directly or indirectly financially interested.¹⁰³ A manufacturer that disagrees with the report of the original inspector is entitled to an appeal in the form of a re-inspection conducted jointly by two different inspectors.¹⁰⁴

99. See also *Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 229 (D.D.C. 2016). The *Metlife* case reviewed a decision by FSOC to list Metlife as a non-bank financial company whose failure could pose a threat to financial stability. The court overturned the decision as an abuse of discretion because the agency had failed to follow its own regulations. The staff met with Metlife representatives 12 times and submitted 21,000 pages of material. The agency held an informal hearing at which Metlife submitted additional materials.

100. See Daniel K. Tarullo, *Bank Supervision and Administrative Law*, 2022 COLUM. BUS. L. REV. 279, 321 (2022) ("The Federal Reserve regulation calls for the calculation of a 'stress capital buffer' for each bank, which reflects the maximum net loss [the bank] could be expected to suffer during [a] hypothesized severely adverse scenario.").

101. 12 C.F.R. § 225.8 (i); see Tarullo, *supra* note 100 at 322-25 (discussing the Federal Reserve's stress test factors).

102. See 50 C.F.R. § 260.12.

103. 50 C.F.R. § 260.24.

104. 50 C.F.R. §§ 260.36, 260.40. See Verkuil, *supra* note 6, at 770 ("The [fish processor] may

3. Approvals for Pilots with Medical Conditions

Pilots seeking a medical certificate who are ineligible because they have various medical conditions (such as diabetes or a mental health disorder) or take certain medications can apply for a special medical certificate (SMC) or a Statement of Demonstrated Ability (SODA) from the Federal Aviation Administration (FAA).¹⁰⁵ The decision to issue or deny an SMC or SODA is made by an Aviation Medical Examiner from available records. The examiner can order additional flight or medical tests. If an application is denied, the applicant can seek reconsideration from the Federal Flight Surgeon (FFS). The FFS convenes a panel of physicians with expertise in the area of concern to review documentation and advise the FFS. The panel conducts its analysis behind closed doors and the airman has no opportunity to testify. No further procedures are provided.¹⁰⁶

4. Adulterated Food

The FDA relies on inspections to determine whether imported food or drugs are misbranded, adulterated, or unfit for human consumption.¹⁰⁷ It must provide the importer with notice and an opportunity to appear before a designee of the Commissioner and introduce testimony. The resulting hearing does not include testimony by government officials and is primarily based on inspection results. It is not limited by an exclusive record requirement.¹⁰⁸ However, the FDA must provide proper notice so that the opportunity to appear and introduce testimony is meaningful.¹⁰⁹ The importer can seek a stay and reconsideration of the decision by the FDA Commissioner.¹¹⁰

F. Land Use Approvals

Numerous land uses proposed by private parties require federal

appeal an initial denial of a certificate by asking for a reinspection by a different inspector.").

105. 14 C.F.R. § 67.401. See Brendan J. Keegan, *The Demon on the Flight Deck: A Proposal for Substantive and Procedure Reform in Aviation Medical Regulations*, 48 UNIV. OF DAYTON L. REV. 55, 59-63 (2023) (discussing regulations pertaining to SMCs and SODAs).

106. See 14 C.F.R. §§ 67.407, .409

107. 21 U.S.C. § 381(a); see also 21 C.F.R. § 1.94(a) (describing hearing procedures).

108. *Sugarman v. Forbragt*, 267 F. Supp. 817, 825 (N.D. Cal.1967), *aff'd*, 405 F.2d 1189, 1190 n.3 (9th Cir. 1968).

109. See 21 C.F.R. § 1.94(a) ("the owner or consignee shall have an opportunity to introduce testimony"); see also *L&M Indus. v. Kenter*, 458 F.2d 968, 970-71 (2d Cir. 1972) (holding that meaningful notice requires "a statement of the grounds upon which the [imported] article may be refused admission" sufficient to provide appellants "some knowledge of the issues upon which the [appellants'] testimony is needed").

110. See 21 C.F.R. §§ 10.33, 10.35 (an "interested person may request reconsideration" or an "administrative stay" of an FDA action).

government approval, such as applications to build pipelines or power plants. The process for considering whether to grant such applications falls between adjudication and rulemaking. The APA classifies land use approval as a “license,” meaning any “form of permission.” A licensing decision is an “order” and “adjudication” is “agency process for the formulation of an order.”¹¹¹ Using the more functional definitions discussed earlier,¹¹² land use approval proceedings are “adjudication” because they are triggered by a particular party’s application. They are Type C adjudication because the approval process does not include a legally required evidentiary hearing.¹¹³ Nevertheless, land use approvals resemble rulemaking more than adjudication, because the proposed project often affects the interests of large numbers of people in addition to the applicant. These decisions do not turn on facts relating to individuals. Rather, they are based primarily on environmental and engineering analyses and often involve difficult political choices.

Land use approval proceedings resemble notice-and-comment rulemaking.¹¹⁴ Statutes require public notice to all stakeholders (including those that might be adversely affected by the proposed project), multiple opportunities for public input (both written and oral), detailed evaluation by agency staff, an environmental impact statement, and a final decision at the agency-head level that explains how the agency resolved the disputed issues arising from the application. The required procedures generally include public hearings, but such hearings are an information-gathering exercise that enables large numbers of people to express their opinions about the proposed project, rather than an evidentiary hearing.

An example of federal land use permitting is the process employed by the Federal Energy Regulatory Commission (FERC) for approval of new hydropower licenses and renewal of existing hydropower licenses.¹¹⁵ Hydropower applications require consideration of numerous complex and often controversial environmental, economic, and technical issues. The Integrated Licensing Process (ILP) is the default

111. APA § 551(6)-(9).

112. See Part I.B.1.

113. See *Mandan, Hidatsa & Arikara Nation v. U.S. Dep’t of the Interior*, 95 F.4th 573, 583-84 (8th Cir. 2024), rejecting a due process challenge to the use of Type C adjudication procedure for approval of oil drilling operations under a lake within an Indian reservation.

114. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). The *Overton Park* decision concerned the approval by a federal agency of a highway route proposed by state and local government. The decision to approve the route resembled a typical notice and comment rulemaking and was very controversial. It was preceded by a lengthy process that included multiple opportunities for written submissions and public hearings, but not evidentiary hearings. See Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1268-76 (1992) (discussing the procedural requirements of highway siting approvals).

115. Interviews with FERC-1 and FERC-2 provided details of the FERC hydropower process. See Jody D. Lowenstein & Samuel J. Panarella, *Troubled Water: Building a Bridge to Clean Energy Through Small Hydropower Regulatory Reform*, 36 UCLA J. OF ENV’T L. & POL’Y 231, 270-74 (2018); Lauren Perkins et al., *The Opportunities and Challenges of Hydropower for Mitigating Climate-Driven Scarcity*, 18 SAN DIEGO J. OF CLIMATE & ENERGY L. 37, 100-102 (2022).

procedural scheme.¹¹⁶

The first step of the ILP is optional but frequently employed. It consists of an application for a preliminary permit that gives the permittee priority over other potential applicants for the site.¹¹⁷ The application provides detailed information about the project and the studies to be performed. A preliminary permit authorizes the applicant to study a project site for a four-year period (which could be extended). The permit application triggers a public notice and comment process. The preliminary permit calls for progress reports every six months. During the preliminary permit stage, an applicant conducts feasibility and environmental studies and engages in pre-filing consultations with other stakeholders.

The second step is the pre-filing process.¹¹⁸ It normally lasts about three years and is largely devoted to identifying and completing studies of technical and environmental issues raised by the application. The applicant files a formal notice of intent (NOI) with the Commission that an application for a new license or a relicense will be filed. The applicant also files a pre-application document that describes the project and proposed studies. The public is invited to participate in the pre-filing process. These stakeholders might include other interested federal agencies (such as the Forest Service) as well as affected landowners, environmental groups, and other members of the public. The staff prepares a scoping document that identifies all known environmental issues and alternatives to the project that will be addressed in the Commission's future National Environmental Policy Act (NEPA) document. The scoping document is then issued for comment.

The applicant files a proposed study plan that responds to the study requests made by the public and the staff. Commission staff makes a final study plan determination and the applicant conducts the studies. Public meetings are held in the project location. Such meetings deal with environmental scoping issues as well as the applicant's study plans. Written as well as oral comments are welcome. The pre-filing period is intended to resolve as many issues as possible so that the final application process is simpler and quicker. Statements made at public meetings are transcribed. Applicants and other agencies are often represented by attorneys and consultants. If disputes arise during this period, they are resolved by panels consisting of the applicant, the party making objections (often another state or federal agency), and a neutral party. FERC commissioners may be available to meet with interested parties

116. FERC, HYDROPOWER PRIMER 29 (2017), available at <https://www.ferc.gov/media/hydropower-primer> (hereinafter *Primer*) (last accessed January 31, 2025). Instead of using ILP, applicants may seek to use two different licensing processes—the Alternative Licensing Process (ALP) and the Traditional Licensing Process (TLP). These options address the pre-filing process step. They require less FERC staff involvement than ILP. ALP is based on collaboration between the applicant, stakeholders, and Commission staff, leading to a settlement agreement. ALP resembles negotiated rulemaking, but it has not been commonly used in recent years. TLP is used for less controversial or less complex projects. It requires fewer studies and less staff involvement during the pre-filing process.

117. See 18 C.F.R. §§ 4.80-4.84.

118. See *Primer*, *supra* note 116, at 29-31 (describing FERC's hydropower licensing process).

including the applicant during the pre-filing period.

The third step¹¹⁹ consists of the filing of the final license application, which contains the studies prepared during the pre-filing process and staff review of the application. The Commission then issues a public notice of the application. Members of the public may seek to intervene and be admitted as parties. Stakeholders and other government agencies may comment, protest, and provide alternative recommendations. Commission staff prepare an environmental impact statement. If the application is contested, for example because an intervenor disputes a material issue, the Commission's *ex parte* rule is triggered and all communications to the staff (including phone calls) regarding the merits of the proceeding must be on the record.

The fourth step consists of the Commission's final decision. It considers the NEPA document prepared by staff and all other information in the record. The decision includes measures that the FERC has determined are necessary for operating the project and protecting the environment, as well as any other mandatory terms and conditions. In uncontested cases, Commission staff can issue the final licensing decision under delegated authority. Parties, including intervenors, may seek rehearing of the decision. Otherwise, the order is final. In order to seek judicial review, a party must request a Commission rehearing.

FERC has an Office of Public Participation (OPP) that assists members of the public who wish to take part in the license approval process but have not intervened. FERC also has a land-owner hotline. FERC has about 150 hydropower projects under current consideration, primarily consisting of relicensing of existing permits that are due to expire. FERC has no ombuds. Persons who are unhappy with the process can complain to the staff or file written complaints that would be included in the record or trigger a dispute resolution proceeding. FERC has not re-examined the hydropower licensing process since ILP was adopted in 2006.

G. Orders Subject to De Novo Judicial Review

Agencies typically need not conduct evidentiary hearings prior to rendering adjudicatory decisions when the agency order is subject to *de novo* judicial review, since one *de novo* proceeding is sufficient.¹²⁰

1. Retailer Disqualification

The Food and Nutrition Service (FNS) of the USDA operates federal-state programs that supply food to the poor, including Supplemental Nutrition Assistance

119. See Primer, *supra* note 116, at 31 ("The end product of pre-filing is a complete license application . . .").

120. Note that the APA excludes from Type A treatment adjudication matters "subject to a subsequent trial of the law and the facts *de novo* in a court." APA § 554(a)(1). Due process does not apply to the administrative phase because *de novo* judicial review supplies all the process that is due. *Alam & Sarker LLC v. United States*, 113 F.4th 153 (1st Cir. 2024).

Program (SNAP, formerly known as food stamps). Local food vendors can be disqualified from SNAP or subjected to monetary penalties for various offenses such as using SNAP debit cards to obtain cash or non-food merchandise. If FNS detects an unusual pattern of SNAP transactions at a particular store, it refers the matter to a program specialist who arranges for a contractor to visit the store and conduct an on-site investigation. The specialist then makes a recommendation to the FNS section chief. If the chief agrees with the recommendation, the chief sends a charge letter detailing the allegations to the store. The store may respond to the charge letter with evidence or arguments against the sanctions.¹²¹

Under USDA regulations,¹²² a vendor may file a written request to submit information in support of its position to an administrative review officer who considers the submitted information along with other available information.¹²³ The administrative review officer's determination is not subject to further administrative review. FNS decisions to sanction retailers are subject to de novo judicial review. The parties can submit additional evidence and the court assembles a new record.¹²⁴ De novo judicial review extends only to FNS' determination of liability, not to its choice of sanction which is reviewed under the arbitrary and capricious standard.¹²⁵

2. Freedom of Information Act Requests

An agency frequently declines to provide records requested under the Freedom of Information Act (FOIA) because it claims that the record is subject to a FOIA exemption and the agency reasonably foresees that disclosure would harm an interest protected by one of the exemptions.¹²⁶ In such cases, the agency typically provides an informal written procedure at which the requester can challenge the denial decision. The procedure used by the Department of Energy (DOE) begins when a FOIA officer processes the request.¹²⁷ The officer forwards the request to an Authorizing Official who has responsibility for the requested records. The Authorizing Official prepares a written response granting or denying the request or informing the requester that the record cannot be located. Normally the Authorizing Official must respond within twenty days (with an additional ten days in unusual circumstances) unless the requester agrees to extend the time. The Authorizing

121. *Irobe v. U.S. Dept of Agriculture*, 890 F.3d 371, 375-76 (1st Cir. 2018).

122. 7 C.F.R. § 279.1 *et seq.*

123. In addition to information provided by the retailer or the FNS, the reviewer's determination can be based on "any additional information, in writing, obtained by the designated reviewer from any other person having relevant information." 7 C.F.R. § 279.5(a)(3).

124. 7 U.S.C. § 2023(a)(13)-(15). The retailer has the burden of proof to overturn the sanctions. The FNS decision can be upheld on the basis of statistical evidence alone. *Irobe v. U.S. Dep't of Agriculture*, *supra* note 121 at 378-80.

125. *Broad St. Food Market v. United States*, 720 F.2d 217 (1st Cir. 1983).

126. *See* 5 U.S.C. §§ 552(a)(3) and (8) and 552(b).

127. *See* ACUS Sourcebook, *supra* note 3, at 133.

Official's response states the reasons for denial, including a brief explanation of how a specific applicable exemption applies to the record and also explains why a discretionary release is not appropriate.¹²⁸

The requester may appeal the Authorizing Official's decision to DOE's Office of Hearings and Appeals (OHA) within ninety days of receipt. The appeal must contain a concise statement of its grounds and the relief the requestor is seeking. It should include discussion of all relevant authorities. OHA considers and decides appeals in a written-only process. It must issue a written decision stating the reasons for the decision.¹²⁹ OHA must decide the matter within twenty days (with an additional ten days in unusual circumstances). A rejected FOIA request is subject to de novo judicial review in the federal district court.¹³⁰

H. Tariffs and Taxation

1. Tariff Classification Rulings

An importer can request that the Customs and Border Protection Service (CBP) issue a tariff classification ruling (TCR). A TCR is a prospective ruling on the tariff applicable to a specific import transaction.¹³¹ Most TCRs are issued by local CBP field offices, but either the staff or the importer can request a TCR from CBP headquarters.¹³² A TCR is binding on CBP with respect to the proposed import transaction and to all identical future imports until it modifies or revokes the TCR. Thus, a TCR has legal effect, even though TCRs are not binding on applicants.¹³³

At either local or headquarter levels, an applicant who desires an opportunity to orally discuss the issue can request a conference, which provides an opportunity "to freely and openly discuss the matters set forth in the ruling request."¹³⁴ At the conference, the applicant can present additional documents, arguments, and exhibits which will be included in CBP's file. Either the local field

128. 10 C.F.R. §§ 1004.5, .7. If the request calls for a classified record, the Director of Classification must concur with a decision to deny the request. 10 C.F.R. § 1004.6.

129. 10 C.F.R. § 1004.8.

130. 5 U.S.C. § 552(a)(4)(B).

131. See 19 U.S.C. § 1625; 19 C.F.R. §§ 177.0-177.13. For a more detailed description, see Shalini Bhargava Ray, *Individualized Guidance in the Federal Bureaucracy*, pp. 20-23 (2024) (report to the Admin. Conf. of the U.S., available on the ACUS website).

132. The Supreme Court denied *Chevron* deference to a TCR issued at the headquarters level, but such rulings may qualify for *Skidmore*-type deference. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

133. 19 C.F.R. § 177.9. A TCR can be relied upon only by the person who requested it. It can be modified or revoked without notice to other persons. Nevertheless, CBP applies TCRs to substantially similar import transactions by third parties who did not obtain the TCR. For that reason, if CBP wishes to modify or revoke a TCR that has been in effect for more than 60 days, it must follow a public notice and comment procedure. 19 U.S.C. § 1625(c); 19 C.F.R. § 177.12(b), (c).

134. 19 C.F.R. § 177.4(a). The person requesting the conference may be accompanied by counsel or by another representative.

office or the importer can request that a TCR issued by a local office be reconsidered by CBP headquarters. Local offices issue about 10,000 TCRs each year.

2. Collection Due Process

The Internal Revenue Service (IRS) must provide a “hearing” to taxpayers when the Collection Division proposes to impose a tax lien on a taxpayer’s property or levies on a taxpayer’s assets such as wages or bank accounts. This process is known as Collection Due Process (CDP).¹³⁵ In order to trigger CDP, a taxpayer must file Form 12153 within 30 days after notice of a lien or levy.¹³⁶ Before or after filing Form 12153, a taxpayer can continue to negotiate with the Collection Division to reach an appropriate resolution.

An appeal officer in the Independent Office of Appeals (Appeals) makes the primary decision in CDP cases. Appeals is organizationally separate from the Collection Division (CD) that made the frontline decision to impose a lien or levy. Appeals is currently staffed by approximately 1,500 employees, including management and support personnel. It hears appeals about tax deficiencies and other appealable issues, including CDP. By statute, an appeal officer hearing a CDP case must be “impartial,” meaning that the appeal officer had no previous involvement in the dispute.¹³⁷ An appeal officer may not receive ex parte communications from other IRS officials if such communications might “appear to compromise the independence” of the appeal officer.¹³⁸

A CDP hearing determines such issues as whether the IRS met procedural requirements for the disputed collection action, whether the tax has been paid, whether innocent spouse defenses are available, and whether the IRS will agree to collection alternatives other than a lien or levy, such as installment payment of the debt. In considering collection alternatives, the appeal officer “balances the need for the efficient collection of taxes with the legitimate concern of the person that any

135. IRS-1 furnished interview data on the CDP process. See Andy Kelso, *A Closer Look at the IRS Independent Office of Appeals*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/about-irs/a-closer-look-at-the-irs-independent-office-of-appeals> (last accessed January 31, 2025).

136. I. R.C. § 6330(b); *Collection Appeal Rights*, IRS Pub. 1660 (rev. 01-2020). TPs who miss the 30-day deadline can request an “equivalent hearing” within one year of notice of a lien or levy. The decision in an equivalent hearing cannot be appealed to the Tax Court and does not suspend collection action. A parallel scheme called the Collection Appeal Program (CAP) provides for conferences with Collection Division managers before or after the IRS takes collection action as well as conferences with the Office of Appeals. CAP can be used to challenge collection actions under a somewhat broader set of circumstances than CDP, such as disputes arising under installment agreements. CAP determinations cannot be appealed to the Tax Court. *Collection Appeal Rights*, *id.* at 3-4.

137. I.R.C. § 6330(b)(3).

138. Internal Revenue Service Restructuring and Reform Act of 1998, § 1001(a)(4), 112 Stat. 689; Rev. Proc. 2000-43, 2000-2 Cum. Bull. 406; *Hinerfeld v. Commissioner*, 139 T.C. 277, 284-89 (2012) (rejecting claim that ex parte communication to appeals officer was prohibited because the attorney making the communication had not been previously involved in the dispute).

collection action be no more intrusive than necessary.”¹³⁹ Collection action is ordinarily suspended during the period within which a CDP hearing may be requested and during the CDP process.

A CDP “hearing” is essentially a conference consisting of one or more phone calls between the appeal officer and the taxpayer or the taxpayer’s representative. Neither side is allowed to cross-examine and neither has subpoena power. The hearing can occur in person at the Appeals Office.¹⁴⁰

An appeal officer’s goal in conducting CDP is to resolve the case through compromise, not to collect the maximum possible amount. The appeal officer anticipates potential Tax Court review and considers litigation hazards as well as the nature of the underlying tax dispute. For example, an appeal officer may exercise discretion differently if the deficiency arose from the incompetence of the taxpayer or taxpayer’s representative or if it arose from a borderline claim to a deduction as opposed to more egregious tax evasion. There are roughly 30,000 CDP appeals per year.

An appeal officer will check the internal IRS database to ascertain the status of the taxpayer’s account. The database provides information about whether returns were filed and whether the taxpayer paid the required deposits and estimated taxes. Both the CD and Appeals provide an opportunity for the taxpayer to present a Collection Information Statement (CIS). The CIS includes the TP’s statement of assets and liabilities and calculates the taxpayer’s ability to make payments in order to support the request for a collection alternative. If the taxpayer presents new information (through a CIS or otherwise), the appeal officer will send an Appeals Referral Investigation (ARI) to the CD requesting it to review and verify that information.¹⁴¹ The appeal officer shares such comments with the taxpayer and provides the taxpayer with an opportunity to respond to them. The appeal officer’s determination is not based on an exclusive record of documents or testimony presented at the hearing.¹⁴² The appeal officer issues a determination letter after the conclusion of the CDP hearing.

Taxpayers may be represented by an authorized representative, including an attorney, certified public accountant, enrolled agent, or a Low Income Taxpayer Clinic. Taxpayers may also be represented by a member of their immediate family, or, in the case of a business, by regular full-time employees, general partners, or bona

139. I.R.C. § 6330(c)(3)(C). The taxpayer is not permitted to challenge the correctness of the underlying tax liability except in cases where taxpayer did not receive a notice of deficiency or an opportunity to dispute the tax liability. I.R.C. § 6330(c)(2)(B); *Collection Appeal Rights*, *supra* note 136.

140. The IRS will deny an in-person hearing if the taxpayer attempts to raise frivolous issues or made the request solely to delay or impede collection. *Collection Appeal Rights*, *supra* note 136.

141. *Id.*

142. Treas. Reg. §§ 301.6330-1(d), A-D6; 301.6330-1(f)(2), A-F4. The latter regulation provides that the record in the Tax Court includes a variety of materials including memoranda created by the appeal officer and any other documents or materials relied on by the appeal officer.

fide officers.¹⁴³ About half of taxpayers represent themselves. The Appeal Officer's determination can be appealed to the Tax Court which reviews it for abuse of discretion.¹⁴⁴

The Taxpayer Advocate Service (TAS) could serve an ombuds function in connection with the CDP process if a taxpayer complains about a failure to protect his or her rights or to furnish fair and equitable treatment.¹⁴⁵ The IRS maintains a quality review system that samples disputes handled by Collection and Appeals, but the quality review cannot overturn an Appeal Officer's decision.

3. Denial of Passports for Persons with Tax Debts

A taxpayer's application for a passport (or renewal of a passport) can be denied if the Commissioner of Internal Revenue certifies to the State Department that the taxpayer has a "seriously delinquent tax debt."¹⁴⁶ Prior to such certification, the IRS must have filed a notice of tax lien. All administrative remedies to challenge collection action (such as CDP, discussed in the preceding subsection) must have lapsed. In addition, a certification can request that the State Department revoke an existing passport. A revocation request might occur if the taxpayer had previously promised to pay the debt through an installment agreement and failed to do so, or if there are offshore assets that could have been but were not used to pay the debt.

There are no administrative procedures to challenge IRS certifications. The State Department will hold a passport application open for 90 days to allow the taxpayer time to enter into a satisfactory payment arrangement with the IRS or resolve any erroneous certification issues.¹⁴⁷ The statute allows taxpayers to challenge a certification by bringing a civil action in federal district court or the Tax Court asserting that the certification was erroneous.¹⁴⁸ It is unsettled whether the scope of

143. *Collection Appeal Rights*, *supra* note 136.

144. It is difficult to establish that an Appeal Officer's decision was an abuse of discretion. *See, e.g.* *Hinerfeld v. Commissioner*, 139 T.C. 277, 289-90 (2012). In that case, the Tax Court ruled that the Appeal Officer did not abuse his discretion in rejecting an offer in compromise because a greater amount was collectible from third parties who were potentially liable for the deficiency.

145. Taxpayer Advoc. Serv., *Can TAS Help Me with my Tax Issue?* www.taxpayeradvocate.irs.gov/can-tas-help-me-with-my-tax-issue/ (last accessed January 31, 2025). *See* further discussion of the TAS in Part V. G.

146. I.R.C. § 7345(a); I.R.S. Pub. 594, 5 (Rev. May 2024); *Revocation or Denial of Passport in Cases of Certain Unpaid Taxes*, I.R.S., <https://www.irs.gov/businesses/small-businesses-self-employed/revocation-or-denial-of-passport-in-cases-of-certain-unpaid-taxes> (last accessed January 31, 2025). *See* *Maehr v. U. S. Dep't of State*, 5 F.4th 1100 (10th Cir. 2021) (upholding constitutionality of this provision). "Seriously delinquent" currently means a tax debt of at least \$64,000, including penalties and interest, an amount adjusted for inflation. *Revocation or Denial of Passport in Cases of Certain Unpaid Taxes*, *supra* Rev. Proc. 2024-40, § 2.60, 2024-45 INT. REV. BULL. 5. The IRS will not certify anyone as owing a seriously delinquent tax debt whose account has been determined to be currently uncollectible due to hardship. *Id.*

147. *Revocation or Denial of Passport in Cases of Certain Unpaid Taxes*, *supra* note 146.

148. I.R.C. § 7345(e)(1).

review in such actions is de novo or arbitrary and capricious.¹⁴⁹

I. Waivers and Exemptions

Requests for an individualized waiver or exemption from a regulatory requirement are an important and common form of Type C adjudication.¹⁵⁰ The FAA provides an example of exemption practice.¹⁵¹ The FAA receives 400-500 requests each year for exemptions from its regulations relating to aircraft safety (not counting thousands of requests for exemptions regarding drones). The process begins with a formal request that is disclosed on Regulations.gov. The requests are assigned for review to the program office that covers the particular regulations from which relief is requested. Most requests are reviewed and decided by an attorney in the Regulation Division of the Office of Chief Counsel. The public is invited to comment on these requests.¹⁵² The agency publishes a summary of requests that are novel or significant. Issues of safety are paramount in consideration of exemption requests. If a request is denied, the requestor can seek reconsideration and such requests are ultimately reviewed by the Administrator.¹⁵³

J. Other Discretionary Actions

Most schemes of Type C adjudication (including many already discussed in Part II) involve decisions requiring officials to exercise discretion. This subsection discusses some discretionary schemes that do not fit easily into other categories identified in Part II.

149. See *Adams v. Commissioner*, 160 T.C. 1 (2023), stating that the result would have been the same regardless of which standard of review applies. The *Adams* decision also states that the Tax Court lacks jurisdiction to consider the correctness of the underlying tax deficiency or the constitutional issues.

150. See ACUS Recommendation, 2017-7, *Regulatory Waivers and Exemptions*, 82 Fed. Reg. 61742 (Dec. 15, 2017) (recommending that agencies provide written explanations for waiver decisions); Aaron L. Neilson, *Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices* (Nov. 1, 2017) (ACUS report) <https://www.acus.gov/document/regulatory-waivers-and-exemptions-final-report>.

151. 14 C.F.R. § 11.81 (2024). See Neilson, *supra* note 150 at 52-55. Another example of exemption practice is EPA's program for granting waivers of biofuel requirements for refiners who can demonstrate substantial economic hardship. The petitions are referred to the Department of Energy to apply a matrix that measures hardship. The regulations do not provide any procedures allowing applicants to challenge a frontline decision denying the exemption petition. See 40 C.F.R. § 80.1441(e), (f) (2024); *United Refining Co. v. United States E.P.A.*, 64 F.4th 448 (3d Cir. 2023). The court in *United Refining* held denial of the exemption was not arbitrary and capricious. The court did not apply the usual requirement that the petitioner have raised appellate issues before the agency because EPA's procedure did not include any opportunity for them to do so. *Id.* at 457-58.

152. 14 C.F.R. § 11.85 (2024).

153. 14 C.F.R. § 11.101 (2024).

1. Decisions to Deny Parole

Prior to the introduction in 1982 of determinate sentences for federal crimes,¹⁵⁴ the U.S. Parole Commission (USPC) set the dates for release of federal prisoners on parole. USPC made parole decisions through an informal hearing procedure. A hearing examiner (or a panel of examiners) considered the prisoner's offense severity rating and salient factor score and the prisoner's institutional conduct along with any other matter the examiner deemed relevant. Examiners conducted a brief personal interview with the prisoner and the prison counselor. Prisoners did not have access to their file but were usually given some indication of its contents. Examiners could receive testimony from witnesses who favored or opposed parole. The rules of evidence did not apply. Examiners were required to consider a variety of reports and to state reasons for their decisions.¹⁵⁵ Prisoners could choose a representative to take part in the conference and to argue for granting parole.

Examiners had broad discretion whether to grant or deny parole and what conditions to attach. A regional commissioner reviewed the examiners' recommendation. If the regional commissioner did not concur with that recommendation, he or she could remand the case for a rehearing or refer the case to another commissioner for further review.¹⁵⁶ The prisoner or the Attorney General could appeal the regional commissioner's decision to the National Appeals Board.¹⁵⁷ The prisoner or Attorney General could provide additional information for the Board to consider. The prisoner could also challenge the parole decision by bringing a writ of habeas corpus, but courts upheld the decision if it had a rational basis.¹⁵⁸

2. Whistleblower Awards

Numerous programs across the federal government compensate whistleblowers and protect them from retaliation. For example, the Securities and Exchange Commission (SEC) is authorized to pay awards to whistleblowers whose voluntarily-provided original information led to "covered judicial or administrative actions" or "related actions" resulting in monetary sanctions exceeding \$1 million.¹⁵⁹

154. See 18 U.S.C. §§ 4201-18. Prior to 1976, the agency was called the U.S. Board of Parole. For discussion of its procedures as of 1972, see ACUS, PROCEDURES OF THE UNITED STATES BOARD OF PAROLE (June 9, 1972), <https://www.acus.gov/sites/default/files/documents/72-3.pdf>. This recommendation was largely implemented by Pub. L. 94-233 and agency regulations.

155. 28 C.F.R. §§ 2.13, 2.18, 2.19 (2024). See *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979) (holding that due process does not require a formal hearing when parole is denied).

156. 28 C.F.R. § 2.24 (2024).

157. 28 C.F.R. § 2.26 (2024).

158. See *Furnari v. Warden*, 218 F.3d 250, 254 (3d Cir. 2000).

159. 15 U.S.C. § 78u-6. The whistleblower award shall be between 10% and 30% of the amount collected. *Id.* §78u-6(b).

Payment of such awards is “at the discretion of the Commission.”¹⁶⁰ In FY 2023, the SEC awarded nearly \$600 million to 68 individual whistleblowers. In that year, the SEC received 18,354 whistleblower tips.¹⁶¹

Under the SEC’s regulations,¹⁶² claims must be filed with the Office of the Whistleblower within 90 days of the date of notice that a monetary sanction was ordered. The Claims Review Staff (CRS) makes a “preliminary determination” of whether the claim should be allowed and, if so, the amount that should be paid.¹⁶³ A claimant may submit a written response that sets forth the claimant’s objections to the denial of an award or the amount of the award. The response may include documentary or other evidentiary support for the claim. The claimant may request the Office of the Whistleblower to make available the materials that formed the basis of the preliminary determination.¹⁶⁴ The claimant may also request a meeting with the Office of the Whistleblower. Such meetings are not required; the Office may, in its sole discretion, decline the request.¹⁶⁵

The CRS considers the issues and makes a proposed final determination. If any commissioner requests review of the CRS decision at the Commission level, the Commission makes the final decision. If no Commissioner asks to review the determination, the proposed final determination becomes final. Judicial review of the final determination is available.¹⁶⁶ Fact findings are reviewed based on substantial evidence and the ultimate decision is reviewed for abuse of discretion.¹⁶⁷

III. LEGAL PROTECTIONS FOR PRIVATE PARTIES ENGAGED IN TYPE C ADJUDICATION

Part II surveyed the vast and diverse world of Type C adjudication. Part III turns to discussion of the trans-substantive legal requirements applicable to Type C adjudication, as opposed to the agency-specific statutes or procedural regulations discussed in Part II. These trans-substantive provisions underpin the best practice

160. 15 U.S.C. § 78u-6(f).

161. 2023 SEC. & EXCH. COMM’N OFF. OF THE WHISTLEBLOWER ANN. REP., 1, <https://www.sec.gov/files/fy23-annual-report.pdf>.

162. 17 C.F.R. § 240.21F-10 (2024).

163. The regulations also provide for a short-cut procedure (called a “preliminary summary disposition”) for applications that clearly do not meet the requirements for an award. 17 C.F.R. § 240.21F-18 (2024).

164. 17 C.F.R. § 240.21F-12(b) (2024). *See Doe v. SEC*, 846 Fed. Appx. 1, 5 (D.C. Cir. 2021) (the SEC is not required to disclose all information it used in settling the underlying claim or its internal memoranda).

165. 17 C.F.R. § 240.21F-10(d), (e), (f) (2024).

166. *See* 17 C.F.R. § 240.21F-13 (2024). But if the Commission makes an award of between 10% and 30% of the monetary sanction collected by the Commission, its determination regarding the amount of the award is not subject to judicial review. *Id.*

167. *Kilgour v. SEC*, 942 F.3d 113, 120 (2d Cir. 2019).

recommendations proposed in Part V.

Part III concentrates on consultative due process, government ethics, the right of representation, sections 555 and 558 of the APA, ombuds, the Freedom of Information Act, and judicial review. Of course, these trans-substantive procedural obligations apply to Types A and B adjudication as well as to Type C. However, these provisions are more salient in the Type C world because informal adjudication lacks the statutory and regulatory constraints and private-party protections that apply to Types A and B adjudication.

A. Consultative Due Process

Under the Fifth Amendment (applicable to the federal government) and the Fourteenth Amendment (applicable to state and local government), no person shall be deprived of life, liberty, or property without due process of law. Procedural due process is the subject of a vast body of case law and scholarly literature.¹⁶⁸ For present purposes, it is sufficient to note that the definitions of “liberty” and “property” are both capacious and controversial.¹⁶⁹ The term “property” includes traditional forms of property and money as well as non-discretionary benefits conferred by statutes, often referred to as “new property” or “entitlements.” Entitlements include tenured government jobs, welfare and disability benefits, public education, public utility service, as well as various licenses.¹⁷⁰ However, “property” does not include *discretionary* government actions or benefits such as at-will or probationary government jobs.¹⁷¹ “Liberty” means freedom from physical confinement or abuse by government as well as benefits provided by other constitutional provisions (such as freedom of speech). It covers freedom from governmentally imposed stigma and various traditional freedoms such as the right to marry, engage in various occupations, and enjoy “those privileges long recognized...as essential to the orderly pursuit of happiness by free men.”¹⁷²

Due process is inapplicable to most Type C adjudication schemes because most of them involve the decisionmaker exercise of discretionary power. Consequently, agency decisions against private parties do not entail a deprivation of “property.” Type C adjudications seldom concern any of the interests included in “liberty.” Nevertheless, on several occasions, the Supreme Court has considered

168. For an overview of procedural due process, see ABA SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, A GUIDE TO FEDERAL AGENCY ADJUDICATION 246-52 (Jeremy S. Graboyes, ed., 3d ed. 2023) (hereinafter “Adjudication Guidebook”).

169. See *Kerry v. Din*, 576 U.S. 86, 91-101 (2015). In *Kerry*, a three-justice plurality opinion by Justice Scalia attacked the prevailing approach to defining “liberty” and “property” as over-inclusive. *Kerry* signals that the Supreme Court may redefine these terms, which would sharply narrow the universe of disputes to which due process applies.

170. *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972).

171. *Id.*

172. *Id.* at 572-75.

schemes of informal adjudication that do entail deprivations of liberty or property. These decisions suggest best practices for Type C adjudication.

Early procedural due process cases called for trial-type hearings and spelled out the timing and precise ingredients of such hearings. These decisions prescribe cross-examination of witnesses, a neutral decisionmaker, a right to counsel, an exclusive record, separation of functions, and other protections.¹⁷³ More recent decisions avoid one-size-fits-all prescriptions, requiring only that the agency provide “some kind of hearing...at some time before a person is finally deprived” of liberty or property.¹⁷⁴ The same idea is conveyed by the requirement that due process requires that a hearing be “granted at a meaningful time and in a meaningful manner.”¹⁷⁵ Courts determine the required elements of due process on a case-by-case basis, using utilitarian analysis to determine both the timing and the ingredients of the hearing. This analysis balances the stakes to the private party, the value of the procedure in question in producing an accurate result, and the cost to the government of providing that procedure.¹⁷⁶

A number of procedural due process cases involve governmental action that carries relatively low stakes, is preliminary, or is otherwise not suitable for judicialized trial-type hearings. These cases call for abbreviated procedures that might be called “consultative” due process. The leading case in this line, *Goss v. Lopez*,¹⁷⁷ involved a ten-day disciplinary suspension of a student from public school, which the Supreme Court held deprived the student of both liberty and property. However, the required procedure fell far short of a trial-type hearing. Instead, the school needed only to give the student “oral or written notice of the charges against him and, if he [denied the charges], an explanation of the evidence... and an opportunity to present his side of the story.” But, the Court held, the student did not have the right “to secure counsel, to confront and cross examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.”¹⁷⁸ In other words, the school was required to provide oral notice of the charges against the student and an informal conference with the disciplinarian. *Goss* does not require a neutral decisionmaker nor an exclusive record (or any record, for that matter) in order to satisfy due process.

Courts have applied the consultative due process model spelled out in the *Goss* decision to numerous situations, such as termination of utility service for non-

173. *Goldberg v. Kelly*, 397 U.S. 254, 268–71 (1970).

174. *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974); see Friendly, *supra* note 9, at 1294–1304.

175. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

176. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 263–64 (1987).

177. 419 U.S. 565 (1975).

178. *Id.* at 581–83. Even this bare-bones procedure can be dispensed with if a *de novo* judicial hearing is available. *Ingraham v. Wright*, 430 U.S. 651, 674–82 (1977).

payment of utility bills,¹⁷⁹ prison disciplinary proceedings,¹⁸⁰ pre-termination employment discharges,¹⁸¹ and an order requiring an employer to temporarily reinstate a discharged employee.¹⁸² Although the specifics differ, the requirements at the core of the consultative due process cases are notice sufficient to permit the private party to challenge the decision,¹⁸³ an opportunity to confer with or submit documents to the decisionmaker, and a statement of reasons for the decision.

B. Government Ethics

All federal government employees are bound by a statutory and regulatory code of ethical conduct. The code identifies financial conflicts of interest that require the employee to be disqualified from participating in a particular matter.¹⁸⁴ The regulations adopted by the Office of Government Ethics (OGE) also create an aspirational standard: “Employees shall act impartially and not give preferential

179. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13–21 (1978). The Court required notice that informed a utility user of the procedure for challenging the bill as well as “the provision of an opportunity for the presentation to a designated employee of a customer’s complaint that he is being overcharged or charged for services not rendered.”

180. *Wolff v. McDonnell*, 418 U.S. 539, 564–72 (1974). *Wolff* held that due process required that prisoners be afforded written notice of the claimed violation and a written statement by the factfinder as to the evidence relied upon and the reasons for the disciplinary action. In addition, the prisoner has the right to call witnesses and present documentary evidence where such would not be unduly hazardous to institutional safety or correctional goals. Confrontation, cross-examination and counsel are not required. *Wolff* was overruled on other grounds by *Sandin v. Conner*, 515 U.S. 472 (1995) (holding that, with some exceptions, prisoners do not have a liberty interest in avoiding prison discipline).

181. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). The pre-termination hearing is “an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” *Id.* at 545–46. The employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story. *Id.* at 546. The pre-termination hearing is generally followed by a more formal trial-type hearing that occurs after the employee is terminated.

182. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). “We conclude that minimum due process for the employer in this context requires notice of the employee’s allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses. The presentation of the employer’s witnesses need not be formal, and cross-examination of the employee’s witnesses need not be afforded at this stage of the proceedings.” *Id.* at 264.

183. The notice must be reasonably calculated to apprise parties of the action the government intends to take and to afford them an opportunity to present evidence. *Dusenbery v. United States*, 534 U.S. 161, 167–69 (2002).

184. 5 U.S.C. § 404; 5 C.F.R. § 2635.101 (2024). This article does not describe these rules in detail. See discussion in Jordan Carr Peterson, *Serving Two Masters? Public Ethics and the Regulation of Financial Conflicts of Interest in the Administrative State*, 85 ALB. L. REV. 179, 200–05 (2021); Louis J. Virelli III, *Recusal in Administrative Adjudication*, 64 ARIZ. L. REV. 135 (2022); Louis J. Virelli III, *Recusal Rules for Administrative Adjudicators*, 12–14 (2018) (ACUS Report), <https://www.acus.gov/sites/default/files/documents/Recusal-Rules-for-Administrative-Adjudicators-Final-Report-11.30.2018.pdf>.

treatment to any private organization.”¹⁸⁵

These ethical rules and aspirational standards apply to decisionmakers in Type C adjudication as well as to Types A and B. An employee must disqualify him or herself from deciding a “particular matter involving specific parties” if the employee (or persons whose interests are imputed to the employee) has a financial interest in the matter and the decision will have a “direct and predictable effect on that interest.”¹⁸⁶ The definition of “particular matter” makes clear that the disqualification rules apply to employees engaged in resolving adjudicatory disputes.¹⁸⁷ The OGE’s regulations also permit agencies to adopt a conflict of interest code that supplements the across-the-board ethics provisions.¹⁸⁸

C. *Right to Counsel*

The Administrative Practice Act, enacted in 1990, provides: “An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.”¹⁸⁹ This provision ensures a right of representation in all agency proceedings, including Type C adjudication, by a lawyer who has been admitted to the bar in any state.

The Administrative Practice Act provides that a lawyer “may represent a person before an agency.” That language would appear to cover representation in any administrative proceeding. It therefore creates a much broader right to legal representation than APA § 555(b), which provides: “A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.”¹⁹⁰ The most obvious application of § 555(b) is to provide a right to

185. 5 C.F.R. § 2635.101(b)(8) (2024).

186. 5 C.F.R. § 2635.502(a) (2024).

187. The ethics rules requiring disqualification apply to “particular matters,” meaning “matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons.” 5 C.F.R. § 2635.402(b)(3) (2024). The particular matters covered by this subpart include a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation or arrest. *Id.* The ethics rules parallel a federal criminal statute that prohibits an executive branch employee from participating personally and substantially in a judicial matter in which the employee has a financial interest. 18 U.S.C. § 208(a).

188. 5 C.F.R. § 2635.105 (2024).

189. Administrative Practice Act, 5 U.S.C. § 500(b). In addition, a notice or other written communication required or permitted to be given to the participant in the matter shall be given to the representative. 5 U.S.C. § 500(f). Note to readers: The Administrative Practice Act (enacted in 1990 and not identified herein by an acronym) is *not* the same legislation as the Administrative Procedure Act (enacted in 1946 and referred to herein as the APA).

190. Administrative Procedure Act, 5 U.S.C. § 555(b). For discussion of § 555(b), see DEPT OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 61 (1947)

counsel for persons who are compelled by subpoena to appear and testify before agency investigators or are required to appear as witnesses at agency hearings.

Case law under § 555(b) stresses that agencies need a concrete and particularized reason to deny a person's choice of counsel.¹⁹¹ In addition, § 555(b) requires an agency to allow an attorney to be accompanied by an expert, such as an accounting expert in a complex Securities and Exchange Commission investigatory proceeding involving accountant misconduct.¹⁹²

The Administrative Practice Act and APA § 555(b) neither grant nor deny a private party the right to be represented by a non-lawyer.¹⁹³ The *Attorney General's Manual* states that it is up to agencies whether to allow non-lawyers to practice before them, or to set reasonable time limits during which former employees may not practice before them.¹⁹⁴ The procedural regulations of many agencies permit lay representation, often by law students in supervised clinical programs. For example, immigration agencies permit representation in detention hearings by accredited representatives and by supervised law students.¹⁹⁵ The Veterans' Administration relies heavily on representation of claimants by employees of veterans' service organizations at both the regional office and Board of Veterans Appeals levels.¹⁹⁶ Indeed, the Supreme Court upheld the constitutionality of a statutory prohibition on paying attorneys to represent veterans in part because the VA's system of lay representation provided an adequate substitute for counsel.¹⁹⁷

(hereinafter ATTORNEY GENERAL'S MANUAL); *Suess v. Pugh*, 245 F. Supp. 661 (D.W.V. 1965).

191. See *Professional Reactor Operator Soc'y v. NRC*, 939 F.2d 1047, 1051-52 (D.C. Cir. 1991); *SEC v. Csapo*, 533 F.2d 7 (D.C. Cir. 1976). In *Professional Reactor*, the court invalidated a Nuclear Regulatory Commission regulation providing that if "a reasonable basis exists to believe that the investigation or inspection will be obstructed, impeded or impaired, either directly or indirectly, by an attorney's representation of multiple interests, the agency official may prohibit that attorney from being present during the interview." 939 F.2d at 1051. The court held that counsel of the witness' choice cannot be excluded absent "concrete evidence" that [his] presence would obstruct and impede the investigation." *Id.* at 1049.

192. See *Laccetti v. SEC*, 885 F.3d 724 (D.C. Cir. 2018); *Whitman v. SEC*, 613 F. Supp. 48 (D.D.C. 1985).

193. The Administrative Practice Act provides: "This section does not—(1) grant or deny to an individual who is not qualified as provided by subsection (b)...the right to appear for or represent a person before an agency or in an agency proceeding." 5 U.S.C. § 500(d)(1). Similarly, Administrative Procedure Act § 5 U.S.C. § 555(b) "does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding."

194. ATTORNEY GENERAL'S MANUAL, *supra* note 190 at 65-66; see also *Herman v. Dulles*, 205 F.2d 715, 717 (D.C. Cir. 1953).

195. See Brittany Benjamin, *Accredited Representatives and the Non-Citizen Access to Justice Crisis*, 30 STAN. L. & POL'Y REV. 263 (2019).

196. See ACUS SOURCEBOOK, *supra* note 3, at 181-82.

197. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).

D. APA § 555

Section 555 of the APA provides a set of modest protections for private parties involved in adjudicatory disputes with federal government agencies. In addition to the right to counsel discussed in the preceding subsection, the most important parts of § 555 provide a right to “appear” and a requirement that agencies provide reasons for denying applications. In addition, § 555 provides that matters must be concluded within a reasonable time, that parties have a right to transcripts, and that subpoenas can only be issued as provided by law.¹⁹⁸ The scattershot provisions of § 555 do not set forth a code of procedure for Type C adjudication,¹⁹⁹ but they provide raw material that is helpful in designing a set of best practices.

1. Right to Appear

Under § 555(b), “[s]o far as the orderly conduct of public business permits, an interested person may *appear* before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function.”²⁰⁰ This right to “appear” allows an interested person to make a submission to the agency heads or to relatively high-level staff members²⁰¹ in informal adjudication, as well as in other agency functions.²⁰²

It is unclear whether the right to “appear” means a right to appear physically or by electronic means to make an oral presentation, as opposed to a right only to

198. 5 U.S.C. § 555(b-d). These requirements set forth in § 555 are of lesser significance and are not discussed in this article. For further discussion of these requirements, see ADJUDICATION GUIDEBOOK *supra* note 168, 267-82 (3d ed. 2024). The right to have matters concluded within a reasonable time is unlikely to be of much use to parties concerned with administrative delay since case law gives agencies broad discretion in how they prioritize cases and make use of their limited resources. See, e.g., *Da Costa v. Immigration Investor Program Office*, 80 F.4th 330, 340–46 (D.C. Cir. 2023).

199. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, *supra* note 3, at 1400–01.

200. Emphasis added. 5 U.S.C. § 555(b) contains a second somewhat redundant right to “appear” that applies to “a party” rather than to an “interested person.” “A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.” 5 U.S.C. § 555(b). The provision concerning the right of a “party” to “appear” is not subject to the “orderly conduct of public business” limitation that conditions the right to “appear” by an “interested person.” *Id.*

201. A responsible officer or employee is “one who can decide the matter or whose function is to make recommendations on such matters—rather than officers or employees whose duties are merely mechanical or formal.” On the other hand, the Act “does not require that every interested person be permitted to follow the chain of command to the head of the agency. It was not intended to require the directors of the Reconstruction Finance Corporation, for example, to confer personally with every applicant for a loan.” ATTORNEY GENERAL’S MANUAL, *supra* note 190, at 63.

202. See *SourceAmerica v. U.S. Dep’t of Educ.*, 368 F. Supp. 3d 974, 999–1000 (E.D. Va. 2019), *rev’d on other grounds, sub. nom. Kansas v. SourceAmerica*, 826 Fed. Appx. 272 (4th Cir. 2020). The *SourceAmerica* decision held that the Army violated § 555(b) by not allowing one of two competing vendors to participate in an arbitration proceeding.

submit written materials. The *Attorney General's Manual* suggests that § 555(b) entitles interested persons to make an oral presentation. The *Manual* states that “any person should be given an opportunity to *confer or discuss* with responsible officers or employees of the agency matters in which he is properly interested.”²⁰³ Thus, the right to “appear” in § 555(b) might extend consultative due process rights²⁰⁴ to informal adjudication proceedings to which due process does not apply.²⁰⁵

The right to appear in the APA is limited by the phrase “[so] far as the orderly conduct of public business permits...”.²⁰⁶ The *Manual* states that “the right and its limitation should be construed to achieve practical and fair results.”²⁰⁷ Consequently, the right to make submissions to an agency would be affected by such factors as whether an oral presentation would be useful in the particular decision making context and by availability of staff to engage in consultation.

2. Reasons for Denial of Applications

Under 5 U.S.C. § 555(e), “[p]rompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.”

This provision requires an agency conducting informal adjudication to explain its reasons for denial of a written application, petition, or other request. The statement of grounds for denial, “while simple in nature, must be sufficient to advise the party of the general basis of the denial.”²⁰⁸ This reason-giving requirement has broad application and may be the most significant portion of § 555. It is similar to the requirement of reason-giving imposed by due process,²⁰⁹ but is less demanding

203. ATTORNEY GENERAL'S MANUAL, *supra* note 190, at 63 (emphasis added)

204. *See* Part III.A.

205. *See* *Miles Construction, LLC v. United States*, 108 Fed. Cl. 792, 805 (2013). The *Miles Construction* case explicitly linked the right to appear in § 555(b) to consultative due process rights, meaning the right to be heard in a meaningful time and in a meaningful manner. Although Miles received a hearing on the issue of whether it qualified as a disabled veteran business, the staff failed to explain the basis of its concern on this issue so Miles could not address those concerns. Consequently, the hearing was not “meaningful” and the decision was reversed. *Id.* The equation of the right to appear in § 555(b) and consultative due process is questionable, however. The *Miles Construction* decision relies on a Supreme Court opinion that does not support it. *Pension Benefit Guaranty Corp. v. The LTV Corp.*, 496 U.S. 633, 655–56 (1990).

206. 5 U.S.C. § 555(b).

207. ATTORNEY GENERAL'S MANUAL, *supra* note 190, at 63.

208. *Id.* at 70.

209. *See, e.g.* *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (“[T]he decision maker should state the reasons for his determination and indicate the evidence he relied on...though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.”).

than the reason-giving requirements imposed by the APA in Type A adjudication.²¹⁰

The D.C. Circuit's *Roelofs* decision illustrates the significance of the reason-giving requirement in § 555(e).²¹¹ In *Roelofs*, the court held that the Discharge Review Board and the Board for Correction of Military Records must state reasons for rejecting an application to upgrade a military discharge from general to honorable.²¹² The court linked this requirement to fundamental rights of procedural justice, stating that § 555(e) embodies "the simple but fundamental requirement that an agency or official set forth its reasons, a requirement that is essential to the integrity of the administrative process, for it tends to require the agency to focus on the values served by its decision,... hence releasing the clutch of unconscious preference and irrelevant prejudice."²¹³ Numerous additional cases have applied the reason-giving requirements of § 555(e).²¹⁴

The requirement of § 555(e) that an agency state its reasons for denial of an application overlaps with the reason-giving requirement applied by reviewing courts.²¹⁵ Several cases equate the two reason-giving requirements.²¹⁶ However, it is unclear whether the two requirements are identical. Section 555(e) requires only a "brief statement of the grounds for denial," which seems less demanding than the explanation requirement imposed by the "arbitrary and capricious" test which is used in judicial review.²¹⁷

210. In Type A adjudication, an ALJ's decision must 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..." 5 U.S.C. § 557(c)(A).

211. *Roelofs v. Sec'y of the Air Force*, 628 F.2d 594 (D.C. Cir. 1980).

212. *Id.* at 599-601.

213. *Id.* at 599-600 (1980) (internal quotation marks omitted). *Roelofs* relies on *Childs v. U.S. Bd. of Parole*, 511 F.2d 1270, 1287 (D.C. Cir. 1974) (Leventhal, J. concurring in result). *Childs* held that due process requires the U. S. Parole Board to state reasons for denial of parole. 511 F.2d at 1284-85.

214. See, e.g., *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852, 857-61 (D.C. Cir. 1978) (failure to explain why there were not "unusual circumstances" in case of dismissal of homosexual member of the Air Force); *King v. United States*, 492 F.2d 1337, 1343 (7th Cir. 1974) (5 U.S.C. § 555(e) requires U.S. Parole Board to state reasons for denial of parole); *Washington v. Off. of the Comptroller of the Currency*, 856 F.2d 1507, 1513 (11th Cir. 1988) (Comptroller of Currency must state reasons for rejecting a public hearing on bank merger); *Butte County v. Hogen*, 613 F.3d 190, 194-95 (D.C. Cir. 2010) (Department of the Interior must explain summary rejection of County's objection that Indian tribe had historical connection to land); *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001) (DEA must explain why it rejected application to proceed in forma pauperis); *United Airlines, Inc. v. TSA*, 20 F.4th 57, 63-65 (D.C. Cir. 2021) (TSA must explain why it rejected airline's request for refund of fees paid by mistake); *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (TSA must explain decision to use alternative procedures); *SecurityPoint Holdings v. TSA*, 769 F.3d 1184, 1188 (D.C. Cir. 2014) (TSA must explain rejection of requests to modify its bin advertising program).

215. See *infra* Part III.I. Reviewing courts require that an agency contemporaneously state the reasons for its action, rather than stating the reasons for the first time during judicial review.

216. See *United Airlines, Inc. v. TSA*, 20 F.4th 57, 63 (D.C. Cir. 2021); *City of Gillette v. FERC*, 737 F.2d 883, 886-87 (10th Cir. 1984); *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852, 857 (D.C. Cir. 1978); *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1219-20 (10th Cir. 1997).

217. See *Dunlop v. Bachowski*, 421 U.S. 560 (1975). *Dunlop* drew a distinction between the

E. Executive Order 13,892

President Trump's Executive Order 13,892 provided persons in dispute with the federal government with a legal right to be heard. The Executive Order stated: "[B]efore an agency takes any action with respect to a particular person that has legal consequence for that person, including by issuing to such a person a no-action letter, notice of noncompliance, or other similar notice, the agency must afford that person an opportunity to be heard, in person or in writing, regarding the agency's proposed legal and factual determinations."²¹⁸ President Biden revoked that Executive Order but Trump revoked the Biden revocation, presumably restoring Executive Order 13,892.²¹⁹

Part V includes a best practice recommendation that agencies should offer parties an opportunity to submit evidence and argument when conducting Type C adjudication.²²⁰ Like the other best practice recommendations discussed in Part V, that proposal is intended as a default; agencies must tailor each recommendation to their own specific circumstances.²²¹ The best practice proposal concerning an opportunity to submit evidence and argument is consistent with the right to be heard spelled out in Executive Order 13,892. However, the best practice is more flexible than the Executive Order since the Order does not call for tailoring its requirements to specific situations confronted by particular agencies.

F. APA § 558(c)—Withdrawal of Licenses

APA § 558(c) provides procedural protections for private parties engaged in licensing disputes with federal agencies, regardless of whether such disputes are

requirement of § 555(e) of the APA and the reasons-giving requirement for arbitrary and capricious review. "Thus, the Secretary's letter . . . may have sufficed as a 'brief statement of the grounds for denial' for the purposes of the Administrative Procedure Act, 5 U.S.C. § 555(e), but plainly it did not suffice as a statement of reasons required by the LMRDA. For a statement of reasons must be adequate to enable the court to determine whether the Secretary's decision was reached for an impermissible reason or for no reason at all. For this essential purpose, although detailed findings of fact are not required, the statement of reasons should inform the court and the complaining union member of both the grounds of decision and the essential facts upon which the Secretary's inferences are based." *Id.* at 573–74.

218. "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication," Exec. Order No. 13892, 84 Fed. Reg. 55239 (2019). The right to be heard in the Executive Order contained several exceptions, such as for settlement negotiations. In an emergency situation, the right to be heard applied as soon as practicable. *Id.* § 6(b-c). The executive order was not judicially enforceable. *Id.* § 11(c).

219. "Unleashing American Energy," Exec. Order 14154 (2025), revoking Exec. Order 13992 "Revocation of Certain Executive Orders Concerning Federal Regulation," Exec. Order 13,992.

220. See *infra* Part V.B.

221. See *infra* Part IV.B.

resolved through Type A, B, or C adjudication. The section has three distinct components—license applications, withdrawals, and renewals. This discussion focuses on the withdrawal provision, meaning a decision to withdraw, suspend, revoke, or annul a license.²²² This provision has broad application, because the APA defines the term “license” to include any “form of permission.”²²³

APA § 558(c) does not provide a right to a hearing (formal or informal) in the case of a license withdrawal.²²⁴ Instead, it requires written notice that a licensee has violated the terms of the license.²²⁵ The notice must list the facts or conduct that may warrant the action, as opposed to a bland statement that “permit action is warranted.”²²⁶ In addition, § 558(c) requires that the licensee have an opportunity to demonstrate or achieve compliance with the defects identified in the warning letter.²²⁷ But this second chance provision does not apply in cases of “willfulness”²²⁸ or when public health, interest, or safety requires otherwise.²²⁹

G. Ombuds

External ombuds are officials situated within an agency who enjoy legal power to investigate and attempt to resolve complaints made by persons outside the agency.²³⁰ Ombuds can advocate in favor of complainants and engage in mediation, but they lack power to compel the agency to do anything.²³¹ Nevertheless, ombuds

222. 5 U.S.C. § 558(c).

223. 5 U.S.C. § 551(8). *See supra* notes 23, 29.

224. *See Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep’t of Treasury*, 638 F.3d 794, 802 (D.C. Cir. 2011).

225. 5 U.S.C. § 558(c).

226. *Clarke v. Commodity Futures Trading Comm’n*, 74 F.4th 627, 642 (5th Cir. 2023) (applying § 558(c) to withdrawal of a no-action letter); *Anchustegui v. USDA*, 257 F.3d 1124, 1129 (9th Cir. 2001); *Blackwell Coll. of Business v. Att’y Gen.*, 454 F.2d 928, 936 (D.C. Cir. 1971); *Lawrence v. CFTC*, 759 F.2d 767, 773 n.13 (9th Cir. 1985).

227. APA § 558(c)(2). This provision generally requires that the licensor provide a second chance, but not a third or fourth chance. *Buckingham v. USDA*, 603 F.3d 1073, 1084–87 (9th Cir. 2010). Section 558(c) does not apply if the licensee would be unable to achieve compliance even if given the opportunity to do so. *China Telecom (Americas) Corp. v. FCC*, 57 F.4th 256, 269–70 (D.C. Cir. 2022).

228. Willfulness means repeated violations, intentional wrongdoing, or gross neglect of a known duty. *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304–05 (4th Cir. 1990); *Lawrence v. CFTC*, 759 F.2d 767, 773 (9th Cir. 1985); *Halvonik v. Dudas*, 398 F. Supp. 2d 115, 125 (D.D.C. 2005). For additional definitions, *see Adjudication Guidebook, supra* note 168 at 280.

229. ATTORNEY GENERAL’S MANUAL, *supra* note 190 at 91 (citing withdrawal of a pilot’s license after an accident); *Tucson Rod & Gun Club v. McGee*, 25 F. Supp. 2d 1025, 1030 (D. Ariz. 1998) (hazardous operation of shooting range justified suspension of license without giving the operator a chance to change its practices).

230. In contrast, the function of an internal ombuds is to receive complaints and attempt to resolve disputes between the agency and its employees.

231. Ombuds are included as a method of alternate means of dispute resolution under the Administrative Dispute Resolution Act. 5 U.S.C. § 571(3).

have “soft power,” because agency officials wish to avoid their criticism. Consequently, an ombuds can play a significant role in achieving informal adjudication that is both fair and perceived to be fair. The presence of an ombuds can compensate to some degree for the absence of evidentiary hearings. ACUS recommendations strongly endorse the use of external ombuds.²³² Countless ombuds exist within the federal government, state and local government, academic and other non-profit institutions, and elsewhere. An ACUS study identified approximately 150 in the federal government alone.²³³ Some were authorized by legislation and others were established by agencies themselves.

The National Taxpayer Advocate (NTA) within the IRS is an example of a successful ombuds program.²³⁴ The NTA conducts an impartial assessment of complaints by individual and small business taxpayers who feel unfairly treated by the IRS. If the NTA decides that a complaint is justified, it advocates on behalf of the taxpayer.²³⁵ In addition, the NTA can recommend systemic changes in the Internal Revenue Code or IRS procedures and is empowered to file reports with Congress without prior review by the Commissioner of Internal Revenue or other officials.²³⁶ In 2015, NTA had a high success rate (about 78% of taxpayers achieved some form of relief), no queue of unresolved cases, and an 88% satisfaction rate (regardless of whether the taxpayers received the requested relief).²³⁷ When an NTA caseworker is unable to persuade an IRS official to grant relief to the taxpayer, NTA can issue a Taxpayer Assistance Order (TAO), which is a formal request that the case be elevated to a higher level of review.²³⁸

Another important ombuds model is the Office of National Ombudsman

232. ACUS Recommendation 90-2, *The Ombudsman in Federal Agencies*, 55 Fed. Reg. 34,211 (Aug. 22, 1990); ACUS Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94,316 (Dec. 23, 2016). Lengthy ACUS consultant reports provide detailed studies of ombuds across the federal government. See Carole S. Houk et al., *A Reappraisal—The Nature and Value of Ombudsmen in Federal Agencies: Part 1: Executive Summary* (Nov. 14, 2016) (hereinafter Houk, *Executive Summary*); *A Reappraisal—The Nature and Value of Ombudsmen in Federal Agencies Part II: Research Report* (Nov. 14, 2016) (hereinafter Houk Part II); Ombudsman Project (2016)-Complete Final Report.pdf. In addition, there is an extensive literature on ombuds. See, e.g. Amy Widman, *Inclusive Agency Design*, 74 ADMIN. L. R. 23, 54–58 (2022); BRYAN GILLING, *THE OMBUDSMAN IN NEW ZEALAND* (1998).

233. Houk, *Executive Summary*, *supra* note 232, at 6.

234. I.R.C. § 7803(c); www.taxpayeradvocate.irs.gov/can-tas-help-me-with-my-tax-issue/ (last accessed on February 2, 2025). See Houk, *Part II*, *supra* note 233 at 141–163 (discussing NTA’s structure and obligations and its positive impacts and contributions).

235. Houk, *Part II*, *supra* note 232 at 152–56.

236. I.R.C. § 7803(c)(2)(B)(i)–(iii).

237. Houk *Part II*, *supra* note 232, at 153, 156. Lubbers reported similar results in 2001. JEFFREY LUBBERS, INDEPENDENT ADVOCACY AGENCIES WITHIN AGENCIES: A SURVEY OF FEDERAL AGENCY EXTERNAL OMBUDSMEN 8 (Report to National Taxpayer Advocate, 2022) (83% were very satisfied or satisfied with the taxpayer advocate; 58% said their opinion of the IRS was more positive as the result of their experience with the advocate).

238. Houk *Part II*, *supra* note 232, at 154.

(ONO) within the Small Business Administration (SBA).²³⁹ ONO serves an ombuds function on behalf of small business in its relationships with all federal agencies, including but not limited to the SBA. The ombuds handles complaints arising out of adjudication and enforcement as well as other administrative functions. In FY 2022, ONO handled 586 complaints. Of the 2022 complaints, 434 were against the SBA, and the remaining complaints were against numerous other agencies. Out of the total of 586 matters, 54 were enforcement related and the balance were non-enforcement related, including many relating to problems arising out of applications for small business government loan programs or contracts disputes with government agencies.²⁴⁰

H. Freedom of Information Act (FOIA) Pro-Active Disclosure

Most FOIA disputes concern requests to agencies to disclose particular records. An agency decides through a Type C adjudication process whether to produce a requested record or to decline production because the record is covered by a FOIA exemption.²⁴¹ In addition, FOIA requires disclosure and indexing through a publicly available computer database of all “final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases...”²⁴² This provision requires agencies to make “pro-active disclosure” since it does not depend on a prior request.²⁴³ Such across-the-board disclosure of final opinions is a significant trans-substantive requirement applicable to Type C adjudication.

On its face, FOIA’s pro-active disclosure provision applies to a vast array of Type C decisions, since, by definition, such decisions are “made in the adjudication of cases.”²⁴⁴ A requirement of pro-active disclosure and indexing of every Type C decision, no matter how trivial, would be burdensome and of little value to the public, since most decisions are routine and repetitious. Consequently, the pro-active disclosure requirement might apply only to adjudicative decisions with “precedential

239. ONO was created by the Small Business Regulatory Enforcement Act of 1996 (SBREFA). 15 U.S.C. § 657. ONO includes ten Regional Regulatory Fairness Boards that conduct outreach and learn the concerns of small business owners in order to identify issues and trends before sharing them with the National Ombudsman.

240. Office of National Ombudsman, 2022 Annual Report to Congress, https://www.sba.gov/sites/default/files/2024-12/SBA%20ONO%20FY2022%20Annual%20Report_Final-508.pdf (last accessed on February 2, 2025).

241. See Part II G. 2.

242. APA § 552(a)(2)(A).

243. APA § 552(a)(2).

244. See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 130, 153–59 (1975) (holding that FOIA requires disclosure of advice and appeal memos by the NLRB general counsel deciding not to issue complaints because they are final opinions made in adjudication of cases); *Nat’l Prison Project of the American Civil Liberties Union Foundation, Inc. v. Sigler*, 390 F. Supp. 789, 791–94 (D.D.C. 1975) (holding that parole decisions by the Bureau of Prison must be disclosed whether or not “precedential”).

effect,” meaning those that an agency considers binding in future decisions.²⁴⁵ ACUS Recommendation 2023-1 urged enactment of a statute that would require disclosure of all such opinions, whether or not they are precedential. The proposed statute would allow agencies to adopt regulations that would exempt decisions where the issues are repetitive or the disclosure of documents would be misleading.²⁴⁶ Further discussion of the murky relationship between FOIA pro-active disclosure and Type C adjudication is beyond the scope of this article.

I. *Judicial Review*

Agency decisions reached through Type C adjudication are usually subject to judicial review.²⁴⁷ A reviewing court considers whether the decision contains errors of substantive law, fails to adhere to binding procedural requirements, or does not satisfy the “arbitrary and capricious” test.²⁴⁸

Agency procedural choices are constrained by the possibility that a Type C adjudicatory decision might be challenged in court. An agency must provide a “reasons statement” contemporaneous with its adjudicatory decision so that a court can decide whether the decision is rational and supported by evidence in the record,²⁴⁹ although courts vary in how strictly they enforce this prescription. Even a

245. See DEPARTMENT OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURE (2019); Daniel J. Sheffner, *Adjudication Materials on Agency Websites* 5–6, <https://www.acus.gov/document/adjudication-materials-agency-websites-final-report> (April 10, 2017) (report to Administrative Conference of the U.S.); Gardner, *supra* note 9 at 161–62; American Immigr. Lawyers Ass’n v. Exec. Office for Immigr. Review, 830 F.3d 667, 679–80 (D.C. Cir. 2016) (pro-active disclosure of non-precedential decisions resolving complaints against immigration judges would serve no useful purpose).

246. The ACUS consultant report argued that existing law requires pro-active disclosure of all adjudicatory decisions. Bernard W. Bell, Cary Coglianese, Michael Herz, Margaret B. Kwoka, Orly Lobel, *Disclosure of Agency Legal Materials* 89–96 (June 2, 2023), <https://www.acus.gov/sites/default/files/documents/Disclosure-of-Agency-Legal-Materials-Final-Report-5.30.23.pdf> (report to the Admin. Conf. of the U.S.). See also Bernard W. Bell, Cary Coglianese, Michael Herz, Margaret B. Kwoka, & Orly Lobel, *Improving the Affirmative Disclosure of Agency Legal Materials*, -- MICH. J. OF ENVIR. & ADMIN LAW. -- (2024), SSRN 4382229.

247. Some Type C decisions fall within judicial review exceptions to reviewability because of statutory preclusion of judicial review or commitment to agency discretion. APA § 701(a)(1) and (2). Discussion of the reviewability of Type C decisions is beyond the scope of this article.

248. APA § 706(2)(A).

249. See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–45 (1985). The requirement that the decision find evidentiary support in the record is applied more leniently in the review of Type C decisions under the “arbitrary and capricious” test than in review of Types A or Type B decisions under the “substantial evidence” test under APA § 706(2)(E). “But the standards do differ as to the allowable origins of factual support and, as a consequence, how those facts are assessed. . . . [It] is therefore permissible. . . for common sense and predictive judgements to be attributed to the expertise of an agency in an informal proceeding, even if not explicitly backed by information in the record. . . . But formal adjudications (which more typically involve historical facts) require substantial evidence to be found based on the closed record before the agency.” *Phoenix Herpetological Society, Inc. v. US Fish and Wildlife Serv.*, 998 F.3d 999, 1005–06 (D.C. Cir. 2021).

“curt” conclusory statement may suffice if it enables the reviewing court to determine the rationale for the agency decision.²⁵⁰ Whether or not the reason statement is concise or detailed, the reviewing court can consider only the reasons stated in the agency’s decision, as opposed to post hoc rationalizations raised during the judicial review process or reasons that the court might supply for itself.²⁵¹

If the adjudicatory decision entails a change in agency policy, the reasoning requirement is more substantial. The agency must acknowledge the change in course and must justify the disappointment of reliance interests engendered by the previous policy. It “need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible . . . , that there are good reasons for it, and that the agency *believes* it to be better.”²⁵²

Moreover, under the closed-record requirement, a reviewing court can consider only unprivileged materials that were considered by agency decisionmakers or staff members who worked on the matter.²⁵³ As a result, an agency must maintain and organize the documents and testimony that the staff and the decisionmakers considered, so that these materials will be conveniently accessible to support the agency decision if the case goes to court.

IV. THE BEST PRACTICES APPROACH TO PROVIDING PROCEDURAL PROTECTION IN INFORMAL ADJUDICATION

A. Public Administration and Best Practices

1. Infeasibility of Judicial Review

Administrative lawyers think first of judicial review as an effective check on erroneous administrative decisions or unfair Type C administrative procedures.

250. See *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (reviewing a decision denying an application for a bank charter.) The agency’s statement of reasons in *Camp v. Pitts* was indeed brief: “[W]e have concluded that the factors in support of the establishment of a new National Bank in this area are not favorable.” *Id.* While “curt,” this explanation was sufficient to explain that the new bank would be an uneconomic venture in light of the banking needs and services already available in the surrounding community. Similarly, see *Bowman Transp., Inc. v. Arkansas Best Freight Sys., Inc.*, 419 U.S. 281, 286 (“[A court] will uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”).

251. *Calcutt v. Fed. Dep’t Ins. Corp.*, 598 U.S. 623 (2023); *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). See Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 960–81 (2007).

252. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

253. Michael Asimow & Yoav Dotan, *Open and Closed Judicial Review of Agency Action: The Conflicting U. S. and Israeli Approaches*, 64 AM. J. COMPAR. L. 521, 523–36 (2016); Leland E. Beck, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking* 19, 29–34, <https://www.acus.gov/document/administrative-record-informal-rulemaking> (May 14, 2013) (Report to Administrative Conference of the U.S.); Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 KAN. L. REV. 1 (2018); Peter Constable Alter, *A Record of What? The Proper Scope of an Administrative Record for Informal Agency Action*, 10 U.C. IRVINE L. REV. 1045, 1061–66 (2020); Young, *supra* note 7, at 208–09.

Indeed, judicial review sometimes does provide valuable oversight of the administrative process.²⁵⁴ As a practical matter, however, judicial review is not a feasible remedy for the vast majority of private parties that are dissatisfied with Type C agency decisions or procedures.²⁵⁵ Most importantly, the high cost of legal services needed to obtain meaningful judicial review make it impracticable, except in cases that involve high stakes, cases in which legal services are furnished by organized non-profits, or cases where a statute allows prevailing parties to recover fees. Often, the lengthy delays inherent in judicial review mean that any court-ordered relief would come too late. And, in many situations, the private party and the government have a continuing relationship that could be jeopardized by an attempt to drag the agency into court.²⁵⁶

In addition to these practical limitations, various deference doctrines relating to questions of law, fact, and discretion place a heavy thumb on the agency's side of the scale. The closed-record rule precludes either side from introducing new evidence at the judicial review stage, even though the opportunity to introduce evidence at the administrative stage was limited by Type C procedure.²⁵⁷ The issue exhaustion rule prevents petitioners from raising new claims that they failed to raise during the unstructured informal adjudication proceedings.²⁵⁸ Courts are prohibited from mandating procedures that are not otherwise legally required.²⁵⁹ Even if a private plaintiff is successful and a court vacates the agency decision for a procedural error, such as a failure to state reasons, the judicial remedy is typically a remand to the agency for reconsideration. The agency on remand often comes to the same conclusion after employing better procedure or stating better reasons. Further discussion of judicial review of informal adjudication is beyond the scope of this article.

254. See Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097 (2018).

255. See Michael Asimow et al., *Between the Agency and the Court: Ex Ante Review of Regulations*, 68 AM. J. COMPAR. L. 332, 357–60 (2020) (discussing infeasibility of ex post judicial review for challenging illegal regulations); Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1629–31 (2018) (pointing to irrelevance of judicial review in informal adjudication).

256. See Asimow et al., *supra* note 255, at 359; Tarullo, *supra* note 100, at 299; Douglas v. Reeves, 964 F.3d 643 (7th Cir. 2020) (finding prisoner failed to prove that prison's retaliation against his grievance claim was sufficient to deter him from filing future grievances); Friends of the Blue Mound State Park v. Wisconsin Dep't of Nat. Res., No. 21-cv-676-jdp, 2023 WL 2163079 (W.D. Wis. 2023) (upholding First Amendment claim that state agency terminated a contract in retaliation against party that filed a lawsuit against it).

257. See *supra* text accompanying note 253.

258. See *United Refining v. EPA*, 64 F.4th 448, 457–58 (3d Cir. 2023). The court did not apply the usual requirement that the petitioner must have raised appellate issues before the agency because EPA's informal adjudication procedure did not include any opportunity for them to do so.

259. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 544 (1978); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 100-03 (2015); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (applying *Vermont Yankee* rule to informal adjudication).

2. Infeasibility of Statutory Solutions

Administrative lawyers often consider trans-substantive statutes or executive orders when they think about how to improve administrative procedure. The APA, FOIA, NEPA,²⁶⁰ the Equal Access to Justice Act,²⁶¹ the Government in the Sunshine Act,²⁶² Executive Order 12866,²⁶³ and numerous other statutes and executive orders have tackled issues relating to administrative decision making across the government. However, a trans-substantive statute governing agency procedure in Type C adjudication will not work.

As the discussion in Part II makes clear, Type C adjudication systems are wildly disparate and have little in common except that they produce binding adjudicatory decisions without conducting evidentiary hearings. Many Type C adjudications involve inquisitorial schemes in which frontline decisions blend seamlessly into primary decisions. The decisionmakers employ an array of informal techniques such as document exchanges, conferences, inspections, negotiations, public hearings, or written arguments, but not oral trial-type hearings involving witness testimony or cross-examination. Sometimes there are no oral proceedings at all. Ex parte communication between the contending parties and the decisionmakers are routine, and decisionmakers are free to rely on their own knowledge and to consider materials not introduced as evidence. Some Type C schemes involve second looks by agency superiors of primary decisions or other error-corrections mechanisms; others do not. Some Type C adjudications have large stakes that deserve and receive substantial procedural protection. Others are as trivial as the decision of a forest ranger to allocate a campsite or the assignment of an undesirable parking place to a government employee.²⁶⁴ Such low-stakes adjudications call for little or no procedure.

Several authors have suggested the enactment of statutes prescribing informal adjudication procedures,²⁶⁵ but these proposals have gained no traction. A trans-substantive statute that imposed uniform procedural requirements in Type C adjudication would be a daunting project. It would have to identify some practicable and easily applied formula to distinguish Type B and C adjudication, even though this line can be difficult to define because it is sometimes unclear whether a particular

260. 42 U.S.C. §§ 4321–4347.

261. 5 U.S.C. § 504.

262. 5 U.S.C. § 552b.

263. 58 Fed. Reg. 51735 (Sept. 30, 1993).

264. See *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) (stating that “[t]here is, of course, a *de minimis* level of imposition with which the Constitution is not concerned.”); see also *Swick v. City of Chicago*, 11 F.3d 85 (7th Cir. 1993) (placing officer on paid sick leave so he could not wear a badge or carry a gun is *de minimis* deprivation of property and does not trigger due process protection).

265. Krotoszynski, *supra* note 9, at 1069–75; Gardner, *supra* note 9, at 158–66 (tentatively proposing an “Informal Procedure Act of 1980” based on required rulemaking).

scheme involves evidentiary hearings.²⁶⁶ A statute would have to somehow identify and exclude government decisions that are too trivial to proceduralize. It should avoid mandating procedures that are not justified by a utilitarian cost-benefit analysis, while scaling up bare-bones procedural requirements for high-stakes disputes. Any such scheme would over-proceduralize some disputes and under-proceduralize others. It would also generate a constant need for amendments, but modification of such schemes through statutory amendments would confront obvious legislative difficulties.

Statutory procedures for informal adjudication would necessarily employ vague terms and thus would invite frequent judicial challenges by losing parties. Even a system of required procedural rulemaking to achieve vaguely stated procedural goals²⁶⁷ would generate judicial claims that the rules failed to achieve the goals set forth in the statute. In any case, it seems unlikely that Congress would prioritize this project by allocating resources to studying the problem and drafting legislation that would govern such disparate proceedings or that proponents could ever secure any consensus on the matter. Type C adjudication, in other words, is the poster child for adjudicative exceptionalism, for the triumph of diversity over uniformity, and for the impracticability of trans-substantive statutory solutions.²⁶⁸

3. Public Administration and Internal Administrative Law

A best practice approach that is grounded in the discipline of public administration avoids the difficulties that beset a statutory solution to the problem of achieving fair procedure in informal adjudication. Public administration is concerned with designing systems for the efficient and effective functioning of public institutions, including the design and management of informal adjudication systems.²⁶⁹ It relies heavily on the expertise and professionalism of the officials who manage these institutions, as well as the norms and practices previously developed within the agency. Administrative law concentrates on imposing legally binding procedural constraints on agency action that are enforced through judicial review,

266. See *supra* Introduction B. 2.

267. Warner Gardner recommended such a system. See Gardner, *supra* note 9.

268. See Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, *supra* note 3, at 1786–90. Bremer generally favors trans-substantive procedural norms. She observes, however, that exceptionalism has benefits even in the world of Type B adjudication. Agency-specific procedural provisions can take account of an agency's unique needs and problems, expand the range of procedural options, enable quick repair of defective procedures, and permit experimentation that may be helpful to other agencies that confront comparable problems. See also Bremer, *The Exceptionalism Norm in Administrative Adjudication*, *supra* note 3, at 1409–16; David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191 (2013). These advantages of agency-specific procedure are even more compelling in the Type C world.

269. ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW (2020); Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIA. L. REV. 577 (2011) (urging public administration approach to constraining administrative discretion).

while public administration facilitates solutions to procedural problems that are generated by the agencies themselves. Harlow and Rawlings call these public administration mechanisms “green light” rather than “red light” approaches to establishing fair and efficient procedures.²⁷⁰ Shapiro refers to these public administration mechanisms as “inside-out” rather than “outside-in” administrative practices.²⁷¹

Administrative law scholars have recently focused on internal administrative law, an approach to procedural reform that is inspired by the norms of public administration. Internal administrative law relies on procedures and practices created by agencies themselves that the agencies were not legally required to adopt.²⁷² Proponents of internal administrative law do not assume that agencies invariably seek to avoid or minimize procedural constraints on their own actions. Instead, they observe that agencies often decide to procedurally self-regulate.²⁷³ An agency might find its interests are served by adopting cost-justified, but not legally required, procedures. Such procedures would be intended to produce more accurate, consistent, and well-reasoned adjudicatory outcomes. They would also improve procedural transparency, enhance stakeholder satisfaction, and heighten the confidence of reviewing courts in the soundness of an agency’s adjudicatory decisions. Many of the procedural constraints on Type C adjudication discussed in Part II were voluntarily adopted by the agencies themselves and thus are examples of internal administrative law.

270. See CAROL HARLOW & RICHARD RAWLINGS, *LAW AND ADMINISTRATION* (2004).

271. Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. 1 (2013).

272. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983) (urging management reforms to Social Security adjudication); Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015) (describing organizational strategies by agency heads); Bagley, *supra* note 21, at 352 (favoring internal over externally imposed procedures); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017) (encouraging recognition and development of internal administrative law); Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 884–88 (2009); Shapiro & Wright, *supra* note 270 (advocating reliance on internal rather than external controls on agency discretion); Nielson et al., *supra* note 6, at 54–60 (advocating regulations protecting adjudicators from removal without cause); Nicholas R. Parrillo, *Jerry L. Mashaw’s Creative Tension with the Field of Administrative Law*, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW*, (Nicholas R. Parrillo ed., 2017) (discussing Mashaw’s emphasis on agency-generated law rather than externally imposed law); Tarullo, *supra* note 100, at 379–98 (proposing judicial review of adequacy of agency’s adoption of internal controls on bank supervision).

273. See Magill, *supra* note 273, at 882–91 (discussing reasons why an agency might decide to self-regulate by adopting procedures that are not legally required); Metzger & Stack, *supra* note 273, at 1273–75 (documenting the extent to which agencies voluntarily adopted a variety of procedures for rulemaking and adjudication before adoption of the APA); Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1924–26 (2016).

B. Best Practice Methodology

This article walks in the footsteps of the public administration and internal administrative law scholarship. It suggests a set of best practices for Type C adjudication that would be implemented by agency-specific procedural regulations and guidance documents. Once adopted as regulations, these procedures would be binding on the agency until the regulations are changed.²⁷⁴ If a particular scheme fails to function as expected, it can be quickly modified or replaced.²⁷⁵

As discussed in Part III, the proposed best practices are grounded in existing statutory and constitutional law, as well as existing procedural regulations and practices. Many of the agencies conducting Type C adjudication already meet or exceed these best practices.

1. Best Practices as Raw Material

The best practice approach avoids the problems inherent in statute drafting of drawing bright lines to define which adjudicatory schemes a particular practice would cover, or to provide the details of how the required procedures would work. Instead, the best practice proposals are intended to serve as the raw material from which agencies craft their own nuanced, cost-minimizing, and appropriately scaled adjudicatory procedures. Because of the enormous differences between Type C adjudication schemes, the procedural regulations incorporating the best practices would be quite dissimilar across the government, but they would share certain basic elements.

The voices of agency stakeholders should be heard when an agency designs or modifies its Type C adjudication procedures. Stakeholders include attorneys who represent disputants, beneficiaries of the agency program, state and local government actors, and other federal agencies. As discussed below,²⁷⁶ agencies should utilize procedures such as public workshops in revising their Type C procedural rules. They should also utilize notice and comment rulemaking for significant revisions, even though the APA allows the adoption of procedural rules without such formalities.²⁷⁷

274. See Magill, *supra* note 273 at 872–82. Further discussion of the circumstances in which courts require agencies to adhere to voluntarily adopted procedures is beyond the scope of this article.

275. Obviously, not every agency procedural innovation is successful. See David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 28–29, 57–67 (2020). This article finds that a reviewing mechanism designed to reduce the number of judicial reversals of decisions of the Board of Veterans' Appeals was a costly failure. See generally Admin. Conf. of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61738 (Dec. 29, 2017) (concerning regulatory experimentation).

276. See *infra* Part V.H.

277. Administrative Procedure Act § 553(b)(A).

2. Factors that Agencies Should Balance in Designing Administrative Procedure

Agencies that are considering the adoption or modification of informal adjudication procedures must engage in a situation-specific analysis. The analysis determines whether to adopt a particular best practice proposal or to require more or less formality than the best practice would call for. Agencies must balance a group of incommensurate factors in order to determine how to implement these practices. These factors include the stakes to the non-governmental party, the degree to which a proposed procedural device will improve the accuracy of the agency's decision making, the efficiency of the proposed procedure and its alternatives, the availability of resources, and the degree to which it would enhance stakeholder satisfaction with the fairness of the adjudication.²⁷⁸ The various factors that must be balanced often run in different directions, making tradeoffs inevitable. Precise information about costs and benefits is lacking. Whether a particular solution is "optimal" in the sense of producing the greatest net benefit to the agency and to the public is obviously difficult to determine, but the agency itself (informed by input from its various stakeholders) is better equipped to make that calculation than Congress or courts.²⁷⁹

Stakes

The stakes to the private party are an important ingredient of a best practice calculus. Some types of Type C adjudication involve relatively trivial stakes. An agency should not require its employees to follow any particular procedures for such decisions beyond listening to the disputants and briefly stating reasons for the decision. However, the personal and financial issues at stake can scale up rapidly to involve large stakes. Many Type C adjudications involve significant amounts of money or significant personal impacts. These disputes call for a set of defined procedural protections. Particularly high stakes decisions or decisions involving credibility conflicts may call for more formal procedures than the recommended best practices.

Accuracy

The term "accuracy" (which might be referred to as the "quality" of the decision) refers to increasing the probability that agency decisions will be "correct."

278. See Cramton, *supra* note 13 591–93 (1972) (balancing accuracy, efficiency, and acceptability); Verkuil, *supra* note 6, at 740 (balancing fairness, efficiency, and party satisfaction); Family, *supra* note 13 at 633–34 (discussing the balance of policy interests implicit when developing criteria).

279. See Vermeule, *supra* note 273 (arguing that agencies are best positioned to determine optimal procedure and thus merit a level of deference); Adrian Vermeule, *Optimal Abuse of Power*, 109 Nw. U.L. Rev. 673, 692–94 (2015) (discussing stakeholder acquiescence to tradeoffs the agency determines to be most efficient).

This means that the decisions correctly ascertain the basic facts, correctly interpret and apply the applicable law and agency policy, reach results consistent with similar cases, and exercise discretion wisely.²⁸⁰ The recommendations relating to notice, opportunity to introduce evidence and arguments, and requiring a statement of reasons all enhance the probability that the decision will be accurate.

Efficiency and resources

Agencies must take account of efficiency concerns when designing informal adjudication procedures. Additional procedures can swell backlogs by increasing the time necessary to dispose of each matter and increase marginal costs. These increased costs decrease the amounts that can be allocated to other agency initiatives, given limited staff availability as well as fixed and often inadequate budgets. Because the procedures are incorporated in regulations, agencies must comply with them even when they turn out to be inconvenient or unnecessary until the regulations can be amended. Additional procedural requirements also increase the likelihood that agency action will be challenged on judicial review by parties alleging that the requirements were not observed in every detail.²⁸¹

Fairness and Acceptability

Adjudication procedures should be designed with disputant satisfaction as an important factor. The social psychology literature contains valuable analysis of procedural justice, meaning the identification and implementation of procedures that are most important to non-governmental parties. Generating a sense of fairness in the dispute settlement process is critical to building legitimacy of the underlying institution. Legitimacy, in this sense,²⁸² means that people will respect the institution and its decisions, will follow the law without being forced to do so, and will continue to take advantage of benefits available from the agency.

The work of Tom Tyler is particularly useful in determining the contours of procedural justice.²⁸³ Tyler conducted an ethnographic study of Chicago residents who had actual experience with the police and courts. He found that people's satisfaction with the procedures they encounter depends on concerns that can be

280. See ACUS Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 FED. REG. 1715, 1722-23 (Jan. 12, 2022); Daniel E. Ho, David Marcus, & Gerald K. Ray, *Quality Assurance Systems in Agency Adjudication: Emerging Practices and Insights* 4-8 (Dec. 1, 2021) (report to the Admin. Conf. of the U.S.), available at <https://www.acus.gov/report/quality-assurance-systems-agency-adjudication-final-report> (last accessed Feb.1, 2025).

281. See Bagley, *supra* note 21, at 361-68. Bagley's insightful discussion analyzes the degree to which procedural constraints and hard look judicial review increase agency costs and delays and discourage the agency from taking desirable action.

282. Bagley refers to legitimacy in this sense as "sociological" rather than "legal" legitimacy." He argues that excessive proceduralism often leads to reduced sociological legitimacy. *Id.* at 378-89.

283. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 115-57 (2d ed. 2006). Tyler summarizes the findings of numerous earlier researchers on the factors that contribute to a sense of procedural justice.

described as “non-instrumental,” “normative,” or “value-expressive.” This means that the perceived fairness of the procedures often does not depend on the actual resolution of the dispute or even whether people think the procedures are likely to influence the outcome.²⁸⁴

Tyler found that the non-instrumental factors that matter most to people are whether a decisionmaker appears to be neutral and fair. In this context, the appearance of neutrality means that the decisionmaker did not prejudge the outcome and had no conflict of interest. In second place was “ethicality,” meaning civility and respect for all parties. The factor in third place was “representation,” meaning the extent to which the disputants have an opportunity to present their arguments, have their views considered, and receive an adequate explanation of the decision. Other important factors included the quality of decisions (meaning whether they were based on reliable and accurate data), consistency of decisions, and the presence of an opportunity to correct perceived errors. The best practices for informal adjudication should build on Tyler’s insights about procedural justice.²⁸⁵

Another interesting element of Tyler’s findings is that people found informal and formal procedures equally acceptable. They were as satisfied by the procedures involved in plea bargains or mediation as by procedures embodied in formal trials. Informal procedures may be more congenial to non-lawyers because they may give disputants more opportunities to be heard by decisionmakers than would occur in formal hearings. Informality in procedure may also allow decisionmakers to be more sensitive to people’s interpersonal concerns.²⁸⁶ This suggests that the methodology of informal adjudication (such as the use of consultation, document exchange, public hearings, negotiation, and mediation) can generate as much, if not more, satisfaction than the trial-type formal and adversarial hearings typical of Types A and B adjudication.

3. Criticisms of Best Practice Methodology

The use of best practice methodology has been subject to criticism.²⁸⁷ These critics point out that so-called best practices are often little more than qualitative suggestions based on the experiences or biases of their proponents, but that are not backed by empirical research. This criticism does not seem persuasive when applied

284. Tyler takes exception to earlier instrumental theories of procedural justice. Under these theories, the satisfaction of participants depends on whether they think the procedures will influence the outcome of the dispute in their favor. See, e.g., JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

285. Tyler, *supra* note 283 at 137–41. Tyler’s emphasis on non-instrumental factors echoes the substantial literature about the protection afforded to dignitary values by the requirements of procedural due process. See, e.g., Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978).

286. Tyler, *supra* note 283, at 154–56.

287. See Ira P. Robbins, *Best Practices on “Best Practices”: Legal Education and Beyond*, 16 CLINICAL L. REV. 269 (2009) (criticizing studies prescribing best practices for clinical education).

to the approach taken in this article. The set of best practices recommended in Part V generalize existing statutory and constitutional models applicable to informal adjudication. These legal resources represent a consensus on the basic elements of acceptable and efficient adjudication procedure. They do not set forth precise templates for procedural regulations across the sprawling universe of Type C adjudication, a result that would be neither possible nor desirable. Instead, the best practice approach suggests that agencies utilize the basic and generally accepted norms for informal adjudication and tailor them by crafting procedures appropriate to each unique situation.

C. Sources for Best Practices in Type C Adjudication

The best practice recommendations that follow in Part V are grounded in the legal norms applicable to informal adjudication discussed in Part III. These include consultative due process, statutes regulating attorney representation and regulatory ethics, ombuds provisions, APA sections 555 and 558, as well as the APA's notice-and-comment rulemaking requirements. Several are based on ACUS recommendations. A set of best practices rooted in these sources of law and policy would build on and honor the work of the drafters of the APA and numerous other relevant statutes as well as the work of ACUS.

Of course, there is no guarantee that adoption of these practices will generate more accurate and consistent decisions or more stakeholder satisfaction than existing approaches at an acceptable cost to agencies. If outcomes are not as expected, agencies should rethink the procedures. However, it seems likely that these low-cost and relatively efficient approaches to decision making will improve accuracy and consistency and enhance perceptions of private parties that they have been dealt with fairly.

V. PROPOSALS FOR BEST PRACTICES IN INFORMAL ADJUDICATION

This section spells out nine proposed best practices for Type C adjudication. Each proposal is stated in general terms and must be tailored to the particular circumstances of each individual adjudicatory scheme. ACUS adopted these proposals in Recommendation 2023-5.²⁸⁸

A. Notice

Appropriate notice is the foundation of fair administrative procedure.²⁸⁹ Agencies conducting Type C adjudication should furnish notice to private disputants

288. Administrative Conference Recommendation 2023-5, *Best Practices for Adjudication Not Involving an Evidentiary Hearing*, 89 Fed. Reg. 1509, 1509-11 (Jan. 10, 2024).

289. See Gardner, *supra* note 9, at 163-64 (proposing that agencies adopt regulations requiring appropriate notice in conducting informal adjudication); Friendly, *supra* note 9, at 1279-81.

and other stakeholders in sufficient time and in sufficient detail to enable them to challenge the agency's frontline decision by submitting evidence and arguments to support their position and to negotiate a settlement. The notice should specify the reasons that the frontline decision rejected an application or recommended imposition of a sanction or other remedy. The notice should include access to unprivileged materials in the agency's file when needed to mount an effective challenge.

This best practice recommendation is grounded in due process authorities that require agencies to provide notice that is "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."²⁹⁰ Consultative due process cases²⁹¹ stress the importance of timely notice in relatively low-stakes disputes.²⁹² The recommendation also finds support in APA § 558(c), which applies to withdrawal of licenses. That provision requires "notice by the agency in writing of the facts or conduct which may warrant the action" and an "opportunity to demonstrate or achieve compliance with all lawful requirements."²⁹³

This recommendation is also grounded in notice-and-comment rulemaking. Rulemaking procedure requires the agency to notify the public of proposed rules through federal websites like regulations.gov. In addition, notice is transmitted through mailings and other methods of communication designed to reach persons or associations known to be interested in the matter. Rulemaking procedure is especially relevant to adjudicatory disputes that involve the rights and interests of third parties or of members of the general public (as in the case of many land-use, banking charter disputes, or drug marketing applications, as discussed in Part II).

An agency's procedural regulations and manuals governing particular schemes of Type C adjudication should spell out the details of how notice and access to material in the agency's file will be provided. The notice requirement should be based on a situation-specific analysis of the adjudicatory process under consideration. Obviously, the notice requirements differ if the agency's frontline decision involves rejection of an application as opposed to imposition of a sanction. The type and detail

290. See, e.g., *Dusenbery v. United States*, 534 U.S. 161, 167–69 (2002). See *Adjudication Guidebook*, *supra* note 168, at 288–90.

291. See *supra* Part III.A. for discussion of consultative due process.

292. Before imposing a brief suspension, a high school must furnish the student with "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Goss v. Lopez*, 419 U.S. 565, 581 (1975). In prison disciplinary proceedings, "[W]ritten notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee." *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) (referring to prison disciplinary proceedings), *disapproved on other grounds* by *Sandin v. Conner*, 515 U.S. 472 (1995) (holding that with some exceptions prisoners are not deprived of liberty when subjected to prison discipline).

293. See *supra* Part III.F.

of the required notice should be quite different in high-stakes disputes than in those having small stakes. In addition, the private party's access to material in agency files is limited by national security considerations or by various privileges.

Agency procedural rules or guidance should spell out such matters as:

- the required timing and detail of the notice
- the procedural details by which the frontline decision can be challenged
- access to unprivileged materials in the agency's files
- whether the agency provides a second chance to achieve compliance
- levels of review of frontline and primary decisions and judicial review
- whether the notice should be in languages other than English
- the means used to publicize the notice to stakeholders
- deadlines
- notice in emergency situations.

B. Opportunity to Submit Evidence and Argument

Parties to disputes with the government should have the opportunity to challenge frontline decisions by submitting evidence and argument to agency primary decisionmakers. This recommendation is supported by a number of relevant legal sources, such as the consultative due process decisions that require agencies to furnish an opportunity for a conference with the decisionmaker.²⁹⁴ The right to offer evidence and argument can be inferred from the second sentence of APA § 555(b) that allows a party "to appear."²⁹⁵ Similarly, the statutory right to comment on a proposed rule and to respond to comments filed by others is key to the broadly accepted rulemaking process.²⁹⁶ Finally, Executive Order 13,892 provides persons in dispute with the government an opportunity to be heard, in person or in writing, regarding the agency's proposed legal and factual determinations.²⁹⁷ As explained above,²⁹⁸ Executive Order 13,892 was revoked by President Biden but revived by President Trump.

The contours of the opportunity to furnish evidence and argument should vary depending on the nature of the dispute, such as whether the dispute concerns credibility issues as opposed to issues of law, legislative fact, or the exercise of

294. See *supra* Part III.A. *Goss v. Lopez*, discussed in text at *supra* notes 177-78, involved a short-term suspension of a high school student. *Goss* required "an opportunity to present his side of the story." 419 U.S. at 581.

295. See Part III.D.1.

296. Administrative Procedure Act § 553(c).

297. Exec. Order No. 13,892, *supra* note 216. The right to be heard in the Executive Order contained several exceptions, such as for settlement negotiations. In an emergency situation, the right to be heard applied as soon as practicable. *Id.*, §§ 6(b)-(c). Compliance with the executive order was not judicially enforceable. *Id.* § 11(c).

298. See *supra* text accompanying note 220.

discretion. It will also vary depending on the stakes involved, as well as the agency's caseload and its decisional resources. The opportunity might take the form of written or electronic submissions, document exchanges, or informal conferences. When credibility issues are presented, there should be some mechanism that allows a disputant to rebut information provided by adverse witnesses. The opportunity to present evidence and argument should be available in a manner that permits people with disabilities or limited English proficiency to take advantage of them. In the case of disputes with trivial stakes, the opportunity to present evidence and argument means little more than a chance to make an oral statement to the decisionmaker as to why the disputant believes that the frontline decision was wrong.

C. Representation

Best practices include a right to be represented by a lawyer. As noted above, the Administrative Practice Act provides a right of representation in Type C adjudication and prevents agencies from creating a specialized bar.²⁹⁹ In addition, APA § 555(b) guarantees a right to be represented by counsel in connection with the right to "appear."³⁰⁰ Due process authorities mandate a right to counsel,³⁰¹ although not necessarily in cases involving small stakes.³⁰²

Neither the Administrative Practice Act nor APA § 555(b) take a position on whether the right to be represented by counsel includes a right to be represented by lay persons, leaving this issue to be decided by agencies.³⁰³ Best practices, however, should include a right to be assisted in Type C adjudication by lay persons who have expertise in the program administered by the agency. This proposal is supported by ACUS Recommendation 2016-4, which sets forth best practices for Type B adjudication and encourages agencies to permit lay representation.³⁰⁴ Similarly, ACUS Recommendation 86-1 urged agencies to permit lay representation

299. See Part III. C. Note to readers: As pointed out in footnote 190, the Administrative Practice Act (enacted in 1990 and not identified herein by an acronym) is *not* the same legislation as the Administrative Procedure Act (enacted in 1946 and referred to herein as the APA).

300. See Part III. D. 1.

301. In appeals of termination of welfare benefits, "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing." *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (citations omitted).

302. *Goss v. Lopez*, 419 U.S. 565, 581–82 (1975).

303. See Part III. C.

304. See Recommendation 2016-4, *supra* note 3, ¶14: "Agencies should permit non-lawyer representation. Agencies should have the discretion to (a) establish criteria for appearances before the agency by non-lawyer representatives or (b) require approval on a case-by-case basis."

in mass justice adjudication.³⁰⁵

For parties who cannot afford or cannot obtain a lawyer, having the assistance of a knowledgeable lay representative is far superior to self-representation.³⁰⁶ Regulations that recognize a right to lay representation preempt state unauthorized practice laws that might prohibit lay representation in civil and criminal cases.³⁰⁷ Apart from representation, agencies should allow participants in Type C adjudication to obtain assistance or support from friends, family members, or other individuals in presenting their case. In addition, agencies should make their proceedings as accessible as possible to self-represented parties. Agencies should provide plain language resources, such as FAQs and other appropriate assistance, to self-represented persons.³⁰⁸

D. Decision Maker Neutrality

Best practices for Type C adjudication should include provisions relating to decisionmaker impartiality.³⁰⁹ Tyler found that an important element of participant satisfaction with the adjudicatory process is the perceived neutrality of the decisionmaker.³¹⁰

The neutrality standards applicable to Types A and B adjudication, enforced through recusal rules and often by due process,³¹¹ must be relaxed in many

305. 51 Fed. Reg. 25,641 (1986).

306. See Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001); Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C.L. REV. 429 (2016); Paul R. Tremblay, *Surrogate Lawyering: Legal Guidance, sans Lawyers*, 31 GEO. J. LEGAL ETHICS 377, 383–85 (2018); Anne E. Carpenter, Alyx Mark, & Colleen F. Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 J. OF LAW & SOC. INQUIRY 1023 (2017); Zona Fairbanks Hostetler, *Nonlawyer Assistance to Individuals in Federal Mass Justice Agencies: The Need for Improved Guidelines*, 2 ADMIN. L. J. 85 (1988). In some circumstances, due process may include a right to seek assistance from non-lawyers. See *Wolff v. McDonald*, 418 U.S. 539, 570 (1974), which involves prison disciplinary proceedings. *Wolff* held that prisons can prohibit the appearance of counsel, but prisoners should be permitted to seek the aid of fellow prisoners where the issues are sufficiently complex.

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

308. ACUS Recommendation 2016-4, *supra* note 3, ¶16; ACUS Recommendation 2016-6, *Self-Represented Parties in Administrative Proceedings*, 81 Fed. Reg. 94,319 (Dec. 23, 2016). Some agencies have experimented with offices dedicated to helping the public navigate agency programs. See discussion of FERC's Office of Public Participation in Part II. D.

309. Friendly ranks an unbiased decisionmaker as the most important procedural safeguard for Type B adjudication. Friendly, *supra* note 9, at 1279. Peterson discusses the salience of financial conflict of interest concerns for the legitimacy of administrative processes, particularly in administrative adjudication. Peterson, *supra* note 184, at 187–96 (2021).

310. See text at note 285.

311. In welfare pre-termination hearings, “[O]f course, an impartial decisionmaker is essential. We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decisionmaker. He should not, however, have participated in making the determination under review.” *Goldberg v. Kelly* 397 U.S. 254, 271 (1970). In prison discipline cases, the

Type C situations.³¹² Impartiality rules in Type C must be tailored to a system of adjudication that is inquisitorial rather than adversarial, meaning that the decisionmaker controls the process to a much greater degree than occurs in Type A or B. Type C decisionmakers are not bound by the exclusive record rule. They are often the same staff members who participated in the investigatory process or have some other prior involvement in the matter. Similarly, various protections of Type A and B administrative judges, relating to hiring, duties, separation of functions, supervision, performance evaluation, or discharge, are not appropriate in Type C adjudication where staff members with conflicting responsibilities often render the primary and administrative review decisions.

As discussed above,³¹³ federal ethics law requires agency investigators and decisionmakers conducting Type C adjudication to disqualify themselves if they (or related persons) have a financial conflict of interest in a matter they are investigating or deciding. Federal ethics law also imposes an aspirational standard that decisionmakers should be impartial.³¹⁴

Both the binding and the aspirational federal ethics rules should be treated as best practices for agencies conducting Type C adjudication. Agencies should adopt regulations requiring disqualification of employees engaged in the adjudicatory process who have a financial or non-financial conflict of interest in particular matters they are investigating or deciding. Under ethics law, agencies can supplement the federal standards by tailoring their regulations to the specific ethics issues they confront, but supplemental regulations must be approved by the Office of Government Ethics.³¹⁵ In addition, in accordance with the aspirational standard of federal ethics law, agency regulations should seek to assure decisionmaker impartiality that extends beyond conflict of interest. The regulations might require disqualification of an agency staff member who, in the view of a hypothetical reasonable person, might not be impartial. An example of lack of impartiality might be the existence of personal animosity between the private party and the decisionmaker.

Best practices for decisionmaker neutrality do not include internal separation of functions or limitation of ex parte communications, as is required in Types A or B adjudication. In most Type C adjudication, staff members below the

Court upheld a decisionmaker panel that did not include anyone involved in investigation of the disciplinary infraction. *Wolff v. McDonnell*, 418 U.S. 539, 571 (1974). For discussion of due process authorities relating to impartial adjudicators, see *Virelli III*, *supra* note 185, at 7–8.

312. See Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019), which applies to Types A and B adjudication; *Virelli III*, *supra* note 184.

313. See Part III. B.

314. *Id.*

315. 5 C.F.R. § 2635.105. Thus, agencies should be able to expand their regulations to reach what Peterson describes as penumbral conflicts of interest that are not presently covered by the regulations adopted by the Office of Government Ethics. Peterson, *supra* note 184, at 206–09.

agency head level engage in both investigation and decision making in the same case. Ex parte communication by outsiders or agency staff members is common. Nevertheless, where Type C adjudication involves serious sanctions, internal separation of functions and prohibition on ex parte communication would be appropriate.

E. Statement of Reasons

A decisionmaker who is responsible for the primary decision in Type C adjudication should provide an oral or written statement of the facts and reasons on which the decision is based. Requiring the decisionmaker to furnish a statement of reasons is likely to improve the quality of discretionary decisions. As the work of Tom Tyler showed, an explanation of the decisionmaker's reasons is also an important factor in enhancing stakeholder satisfaction with the process.³¹⁶

The reasons statement should be in a form that is comprehensible to persons involved in the dispute. It should explain why the private party's arguments were rejected as well as setting forth the rationale for the agency's discretionary choices.³¹⁷ As in the case of the other best practice recommendations, the detail and formality required of an agency's reasons statement depend on the context, such as the stakes involved in the decision, the complexity of issues, and the agency's caseload and other resource constraints.

The reason-giving requirement is grounded in a number of legal sources. Consultative due process requires at least a brief statement of reasons when the reasons are not obvious.³¹⁸ Under APA § 555(e), an agency that denies an application, petition, or other request must furnish a notice that "shall be accompanied by a brief statement of the grounds for denial."³¹⁹ For judicial review purposes, a court can consider only the reasons for the decision stated by the agency when it made the decision under review, not post hoc rationalizations.³²⁰ Similarly, the broadly accepted rulemaking process requires that final rules contain a "concise general

316. See text at notes 283-86.

317. See Verkuil, *supra* note 6 at 790-92; Friendly, *supra* note 9 at 1292.

318. As the Supreme Court said of prison disciplinary proceedings, "We also hold that there must be a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action. . . . Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, as to the disciplinary action itself, the provision for a written record helps to ensure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others..." *Wolff v. McDonnell*, 418 U.S. 539, 564-65 (1974) (citation omitted).

319. See Part III. D. 2.

320. See Part III. I.

statement of their basis and purpose.”³²¹ Finally, Executive Order 13,892,³²² requires that “[t]he agency must respond in writing and articulate the basis for its action.”

F. Administrative Review

Most adjudicatory systems provide for a second look at the primary decision.³²³ In Type C adjudication, a staff member superior to the primary decisionmaker in the agency hierarchy usually provides the review decision. Best practices for Type C adjudication include some form of administrative review of primary decisions.

The purpose of administrative review is to make sure proper procedures were followed at the primary decision level, as well as error-correction and promotion of consistent primary decisions that exercise discretion wisely. A review process invokes the so-called sentinel effect, which holds that decisions may be better when decisionmakers know their work will be scrutinized.³²⁴ In addition, a system of internal review facilitates quality assurance mechanisms by creating a database of potentially problematic situations, as discussed in Best Practice I. Finally, a party’s ability to have someone review a negative primary decision enhances user satisfaction with the administrative process.³²⁵

Of course, there are many situations in which an opportunity for administrative review is impracticable because of high caseload, low stakes, lack of available staff, or time constraints. For instance, in the paradigmatic campsite example, it is not practical to allow a disappointed applicant for a campsite to appeal to a higher-level official, given the need for quick decisions, the likely late hour, and the probability that the deciding ranger’s superior officer is not located on site.

There is a constitutional dimension to the issue of whether Type C agencies should provide for some kind of administrative review of adjudicatory decisions by lower-level primary decisionmakers. In the *Arthrex* decision,³²⁶ the Supreme Court indicated that a Type B agency (the Patent Trial and Appeal Board) must provide some form of administrative review of adjudicatory decisions by principal officers, meaning officials appointed by the President and confirmed by the Senate. The

321. APA § 553(c).

322. See Executive Order 13892, *supra* note 218.

323. See Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 FED. REG. 57461, 57461 (Dec. 30, 1983). There are hundreds of appellate review schemes in federal agencies. These schemes are diverse, and many do not conform to the Type A appeal scheme set forth in APA § 557(b). See Walker & Wiener, *supra* note 6. Walker & Wiener’s report primarily discusses review schemes in Type B adjudication. *Id.* at 7, n. 30. These systems often consist of formal review boards. The second-look review systems in Type C adjudication are more informal and more diverse than in Type B schemes.

324. Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1464 (2011).

325. See text at *supra* note 286.

326. *United States v. Arthrex, Inc.*, 594 U.S. 1, 23 (2021).

impact of *Arthrex* on Type C adjudication has yet to be determined, but it could potentially be quite destabilizing. It is unclear, for example, whether *Arthrex* is triggered only by preclusion of principal officer review that occurs in a statute as opposed to preclusion that occurs in a regulation (which would be typical of Type C adjudication).³²⁷

G. Ombuds

As discussed earlier,³²⁸ an external ombuds is empowered to investigate and attempt to resolve complaints from persons outside the agency but lacks power to compel the agency to do anything. Ombuds act informally and charge no fees. ACUS has repeatedly endorsed their use.³²⁹ Ombuds in numerous federal agencies are empowered to consider complaints arising in the informal adjudication process.³³⁰

Even though Type C primary decisions are typically subject to both judicial review and internal agency review (discussed in Part V. F.), an ombuds can play a distinct role in achieving fair and acceptable Type C procedure and can compensate in part for the absence of an evidentiary hearing. As previously discussed,³³¹ judicial review is not a feasible or affordable remedy for most Type C disputants. It cannot correct disrespect or incivility by agency staff or decisionmakers. Yet in the minds of private disputants, the decisionmaker's perceived respect and civility is the second most important element of procedural justice behind decisionmaker neutrality.³³² An ombuds can deal effectively with complaints of this kind.

Internal agency review is unlikely to respond to complaints about disrespect or incivility or to inadequate reasons statements. Internal reviewers may be reluctant to criticize or second-guess the work of the primary decisionmakers.³³³ Moreover, internal agency reviewers are unlikely to initiate wide-scale investigations into issues raised by the appeals that come before them, as an ombuds often can.

Best practice for an agency conducting informal adjudication is to designate

327. See *Rodriguez v. Social Security Adm'n*, 118 F.4th 1302 (11th Cir. 2024). The *Rodriguez* decision held that *Arthrex* does not apply to the Social Security Appeals Council, since preclusion of review by a principal officer in the Social Security system is mandated by a regulation rather than by a statute. Further discussion of *Arthrex* is beyond the scope of this article.

328. See note 232, listing a number of ACUS recommendations supportive of external ombuds.

329. See text at notes 232–40.

330. In addition to the National Taxpayer Advocate and the Small Business Administration's Office of National Ombudsman, discussed in Part III. G., Lubbers identifies numerous federal ombuds whose powers include investigation of informal adjudication, such as the Department of Education Student Loan Ombudsman. Lubbers, *supra* note 237 at 17–19. In addition, the Federal Reserve System's ombudsman plays an important role in the FRS informal adjudication system. See *Internal Appeals Process for Material Supervisory Determinations and Policy Statement Regarding the Ombudsman for the Federal Reserve System*, Docket No. OP-1696, [federalreserve.gov/supervisionreg/srletters/SR2028a1.pdf](https://www.federalreserve.gov/supervisionreg/srletters/SR2028a1.pdf), (2020).

331. Part III. I.

332. See text at note 285, *supra*.

333. See Ames et al., *supra* note 275 at 61–62.

an ombuds who is empowered to receive complaints about a broad range of agency actions, including informal adjudication. The ombuds should be authorized to investigate, mediate, and advocate on behalf of private parties who are in dispute with agencies. The ombuds must have independence and stature within the agency structure and be equipped to handle complaints confidentially and impartially.³³⁴ The ombuds must have a sufficiently large staff to handle the volume of complaints in a timely manner. Smaller agencies or those with low adjudicatory caseloads should consider sharing an ombuds with other agencies that are similarly situated.³³⁵ If an ombuds detects a pattern of complaints suggesting that the agency should consider improvements or reforms in its Type C adjudication procedure, the ombuds should be empowered to advocate for such changes.

H. Procedural Regulations

People should have convenient access to the details of adjudicatory procedures that affect them. Consequently, agencies should adopt regulations that specify the procedural details of each scheme of Type C adjudication that the agency conducts.³³⁶ Although the APA does not require agencies to use the usual notice-and-comment process for adopting procedural regulations,³³⁷ agencies should consider making use of that process when they consider the adoption or revision of significant Type C procedural regulations. The rulemaking process enables affected stakeholders to weigh in on the tradeoffs necessarily inherent in adopting adjudicatory procedures.³³⁸ But minor revisions of existing adjudicatory processes would not justify the considerable expense of conducting notice and comment.

Procedural regulations concerning informal adjudication should include details relating to the best practices discussed in Part V. Other essential details might include the identity and assignment of frontline, primary, and administrative review

334. Independence, confidentiality, and impartiality are the three core standards of ombudsman practice. See Houk, Executive Summary, *supra* note 232.

335. Agencies that do not choose to establish an ombuds program (or share in an ombuds program established by other agencies) should at least consider alternative procedures for allowing parties to submit feedback or complaints, such as through an agency portal or dedicated email address.

336. Gardner's proposed "Informal Procedure Act of 1980" relied primarily on required rulemaking. See Gardner, *supra* note 9 at 158–66 (outlining the purposes and elements of his proposed statute).

337. APA § 553(b)(A). Moreover, the rulemaking provisions of the APA do not apply to a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. APA § 553(a)(2). Type C adjudication often concerns disputes arising out of agency programs that fall within these rulemaking exceptions. Nor is notice and comment required for adoption of guidance documents such as staff manuals and FAQs. APA § 553(b)(A).

338. See ACUS Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30102 (July 8, 1992) (encouraging agencies to voluntarily use notice-and-comment procedure in promulgating procedural rules, except in situations in which the costs of doing so outweigh the benefits).

decisionmakers; disclosure of the agency's file; opportunities for negotiation with the staff; forms; and deadlines. And, of course, agencies are obligated to follow their procedural regulations, even if the regulations provide protections that the agencies were not legally required to adopt and even though the agency adopted the regulations without prior notice and comment.³³⁹

Agencies should follow up procedural regulations with guidance documents, staff manuals, and plain-English FAQs that are easily accessible on the internet and are more user-friendly than regulations.³⁴⁰ It may also be feasible and helpful to the public to post sample written decisions in previous Type C adjudications (redacted to remove personal information), even though these are not intended to be precedential.

This proposal for adoption of regulations and guidance documents is rooted in existing law. The APA already requires agencies to publish in the Federal Register for the guidance of the public "statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available."³⁴¹ In addition, the APA requires that the agency publish "rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations."³⁴²

I. Quality Assurance Systems

An agency that performs informal adjudication should consider adoption of a quality assurance system.³⁴³ Such systems are internal mechanisms designed to collect data and to detect and remedy systemic problems in adjudicative programs. Quality assurance mechanisms can identify recurring decisional errors and low-performing investigators and decisionmakers. They can expose problems with the systems as a whole, such as undue delay, outdated technology, poor training, poor internal communications, lack of transparency, unnecessary paperwork, or faulty

339. See *Service v. Dulles*, 354 U.S. 363, 388 (1957) (noting that while the Secretary of State was not obligated to burden himself with more rigorous substantive and procedural standards, his doing so means he cannot proceed without regard to them); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (objecting to the Board of Immigration Appeal's alleged failure to exercise its discretion contrary to existing regulations it placed upon itself).

340. See Walker & Wiener, *supra* note 3 at 23–27 for discussion of the need for agencies to adopt both regulations and guidance documents concerning appeals within the agency.

341. APA § 552(a)(1)(B).

342. APA § 552(a)(1)(C). As discussed in Part III H., the APA also requires agencies to make available without prior request and index all adjudicatory decisions. How this requirement applies to Type C adjudication remains in dispute.

343. See William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROB. 61 (2015); Charles F. Sabel & William H. Simon, *The Duty of Responsible Administration and the Problem of Police Accountability*, 33 YALE J. ON REG. 165 (2016). See *Adjudication Guidebook*, *supra* note 168, at 383–399.

procedures. Quality assurance systems should examine the entire adjudicative process, including investigation and frontline decision making, primary decision making, and internal review mechanisms. As ACUS Recommendation 2021-10 put it: “Identifying such problems enables agencies to ensure adherence to their own policies and improve the fairness (and perception of fairness), accuracy, inter-decisional consistency, timeliness, and efficiency of their adjudicative programs.”³⁴⁴

Many quality assurance programs utilize peer review of random samples of prior case files, especially those created by internal review mechanisms. High-volume systems may lend themselves to AI analysis and machine learning. Regardless of volume, however, agencies with quality assurance systems should collect and analyze data in order to assess and improve the quality of decisions in their adjudication systems. Assurance systems should provide for feedback to personnel at all stages of informal adjudication. In short, agencies should periodically evaluate their informal adjudication systems to assure that their procedures strike the optimal balance of accuracy, efficiency, and perceived fairness.

The informal adjudication systems discussed in this article vary enormously and no single type of quality assurance system would be appropriate for all of them. Some Type C systems have heavy caseloads, while others decide very few cases. Some systems have substantial backlogs; others are current. Some agencies have sufficient resources to perform quality assurance, perhaps using outside contractors, but others lack such resources. Other important variables concern the complexity of disputed issues as well as the stakes for both the private party and the government.

CONCLUSION

Type C adjudication is everywhere. The federal government could not function without being able to conduct massive amounts of it. Type C adjudication is difficult to study and describe because of its vast scale and diversity. It resists regulation by trans-substantive procedural statutes. While Types A and B adjudication have been extensively studied, Type C remains the largely unexplored last frontier of administrative adjudication.

This article begins the task of mapping that *terra incognita*. It sketches the world of Type C adjudication and seeks to initiate the process of agency self-study of informal agency procedure. Agencies should design systems for dispensing Type C justice in ways that promote accurate and consistent decisions and the wise exercise of discretion. These procedures should be efficient and properly scaled to the stakes in the dispute. They should be viewed as fair by stakeholders. They should preserve informality while furnishing the fundamental rudiments of fair decision making.

This article suggests an undemanding set of best practices for conducting informal adjudication. The Administrative Conference adopted these proposals in

344. ACUS Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022); see Ho, Marcus & Ray, *supra* note 280.

Recommendation 2023-5. They are grounded in existing sources of law and administrative practice. For the most part, agencies engaged in Type C adjudication already observe them. These best practice proposals are not precise and prescriptive, but instead are intended to furnish the raw material from which agencies can fashion a set of procedures that strike an appropriate situation-specific balance of cost and benefit.

Informal adjudicatory processes are the face of administrative justice for vast numbers of people and entities that have disputes with the government. They should be well designed, efficient, fair, and perceived to be fair. The informal adjudication process deserves attention from administrative and public administration scholars and from every agency that engages in it.