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THE SPREADING UMBRELLA: EXTENDING THE APA’S ADJUDICATION PROVISIONS TO ALL EVIDENTIARY HEARINGS REQUIRED BY STATUTE

MICHAEL ASIMOW*

INTRODUCTION

The Administrative Procedure Act of 1946 (APA)¹ has achieved nearly constitutional status. The statute is of immense importance to the administrative process and to uncounted millions of people whose lives and businesses are impacted by federal agencies. The APA regulates *all* executive branch rulemaking² and *all* judicial review of agency action³ (with narrowly drawn exceptions in each case). The Freedom of Information Act⁴ covers *all* government information (again with specific exceptions). The process of alternate dispute resolution is also comprehensively regulated.⁵

However, the situation of federal agency *adjudication* under the APA is quite different. The APA’s adjudication provisions govern only a portion (probably half or less) of the evidentiary hearings called for by federal statutes. The APA prescribes procedures only in the cases in which administrative law judges (ALJs) preside—primarily benefits cases involving Social Security, Medicare, and Black Lung plus a number of regulatory programs. This universe of hearings is referred to herein as “Type A adjudication.” A large number of federal regulatory and beneficiary schemes call for evidentiary hearings outside the APA. Such hearings are referred to herein as “Type B adjudication” and the persons who preside are referred to as “presiding officers” (POs). The APA provides virtually no procedural protections to litigants in Type B adjudication.⁶ This article proposes that Congress amend the APA to extend certain procedural

* Professor of Law Emeritus, UCLA School of Law. Email address: asimow@law.ucla.edu. This article arises out of work in progress for the Section of Administrative Law and Regulatory Practice of the ABA but represents only the views of its author. All comments are welcome. The author gratefully acknowledges the contributions of Judge Ann Marshall Young in developing the recommendations discussed in this article. In addition, numerous Section members and many others have furnished input on these proposals. I gratefully acknowledge all of their contributions but space limitations preclude naming them here.

¹ 5 U.S.C. § 551 et. seq. (2000). The APA is cited herein without the prefatory 5 U.S.C.

² APA § 553.

³ APA § 701-706.

⁴ APA § 552.

⁵ APA §§ 561-70, 571-83.

⁶ APA §§ 555 and 558 apply to all adjudications but provide protections that fall far short of those provided in Type A adjudications. See MICHAEL ASIMOW, ET. AL. A GUIDE TO FEDERAL AGENCY ADJUDICATION ¶¶9.04, 9.06 (ABA Section of Administrative Law and Regulatory Practice, 2003) [hereinafter referred to as GUIDEBOOK]. Sections 555 and 558 are not discussed in this article.

protections applicable in Type A adjudication to Type B adjudication. This proposal would spread the APA's umbrella to a vast array of administrative adjudication that presently lies outside its protection.

This proposal arises out of work done for the Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA). For the last several years, the Section has been engaged in an extensive project on the APA. It has finalized "black-letter" summaries of the law in the areas of rulemaking, judicial review, government information and management, as well as adjudication.⁷ It published a book on adjudication under the APA.⁸ One of the objectives of the APA project is to generate a set of prescriptive recommendations for amending the APA. This article concerns one such recommendation which has been the subject of extensive consultations and negotiation among numerous constituencies.⁹ As of this writing, the Section's Council has approved a circulation draft of a number of proposals relating to adjudication. However, the Section has not yet definitively approved them nor submitted them to the ABA's House of Delegates. Part I of this article describes the background of the problem and the rationale for the recommendation. Part II contains specific statutory language that would implement the recommendation.

I. BACKGROUND AND RATIONALE FOR THIS PROPOSAL

A. Type A and Type B adjudication

This article uses the term "Type A adjudication" to describe those hearing schemes to which the existing APA adjudicatory provisions apply.¹⁰ These proceedings, often referred to "formal adjudication," are usually conducted by ALJs.¹¹ The great majority of those proceedings involve disputes about federal benefits, particularly Social Security, Medicare, and Black Lung. In addition, these proceedings involve

⁷ These black letter statements are available at <http://www.abanet.org/adminlaw/apa/blackletter1101.doc> (last visited July 12, 2004).

⁸ GUIDEBOOK, *supra* note 6.

⁹ A current draft of the entire set of prescriptive recommendations relating to adjudication, which includes several proposals in addition to the one discussed in this article, is available at http://www.abanet.org/adminlaw/apa/Prescriptive_recommendations--6-02-04_revision.doc (last visited July 12, 2004).

¹⁰ APA §§ 554, 556-58. See proposed § 551(15) creating the category of "Type A adjudication." The proposed statutory language appears in Part II of this article.

¹¹ Not all Type A adjudication is conducted by ALJs. Some statutes require agencies to comply with the APA adjudication provisions even though ALJs do not preside. APA § 556(b); GUIDEBOOK, *supra* note 6, ¶10.03. The APA also permits the agency head or heads to preside at hearings instead of ALJs (although this almost never happens). In initial licensing or ratemaking cases, it allows the agency to designate staff members other than ALJs to serve as presiding officers. § 556(b). The term "Type A adjudication" in this article covers hearings and procedures described in this footnote even though ALJs do not preside.

adjudications conducted in dozens of regulatory agencies (such as the FTC, FERC, NLRB, and SEC).

There are approximately 1,350 federal ALJs.

The term “informal adjudication” is sometimes used to refer to all cases of adjudication in which ALJs do not preside.¹² However, this usage overlooks an important distinction. There is a large and important set of evidentiary hearings required by federal statutes that are just as “formal” as adjudications presently conducted by ALJs. This article refers to such hearings as “Type B adjudications.”¹³ Type B adjudication must be carefully distinguished from the vast realm of true “informal adjudication” which does not involve evidentiary hearings required by statute.¹⁴ As already pointed out, the APA fails to provide procedural protections for litigants in Type B adjudication, even though the world of Type B adjudication is functionally indistinguishable from Type A adjudication. At present, Type B hearings are governed only by the Fifth Amendment’s Due Process clause and by a maze of situation-specific statutes and procedural regulations.¹⁵ This unfortunate balkanization of hearing procedures defeats the purpose of the drafters of the APA who wished to achieve greater uniformity and to prescribe basic fair hearing norms across the federal administrative establishment.¹⁶

¹² The term “adjudication” is defined in the APA to cover “agency process for the formulation of an order.” APA § 551(7). An “order” in turn means “a final disposition...of an agency in a matter other than rule making but including licensing.” APA § 551(6). The government issues many millions of “orders” every year. These range all the way from highly significant economic decisions, such as denial of an application to open a national bank, to relatively trivial decisions such as a forest ranger’s determination that A rather than B can use a national forest campsite.

¹³ Proposed § 551(16).

¹⁴ Space limitations preclude a discussion of true informal adjudication. Earlier drafts of the ABA adjudication recommendations included provisions calling for a set of barebones procedures for informal adjudication. They would have required an agency (when it would be practicable to do so) to give appropriate notice, allow parties to submit comments or objections, and furnish reasons for its order. Because compliance with these provisions would not have been judicially reviewable, they would have been in the nature of a code of best practices. Because of the immense variety of hearing situations that fall into the informal adjudication category, and because of doubts about preclusion of judicial review, this proposal encountered serious opposition and was dropped. See generally Warner W. Gardner, *The Procedures By Which Informal Action is Taken*, 24 ADMIN. L. REV. 155, 163-66 (1972); Paul Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 780-92 (1976).

¹⁵ In addition, APA §§ 555 and 558 provide some meager protections in these cases. See note 6, *supra*.

¹⁶ See ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947); Jeffrey S. Lubbers, *APA Adjudication: Is the Quest for Uniformity Faltering?* 10 ADMIN. L. J. 65 (1996); Cooley R. Howarth, *Restoring the Applicability of the APA’s Adjudicatory Procedures*, -- ADMIN. L. REV. -- (2004, forthcoming this issue).

A 1992 study by ALJ John H. Frye III (based on 1989 data) identified about 83 case-types (involving about 343,000 cases annually) that fall into the area of Type B adjudication.¹⁷ Frye identified 2,692 Type B presiding officers (POs). Of the 83 case-types, 15 accounted for 98% of the total. The largest category of Type B adjudication is immigration cases (primarily deportation).¹⁸ A substantial number of law enforcement-type cases, including many civil penalty schemes,¹⁹ as well as passport denials or security clearance disputes,²⁰ fall into this category. Many Type B adjudications involve entitlements, such as veterans' benefit hearings conducted by the Board of Veteran's Appeals²¹ and Medicare Part B cases decided by employees of insurance carriers.²² A good deal of traditional business regulation occurs in Type B adjudication (such as nuclear and some environmental regulation).²³ A substantial number of cases deal with economic disputes (such as programs involving farm credit, contract disputes, bid protests, or debarment of contractors)²⁴ and federal employment relationships (such as those administered by the Merit Systems Protection Board and Equal Employment Opportunity Commission).²⁵ Some POs are full-time decisionmakers; others are agency staff members who engage in part-time judging along with other tasks.²⁶ Frye found that full-time POs decide about 90% of Type B cases (but that part-time POs decided cases in 34 of the 83 case-types, mostly the less active ones).

In 2002, Raymond Limon updated Frye's study.²⁷ Limon found 3,370 non-ALJ POs, about a 25% increase from 1989 figures.²⁸ In contrast, there were 1,351 ALJs in 29 different agencies (a 15% increase

¹⁷ John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 264 (1992) [hereinafter cited as *Frye*]. Frye eliminated 46 case types that showed a caseload of less than one case per year. See also Paul Verkuil et. al., *The Federal Administrative Judiciary*, Vol. 2 [1992] ACUS Rec. & Rep. 779, 788-90, 843-73 [hereinafter *ACUS Study*]. ACUS estimated that the number of cases decided in Type B adjudication exceeded the number of Type A adjudications in the late 1980's-early 1990's. *Id.* at 788. In light of the sharp increase in the number of Social Security and Medicare cases since the ACUS Study was written, it is not clear which category—Type A or Type B adjudication—currently predominates. Undoubtedly, each category includes well over half a million hearings each year.

¹⁸ Frye, *supra* note 17, at 275-77; *ACUS Study*, *supra* note 17, at 852-57. See note 42, *infra*.

¹⁹ See William F. Funk, *Close Enough for Government Work?—Using Informal Procedures for Imposing Civil Penalties*, 24 SETON HALL L. R. 1 (1993).

²⁰ Frye, *supra* note 17, at 277-83.

²¹ *Id.* at 293-99. See note 49, *infra*.

²² 42 U.S.C. §1395u(b)(3)(C) (2000); 42 CFR §§405.815 to .856 (2003); Frye, *supra* note 17, at 291-93.

²³ *Id.* at 333-41; *ACUS Study*, *supra* note 17, at 850-52.

²⁴ Frye, *supra* note 17, at 301-24; *ACUS Study*, *supra* note 17, at 866-76.

²⁵ Frye, *supra* note 17, at 324-33.

²⁶ Some part-time POs are not agency staff members at all; they may be retired judges or academics who are called upon by the agency from time to time as their particular expertise is needed.

²⁷ RAYMOND LIMON (OFFICE OF ADMINISTRATIVE LAW JUDGES), *THE FEDERAL ADMINISTRATIVE JUDICIARY THEN AND NOW—A DECADE OF CHANGE 1992-2002*, p. 4 (Dec. 23, 2002).

since the Frye study). Frye reported 393,800 proceedings conducted by POs each year; Limon reported 556,000 such proceedings (a 41% increase). During the interim between the Frye and Limon studies, Congress created a number of new Type B hearing programs.²⁹

B. Rationale for applying APA provisions to Type B adjudication

Many Type B proceedings are functionally indistinguishable from ALJ proceedings. There is no logical basis for using ALJs to decide some of them and POs to decide the rest.³⁰ For that reason, newly adopted hearing schemes involving substantial stakes should ordinarily be constituted as Type A adjudication.³¹ In addition, Congress should convert many of the existing systems of Type B adjudication to Type A adjudication. The public would benefit if more cases were heard by ALJs, because ALJs enjoy both de jure and de facto independence of the agencies for which they decide cases. However, it is unlikely that Congress will be persuaded to do so in the foreseeable future. The reason is that agencies strongly resist being required to utilize ALJs, whether in newly adopted or existing hearing schemes.

The APA contains a set of provisions relating to the hiring, evaluation, rotation, compensation, and tenure of ALJs.³² The Office of Personnel Management selects applicants for the register of new ALJs

²⁸ Most of the full-time POs are lawyers, but the overall majority of POs are not lawyers. *Ibid.*

²⁹ See, e.g., Pub. L. No. 106-113, App. C. § 124, 113 STAT. 1501A-160. This provision states that in order to reduce the backlog of Indian probate cases in the Department of Interior, the Department can appoint judges without regard to the normally applicable provisions for ALJs. Another important scheme (not mentioned by Limon) is the statutory right to a “collection due process” (CDP) hearing by the IRS. CDP proceedings appear to be Type B adjudication. I.R.C. §§ 6320, 6330 (2000). There are currently about 30,000 CDP hearings each year and the number is rising steadily. In some CDP cases (where the amount of tax is open for dispute), the Tax Court provides for a de novo review. In most CDP cases (where only collection issues rather than the amount of tax are open for consideration), the Tax Court provides only abuse of discretion review. See *Goza v. Commissioner*, 114 T.C. 604, 610 (2000). Only the latter, not the former, group of CDP cases would be Type B adjudication; a hearing is not considered Type B adjudication if any entity (agency or court) can provide a subsequent de novo hearing. See note 46, *infra*. On CDP hearings, see Leslie Book, *The Collection Due Process Rights: A Misstep or Step in the Right Direction*, 41 HOUSTON L. REV. — (forthcoming, 2004); Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLORIDA L. REV. 1, 119-28 (2004).

³⁰ See *ACUS Study*, *supra* note 17, at 843-75, 1046-56.

³¹ ABA Resolution 113 (June 2000) calls for a prospective-only default rule. Under the default rule, in any future legislation that creates an opportunity for an agency evidentiary hearing, such hearings will be Type A adjudication unless Congress otherwise provides. See Gary Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on “Ossifying” the Adjudication Process*, 55 ADMIN. L. REV. 787 (2003). If enacted, this default rule would nudge newly adopted hearing schemes into Type A. But it would do nothing to convert the many existing Type B programs to Type A programs or provide any fundamental procedural protections in Type B programs. The ABA resolution and the accompanying report are reprinted as an Appendix to the Edles article. *Id.* at 819-22.

³² See *GUIDEBOOK*, *supra* note 6, chapter 10, for detailed discussion of the various protective provisions applicable to ALJs. *Id.* at

through a process that is complex and mechanical and which confers a large advantage on applicants who are veterans. The process allows little room for judgment and discretion and affords agencies virtually no choice in which ALJs to hire.³³ It does not take account of whether a new ALJ has specialized experience in the regulatory or beneficiary scheme administered by the agency.³⁴ The APA does not permit agencies to evaluate the work of their ALJs nor to discharge ALJs for anything short of major misconduct. Once hired, an ALJ has virtual lifetime tenure without any probationary period. ALJs are also more highly compensated than most non-ALJ POs. This set of provisions guarantees ALJ independence, but it interferes with an agency's ability to manage its adjudicatory function and increases an agency's costs of conducting adjudication. As a result, it impels agencies to avoid using ALJs if they can do so.³⁵

This article proposes that Congress should impose procedural constraints on Type B hearings without converting them to Type A hearings. While POs, rather than ALJs, would continue to preside in Type B hearings, the APA would impose a set of fundamental, baseline due process-type protections that are similar to those imposed in Type A hearings.³⁶ These provisions guarantee the rudiments of a fair hearing: notice, a hearing that includes the ability to present evidence and confront opposing witnesses, an impartial decisionmaker, prohibition of outsider ex parte contacts, internal separation of functions, and a decision based on the record that sets forth its factual, legal and discretionary bases. For sixty years, the APA provisions that provide bottom-line procedural protections in Type A adjudications have worked smoothly and well. It is time to extend them to the set of equally formal hearings embodied in what this article calls Type B adjudication. Because this proposal does not require that ALJs preside, it is concededly a second-best solution, but second-best is often better than nothing at all.

C. Meaning of "evidentiary proceeding"

³³ As a result, most agencies that use ALJs do not hire off the register but instead hire ALJs away from other agencies. At present, only Social Security hires off the register.

³⁴ For discussion of the ALJ selection process, see *ACUS Study*, *supra* note 17, at 931-67.

³⁵ See Funk, *supra* note 19, at 26-27 (reporting EPA's "deep seated negative perception of ALJs as a group" which led to enactment of provisions permitting Type B adjudication for enforcement of civil penalties); *ACUS Study*, *supra* note 17, at 1057 ("agencies will likely continue to seek alternatives to the use of ALJs to avoid a counterproductive set of problems...").

³⁶ New provisions in California's APA that were enacted in 1995 create a structure similar to this proposal. The California statute preserved a system similar to Type A adjudication that applies mostly to professional licensing and employs a corps of central panel ALJs. It then provides for an "administrative adjudication bill of rights" for Type B hearings. See generally CAL. GOV'T CODE § 11,425.10 *et. seq.* (West 2004 Supp); Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 TULSA L. J. 297 (1996).

The proposal is plagued by a serious drafting problem, namely the need to distinguish Type B adjudication from i) Type A adjudication on the upside and ii) informal adjudication on the downside.

1. *Distinguishing Type A and Type B adjudication.* Congress often provides specifically that Type A adjudication provisions apply to a given hearing scheme. Sometimes, however, a statute calls for an evidentiary hearing, but fails to specify whether the APA applies. In such cases, it is often unclear under present law whether the statute calls for Type A adjudication. Type A adjudication applies “in every case of adjudication required by statute [outside the APA] to be determined *on the record* after opportunity for an agency hearing...”³⁷ The phrase “on the record” has acquired talismanic properties and some cases hold that a statute must use those very words (or contain other clear evidence of Congressional intent) before the Type A adjudication provisions come into play. However, the case law is conflicting.³⁸ The recommendation in this article does nothing to resolve that conflict, but assumes that the distinction between Type A and Type B adjudication will continue to be drawn based on existing case law.³⁹

2. *Distinguishing Type B adjudication from informal adjudication.* Type B adjudication, as defined in proposed section 551(16), means “an agency evidentiary proceeding required by statute, other than Type A adjudication.” Under proposed section 551(17), the term “agency evidentiary proceeding” means “the opportunity for a decision based on evidence submitted by the parties orally or in writing.” Proposed section 551(18) states that a “presiding officer” conducts Type B adjudication.

Thus the key to determining whether a particular scheme is Type B adjudication (to which the various proposed procedural constraints would apply), or informal adjudication (to which these procedural

³⁷ APA § 554(a) (emphasis added). See GUIDEBOOK, *supra* note 6, ¶3.01.

³⁸ See *Id.* ¶3.01; Edles, *supra* note 31, at 796-804; Cooley R. Howarth, *Federal Licensing and the APA: When Must Formal Adjudicative Procedures Be Used?* 37 ADMIN. L. REV. 317 (1985). One line of cases presumes that Congress intended Type A adjudication when a statute calls for an adjudicatory hearing. *E.g.* *Steadman v. SEC*, 450 U.S. 91, 96 n.13 (1981); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 875-78 (1st Cir. 1978); *Lane v. USDA*, 120 F.3d 106 (8th Cir. 1997). A second line presumes just the opposite and requires the use of the words “on the record” or some other clear statement of Congressional intention to trigger Type A. *E.g.* *Railroad Comm’n of Texas v. United States*, 765 F.2d 221, 227-29 (D.C. Cir. 1985); *City of West Chicago v. NRC*, 701 F.2d 632, 644-45 (7th Cir. 1983). And still others accord *Chevron* deference to the agency’s determination that the statute does not call for Type A adjudication. *Chemical Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1480-83 (D.C. Cir. 1989).

³⁹ As observed in note 31, the ABA has recommended that Congress enact a default rule relating to newly adopted adjudication schemes. Under that rule, such schemes will be Type A adjudication unless Congress otherwise provides. If adopted, this proposal would prospectively solve the problem of distinguishing Type A and Type B adjudication but would not clarify the law with respect to existing hearing schemes.

constraints would not apply⁴⁰), is to determine whether a particular statute calls for “an opportunity for a decision based on evidence submitted by the parties orally or in writing.” Many statutes explicitly call for a “hearing” and the context indicates that an evidentiary hearing is contemplated. The provisions for Type B adjudication would apply to hearings provided for in such statutes.⁴¹ Statutes may use different terms to describe such proceedings but the intention to require an evidentiary proceeding is generally clear from such provisions.⁴² The term “evidentiary proceeding” is intended to include such hearings even if all of the evidence is submitted in writing rather than orally, so long as the decisionmaker is limited to considering only record evidence. The term includes non-adversarial, inquisitorial hearings in which the Government is not represented, such as the hearings conducted by the Board of Veterans’ Appeals (just as Type A adjudication includes non-adversarial Social Security hearings).⁴³

However, the term “evidentiary proceeding” is not intended to cover every possible situation in which a statute requires a “hearing.” It does not cover statutory provisions calling for notice and comment-type procedures (even if applicable to adjudication) that do not limit the decisionmaker to consideration only of the evidence in the record.⁴⁴ Similarly, Type B adjudication does not cover so-called “hearings” in

⁴⁰ As previously observed, existing APA §§ 555 and 558 do impose some constraints on informal adjudication. These would, of course, remain in place. *See* note 6, *supra*.

⁴¹ For example, in railroad unemployment insurance cases, an employee “shall be granted an opportunity for a hearing before a referee.” 35 U.S.C. § 355 (2000). A federal government employee claiming workers compensation “is entitled to a hearing on his claim before a representative of the Secretary.” 5 U.S.C. § 8124(b)(1) (2000). In Agriculture Department disputes, there is a “right to appeal an adverse decision for an evidentiary hearing of a hearing officer.” 7 U.S.C. § 6996(a) (2000). Persons who are subject to IRS collection activities have “a right to a hearing.” I.R.C. § 6330(a)(1) (2000). In Medicare Part B, there shall be an “opportunity for a fair hearing by the carrier, in any case where the amount in controversy is at least \$100 but less than \$500.” 42 U.S.C. § 1395u(b)(3)(C) (2000).

⁴² In immigration cases, an Immigration Judge (IJ) “shall conduct proceedings for deciding the inadmissibility or deportability of an alien.” In context, it is clear that the IJ is to conduct an evidentiary proceeding. For example, an alien “shall have reasonable opportunity to present evidence and cross examine witnesses presented by the government.” 8 U.S.C. § 1229a(1)(a)(1), (b)(4)(B) (2000). The Contract Disputes Act provides that a board of contract appeals shall “provide to the fullest extent practicable informal, expeditious, and inexpensive resolution of disputes and shall issue decisions in writing.” A member may administer oaths, authorize depositions, and subpoena witnesses for taking of testimony. Again, the context makes clear that an evidentiary hearing is intended. 41 U.S.C. §§ 607(e), 610 (2000).

⁴³ 38 U.S.C. §§ 7104(a), 7107(b) (2000). BVA hearings are informal and non-adversarial. *See* 38 C.F.R. § 20.700(c) (2003).

⁴⁴ *See* 16 U.S.C. § 1456(c)(3)(A) (2000) concerning licensing decisions for activities within the coastal zone. The Secretary of Commerce can override a state’s objection to the issuance of a federal license or permit after finding the activity consistent with goals and objectives of the Coastal Zone Management Act or necessary in the interests of national security. The Secretary must first provide an opportunity for the state and permit applicant to submit detailed comments. Though the regulations implementing this provision establish detailed appellate-like procedures for the conduct of the Secretary’s inquiry, the statute

which the public is invited to appear and make statements (such as often occur with respect to various forms of land use decisions),⁴⁵ because the decision in such cases is not necessarily based on the evidence submitted at the hearing. It also excludes informal inquiries or investigatory or settlement-oriented hearings (meaning hearings that can be followed by another de novo administrative or judicial hearing to finally resolve the matter).⁴⁶

3. *Hearing required by due process.* An important policy issue is whether evidentiary proceedings called for by the due process clause of the Fifth Amendment but not by any statute should be treated as Type B adjudication. The recommendation does not propose this, because it would be difficult to decide when due process calls for an “evidentiary proceeding” and when it calls only for some sort of interaction that is less formal than an “evidentiary proceeding.”⁴⁷ Due process cases use an ad hoc balancing test to decide what procedures are applicable⁴⁸ and thus resist the sort of rigidity that the proposal would entail (that is, the proposal calls for imposition of an entire menu of procedural constraints or none at all). It did not seem wise to impose more formality on a hearing required by due process than due process balancing would call for.

4. *Hearings required by procedural regulation.* Another important policy issue is whether to extend the Type B adjudication concept to evidentiary proceedings called for by *agency procedural regulations* rather than by statutes.⁴⁹ This does not seem like a good idea because it would create perverse incentives. Applying the Type B hearing concept to hearings required only by a regulation might discourage agencies from voluntarily adopting hearing procedures through their regulations when they are

indicates no requirement for an “evidentiary proceeding” since the Secretary is not limited to considering only the data contained in the written comments submitted by the parties.

⁴⁵ See, e.g., *Buttrey v. United States*, 690 F.2d 1170, 1174-83 (5th Cir. 1982) (“opportunity for public hearing” does not trigger APA formal adjudication).

⁴⁶ Existing section 554(a)(1) contains an exception to the adjudication provisions for “a matter subject to a subsequent trial of the law and the facts de novo in a court.” The proposal adds the words “Type A or Type B adjudication.” As a result, the requirements for Type B adjudication will not apply to any “hearing” that can be followed by another de novo hearing, whether in an Article III court or before some administrative tribunal or Article I court.

⁴⁷ See, e.g., *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) (procedures required before public employee is discharged); *Goss v. Lopez*, 419 U.S. 565 (1975) (procedures required before suspending child from school for ten days or less).

⁴⁸ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁴⁹ For example, the VA regulations (but not a statute) provide for a hearing in connection with disputes concerning benefits. 38 C.F.R. § 3.103(c) (2003). Such hearings would not be included in Type B adjudication for two reasons: they are provided for in a rule (rather than a statute) and they are followed by a subsequent de novo administrative hearing before the Board of Veterans Appeals. 38 U.S.C. § 7107(b) (2000).

not required to do so by statute or due process. Also, it might encourage agencies to dispense with hearing procedures now called for by regulations. Agencies should not be discouraged from providing fair procedures that they are not required to provide.⁵⁰

D. APA provisions applicable to Type B adjudication

The proposal calls for certain provisions of the existing APA to apply to Type B adjudication:

- Timely notice and right to submit settlement offers;⁵¹
- The right to present a case by oral or documentary evidence and to conduct cross examination when required for a full and true disclosure of the facts;⁵²
- Decisionmaker impartiality;⁵³
- Decisionmaker independence and separation of functions;⁵⁴

⁵⁰ Of course, agencies might choose to incorporate the principles applicable to Type B adjudication in their procedural regulations that call for evidentiary proceedings.

⁵¹ Proposed APA §§ 554 (b) and (c) apply the existing APA provisions for notice and submission of settlement proposals to non-ALJ proceedings. See GUIDEBOOK, *supra* note 6, ¶4.02.

⁵² Proposed APA § 554(e)(1) incorporates language from APA § 556(d): “A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.” See GUIDEBOOK, *supra* note 6, ¶¶5.07, 5.08. As under existing law, a PO would have substantial discretion with respect to whether evidence should be presented orally or in writing. Similarly, a PO would exercise discretion concerning whether to permit cross-examination. A PO might decide that cross-examination is not needed for a “full and true disclosure of the facts.” As in Type A adjudication, the PO may decide that evidence that has been received in written form need not be subject to cross-examination. In general, the PO should exercise discretion not to require cross examination unless there is need to resolve disputed factual questions that turn on credibility conflicts. See RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 8.2, p. 539 (2002).

In several agencies, this provision could pose difficulties. The regulations concerning the Board of Veterans Appeals state that no cross-examination is allowed. 38 C.F.R. § 20.701 (2003). It may be necessary to craft an exemption for the BVA or to create a more broadly phrased exception from the statute. Similarly, IRS collection due process (CDP) hearings do not include cross-examination. Treas. Reg. § 301.6330-1(d)(1) A-D6 (2002). However, the issues in a CDP hearing do not ordinarily involve credibility conflicts so cross-examination should not be necessary. See *supra* note 29 for discussion of whether CDP hearings are Type B adjudication.

⁵³ Proposed APA § 554(e)(2) adapts language drawn from § 556(b): “The functions of presiding officers and officers who review the decisions of presiding officers shall be conducted in an impartial manner.” See GUIDEBOOK ¶7.02, *supra* note 6.

⁵⁴ Proposed § 554(e)(3)(A) provides that a PO shall make the recommended or initial decision unless he or she becomes unavailable. This parallels existing § 554(d). Proposed § 554(e)(3)(B) provides that a PO shall not consult any person or party ex parte on a fact in issue. This parallels existing § 554(d)(1). Proposed § 554(e)(3)(C) prohibits command influence. It parallels existing § 554(d)(2). The proposed command influence provision applies only to full-time POs. It would be impracticable to prohibit command influence in the case of part-time POs who engage in investigation or prosecution functions in other cases and are supervised by staff members who engage in such functions. Instead, the draft statute proposes that a part-time PO not be supervised by a person serving as prosecutor or investigator in the same case that the PO is deciding. Finally, proposed § 554(e)(3)(D) parallels the existing provision for separation of functions; it

- Prohibition on ex parte contacts by outsiders with decisionmakers;⁵⁵
- The exclusive record and official notice provisions;⁵⁶ and
- The requirement of a written or oral decision containing findings and reasons.⁵⁷

It is intended that the provisions for notice and hearing, decisionmaker independence, and written or oral decisions, would apply only to the initial proceeding.⁵⁸ The requirements of impartiality, separation of functions, ex parte contact, and exclusive record would apply both to the initial decision stage and to the agency review stage.

Numerous provisions of the existing APA would *not* apply to Type B adjudication unless required by statute (or by agency rule). These include:

- The various provisions relating to the hiring, compensation, rotation, evaluation and discharge applicable to ALJs.⁵⁹
- Provisions relating to evidence and burden of proof.⁶⁰
- Various provisions relating to review of initial decisions.⁶¹
- The right to an award of attorney's fees under the Equal Access to Justice Act.⁶²

prohibits agency prosecutors or investigators in a Type B adjudication from participating or advising in the initial decision or agency review of that decision. See GUIDEBOOK ¶7.06, *supra* note 6.

⁵⁵ Proposed APA § 554(e)(4) incorporates the provisions of existing APA § 557(d). See GUIDEBOOK ¶7.04, *supra* note 6..

⁵⁶ Proposed APA § 560(e)(5) incorporates APA § 556(e). See GUIDEBOOK ¶7.08, *supra* note 6.

⁵⁷ Proposed APA § 560(e)(6) requires a PO's decision to include a "statement of findings, conclusions, and reasons, on material issues of fact, law, or discretion presented on the record. Such decision may be delivered orally or in writing in the discretion of the PO." This provision modifies language in existing APA § 557(c). See GUIDEBOOK, *supra* note 6, ¶6.02. In some instances of Type B adjudication, the PO's decision is delivered orally, and the proposal does not compel a change in this practice by requiring written decisions. In some Type B proceedings, POs write recommended decisions that are not disclosed to the parties until after the agency review phase is completed. The proposed language would change this practice by requiring that a PO decision reviewed at a higher agency level be disclosed to the parties who would have an opportunity to comment on it.

⁵⁸ Normally the initial proceeding would be conducted by a PO but these requirements should also apply if the initial proceeding is conducted by the agency heads or other officials.

⁵⁹ 5 U.S.C. §§ 3105, 7521, 5372, 3344, 1305 (2000). See GUIDEBOOK, *supra* note 6, Chapter 10.

⁶⁰ APA § 556(d). See GUIDEBOOK, *supra* note 6, ¶5.03 to 5.05. The drafters of the proposal do not believe that it is necessary to incorporate the APA's provisions relating to evidence and burden of proof in order to insure fair procedure in Type B adjudication. In particular, they did not wish to impose the *Greenwich Collieries* decision on agencies conducting Type B adjudication unless they choose to adopt it. Director, Office of Workers' Compensation Programs v. *Greenwich Collieries*, 512 U.S. 267 (1994); GUIDEBOOK, *supra* note 6, ¶5.033.

⁶¹ APA §§ 557(b), (c). See GUIDEBOOK, *supra* note 6, ¶6.03.

The ACUS adjudication study and the Frye report confirm that agencies conducting Type B adjudication respect the independence of their POs and that POs believe their independence is respected.⁶³ In general, Type B adjudication already follows the requirements that would be imposed by this proposal. As a result, the adoption of these baseline procedural protections should not significantly change the way that federal agencies conduct Type B adjudication. These provisions will not increase the costs of conducting Type B adjudication or cause delays or confusion or require costly agency reorganizations. The purpose of these proposals is to insure that litigants will receive fundamental due process-type protections in Type B adjudication without requiring restructuring of existing hearing schemes.

II. DRAFT STATUTE

The devil, of course, is in the details, so what follows is draft statutory language intended to implement the proposal sketched in Part I. Italicized language is new; stricken-out language is deleted from the existing statute.

A. Definitions

Sec. 551: Definitions...

(15) “Type A adjudication” means adjudication required by statute to be determined on the record after opportunity for an agency hearing or required by statute to be conducted in accordance with sections 556 and 557 of this Title.

(16) “Type B adjudication” means an agency evidentiary proceeding required by statute, other than a Type A adjudication.

(17) An “agency evidentiary proceeding” means the opportunity for a decision based on evidence submitted by the parties orally or in writing.

(18) A “presiding officer” is the initial decisionmaker in Type B adjudication.

B. Elements of Type B adjudication

Amend existing APA section 554 so that it reads as follows:

Sec. 554. - Adjudications

⁶² See GUIDEBOOK, *supra* note 6, chapter 11. The drafters would not oppose extension of the EAJA to Type B adjudication but did not recommend it at this time in the interest of minimizing the budgetary impact of the proposal.

⁶³ ACUS Study, *supra* note 17, at 927-30, 983-85; Frye, *supra* note 17, at 341-46.

(a) *General principles.* This section applies, according to the provisions thereof, in every case of Type A adjudication and Type B adjudication ~~in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,~~ except to the extent that there is involved —

- (1) a matter subject to a subsequent trial of the law and the facts de novo in a court *or in a Type A or Type B adjudication*;⁶⁴
- (2) ~~the selection or tenure of an employee, except an administrative law judge appointed under section 3105 of this title.~~⁶⁵
- (3) proceedings in which decisions rest solely on inspections, tests, or elections;
- (4) the conduct of military or foreign affairs functions;
- (5) cases in which an agency is acting as an agent for a court; or
- (6) the certification of worker representatives.

(b) *Notice.* Persons entitled to notice of an agency hearing *in Type A or Type B adjudication* shall be timely informed of —

- (1) the time, place, and nature of the hearing;
- (2) the legal authority and jurisdiction under which the hearing is to be held; and
- (3) the matters of fact and law asserted. ... [balance of subsection remains the same]

(c) *Settlement proposals.* *In Type A or Type B adjudication,* the agency shall give all interested parties opportunity for — [balance of sub-section remains the same except final reference to sections 556-57 is broadened to include Type B adjudication]

(d) *Procedures for Type A adjudication.* *Type A adjudication will be conducted pursuant to sections 556 and 557 of this title.*

- (1) The employee who presides at the reception of evidence pursuant to section 556 ~~of this title~~ shall make the recommended decision or initial decision required by section 557 ~~of this title,~~ unless he *or she* becomes unavailable to the agency.

⁶⁴ This change is explained in note 46, *supra*.

⁶⁵ In provisions not discussed in this article, the ABA proposal also recommends that POs should be protected from discharge without cause and should be entitled to Type A hearings before the Merit System Protection Board, in the event of discipline or discharge. In general, the APA's provisions for Type A or Type B adjudication should apply to cases involving selection or tenure of federal government employees whenever an applicable statute calls for an evidentiary hearing.

(2) Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —

(A) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(B) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

(3) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in an *Type A adjudication case* may not, in that or a factually related *adjudication case*, participate or advise in the *initial or recommended decision or any review of such decision, decision, recommended decision, or agency review pursuant to section 557 of this title*, except as witness or counsel in public proceedings. This subsection does not apply —

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) *Procedures for Type B adjudication. In Type B adjudication, the following procedural requirements apply.*

(1) Presentation of evidence. A party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. An agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(2) Impartiality of presiding officers and reviewing officers. The functions of presiding officers and officers who review the decisions of presiding officers shall be conducted in an impartial manner.

(3) Agency decisional process

(A) The presiding officer shall make the recommended or initial decision unless he or she becomes unavailable to the agency.

(B) Except to the extent required for the disposition of ex parte matters as authorized by law, the presiding officer shall not consult any person or party on a fact in issue, unless on notice and with an opportunity for all parties to participate.

(C) A full-time presiding officer shall not be responsible to or subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions. A part-time presiding officer in a case shall not be subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions in the same case.

(D) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a Type B adjudication may not, in that or a factually related adjudication, participate or advise in an initial or recommended decision or any review of such decision, except as witness or counsel in public proceedings.

(E) This subparagraph (3) does not apply—

(i) in determining applications for initial licenses;

(ii) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(iii) to the agency or a member or members of the body comprising the agency.

(4) Ex parte communications. Section 557(d) shall apply except that for purposes of this subsection (4) the term “presiding officer” shall be substituted for “administrative law judge” wherever it appears in section 557(d).

(5) Exclusive record and official notice requirements. Section 556(e) shall apply.

(6) Decision. The decision of a presiding officer shall include a statement of findings, conclusions, and reasons, on material issues of fact, law, or discretion presented on the record. Such decision may be delivered orally or in writing in the discretion of the presiding officer. In the event the decision is reviewed at a higher agency level, the parties shall have an opportunity to submit comments on the decision before the review process is completed.⁶⁶

⁶⁶ Existing APA § 554(e) provides for declaratory orders. The ABA’s proposal moves this provision from § 554 to § 555 in order to confirm that any adjudicating agency (Type A, Type B, or informal) is authorized

CONCLUSION

The drafters of the APA distinguished formal and informal adjudication. They intended that most formal evidentiary hearings would be regulated by the procedural provisions of the APA and decided by ALJs.⁶⁷ But the intervening years have opened a fissure in federal administrative adjudication. We know now that the statute suffers from an excluded middle: it fails to regulate in any significant way the vast and rapidly increasing number of more or less formal evidentiary adjudicatory hearings that are not conducted by ALJs and yet are functionally indistinguishable from the hearings that are conducted by ALJs. This article refers to such hearings as Type B adjudication. This unfortunate reality mocks our pretension that the APA has universal application to all the functions of federal administrative agencies.

Agencies understandably wish to avoid the numerous statutory provisions relating to the hiring, compensation, evaluation, and tenure of ALJs.⁶⁸ As a result, they have campaigned successfully to exclude their adjudicatory hearings from the APA's adjudication provisions. The proposal in this article seeks to decouple the APA's provisions relating to ALJs from its provisions calling for fair hearings, decisions on the record, and impartial decisionmakers. It is not the optimal solution to the problem of the excluded middle, but it may be politically achievable and it would be far superior to the status quo. This proposed change, by far the most dramatic modification of the APA adjudication provisions since 1946, would guarantee fair administrative procedure to future generations of litigants in a wide range of Type B adjudication.

to conduct declaratory order proceedings. See Jeffrey S. Lubbers & Blake D. Morant, *A Reexamination of Federal Agency Use of Declaratory Orders*, -- ADMIN. L. REV. -- (2004, this issue).

⁶⁷ See ATTORNEY GENERAL'S MEMORANDUM ON THE ADMINISTRATIVE PROCEDURE ACT 9, 40-43 (1947), which suggests that the APA applies to all situations in which a statute requires a hearing whether or not the words "on the record" are employed; materials cited in note 16, *supra*.

⁶⁸ See text at notes 32-35, *supra*.