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FAIR PROCEDURE IN INFORMAL ADJUDICATION

Michael Asimow
Professor of Law Emeritus, UCLA Law School
Dean's Executive Professor of Law, Santa Clara Law School

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I. INTRODUCTION

In a vast number of federal administrative adjudications, decisionmakers resolve disputes between private parties and the government without being legally required to conduct an evidentiary hearing. Such proceedings are referred to as "informal adjudication." This Report proposes a set of best practices for the procedures federal agencies should employ when conducting informal adjudication.

A. Three Types of Administrative Adjudication

Recent scholarship on federal administrative adjudication classifies it into three types, referred to herein as Types A, B and C.[1] Type A adjudication is the subject of the formal adjudication provisions of the Administrative Procedure Act (APA).[2] Type A adjudication occurs where a statute requires the agency to adopt it.[3] Type A entails a trial-type evidentiary hearing presided over by an Administrative Law Judge (ALJ) and subjected to a variety of procedural

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*Professor of Law Emeritus, UCLA Law School; Dean's Executive Professor of Law, Santa Clara Law School. My thanks to Kent Barnett, Jack Beermann, Emily Bremer, Jill Family, Eric Goldman, Deep Gulasekaram, Dan Ho, Michelle Layser, Jeff Lubbers, Nina Olson, Matt Wiener, William Simon, Sid Shapiro, David Sloss, Chris Walker, and Tseming Yang, who provided helpful comments on drafts of this Report. I want to also acknowledge with gratitude the assistance of ACUS staff member Matthew Gluth and ACUS intern Hannah Sheperd. I also express appreciation to the staff members of agencies who graciously furnished interview data about informal agency procedures described in Part II. I have protected their anonymity.

[1] The Type A-B-C typology was introduced in an ACUS Report. Michael Asimow, Adjudication Outside the Administrative Procedure Act (March 24, 2016) (report to Admin. Conf. of the U.S.) (hereinafter 2016 ACUS Report), https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report. That report was implemented Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016). The 2016 Report was expanded and published as a book. MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (ACUS 2019) (herein ACUS SOURCEBOOK). *See also* Michael Asimow, *Best Practices for Evidentiary Hearings Outside the Administrative Procedure Act,* 26 GEO. MASON L. REV. 923 (2018). Other scholars have employed the A-B-C typology. *See* Rebecca S. Eisenberg & Nina A. Mendelsohn, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 101, 123-24 (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 (2019); Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WISC. L. REV. 1351, 1405-09; 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.).

[2] 5 U.S.C. §§ 554, 556-57. The APA is cited herein without the prefatory 5 U.S.C.

[3] APA § 554(a).

constraints, such as prohibition of ex parte communications, separation of functions, and the exclusive record principle.

Type B adjudication occurs when a statute (other than the APA), or an executive order or a regulation requires an agency to conduct an evidentiary hearing, but that hearing is not covered by the APA's formal adjudication provisions.[4] The procedures employed in Type B adjudication are prescribed by agency-specific statutes and procedural regulations as well as due process. Type B adjudication includes hearings conducted by the Board of Veterans Appeals, the Patent Trial and Appeal Board, the Immigration Court, the Environmental Appeals Board, and many others.

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

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[4] Most research on adjudication outside the APA focuses on Type B adjudication. *See, e.g.*, 2016 ACUS study, *supra* note 1; 2019 ACUS Sourcebook, *supra* note 1; Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 430-36 (2021) (hereinafter Bremer, *Lost Stages*); Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight & Removal*, 53 GEORGIA 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 1; Christopher J. Walker & Matthew Lee Wiener, *Agency Appellate Systems* (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.), available at https://www.acus.gov/report/final-report-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).

to Type B adjudication as "informal adjudication," as the literature frequently does.[5]

Type C adjudication occurs when an agency is not legally required to conduct an evidentiary hearing in order to resolve adjudicatory disputes because neither Congress, the due process clause, nor the agency itself imposed such a requirement. This is true informal adjudication. It is a vast but understudied universe of federal agency adjudicative decisionmaking.[6] This Report seeks to describe the Type C universe and suggests best practices for Type C decisionmaking. These practices provide procedural protections for private disputants that substitute, in some degree, for the evidentiary hearings provided in Types A and B adjudication.

The number of Type C adjudications that occur each year is enormous, but they are impossible to count. Agencies conducting Type C adjudication employ dispute resolution methodologies that fall short of adversarial trial-type evidentiary

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[5] *See e.g.,* Aaron L. Neilson, *Three Wrong Turns in Agency Adjudication*, 28 GEO. MASON L. REV. 657, 666 (2021); 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).

[6] See generally BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RSCH. SERV., INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW (2021); ACUS Sourcebook, supra note 1; ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 35-42 (1941) (hereinafter Final Report); Ronald C. Krotozynski, *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 4; 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).

hearings. These procedures may include document exchanges and submission of research studies, as well as oral arguments, public hearings, conferences with staff, interviews, negotiations, mediation, examinations, or inspections. Of course, agencies engaged in Type A or B adjudication also make use of these informal dispute resolution techniques as attempt to settle cases and, in the relatively few cases that do not settle, as preliminaries to conducting evidentiary hearings.[7] In contrast, agencies conducting Type C adjudication employ informal procedures to generate legally binding decisions *without recourse to an evidentiary hearing.*

The stakes in disputes resolved through Type C adjudication range from relatively trivial to extremely consequential. 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 about the cost of mailing a package, or an agency's assignment to an employee of an undesirable parking space. These adjudicatory decisions are too trivial to merit adoption of required or recommended administrative procedures. At the consequential end of the spectrum lie many of the disputes discussed in Part II, such as National Science Foundation grantmaking, pipeline construction approvals,

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[7] See Bremer, *Lost Stages, supra* note 4, at 402-12, pointing out that most Types A and B adjudications include both informal and formal stages. APA § 554(c) of the APA 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."

new drug marketing approvals, issuance of bank charters, or denial of naturalization. Whether the stakes are high or low, each Type C adjudicatory decision matters greatly to the non-governmental party. For many people, informal adjudication by government agencies is the face of justice. Decisionmaking in such cases should be accurate, efficient, and perceived to be fair, regardless of the stakes.

Informal adjudication is sometimes described as a procedure-free black hole, but this is an exaggeration. As discussed in Part II, numerous federal statutes and executive orders specify procedures that agencies must observe in conducting Type C adjudication. Such statutes include several provisions of the APA,[8] statutes concerning the conduct of federal government employees and rights of representation,[9] ombuds statutes,[10] and statutes specific to particular regulatory schemes. The judicial review process generates certain procedural constraints on an agency's conduct of informal adjudication.[11] Agencies conducting Type C adjudication are sometimes constrained by due process requirements.[12] Finally, and perhaps most importantly, agencies are bound by their own voluntarily adopted regulations that prescribe Type C adjudication procedures.

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[8] *See* Part III. C. and D.
[9] *See* Part III. B and C.
[10] *See* Part III. F.
[11] *See* Part III H.
[12] *See* Part III A.

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.[13]

Rather than proposing a legally binding code of Type C procedures, this Report advocates a set of procedural best practices. These practices are grounded in numerous sources of law, including due process decisions involving informal adjudication (referred to as “consultative due process”), the informal adjudication and rulemaking provisions of the APA, the Administrative Practice Act, government ethics statutes, ombuds statutes and regulations, judicial decisions involving review of informal adjudications, and patterns of existing procedural regulations. These best practices serve as defaults that could be incorporated in procedural regulations or guidance documents adopted by the agencies that conduct Type C adjudication. Of course, these practices should be adopted, structured, and revised only after a careful situation-specific analysis. This is emphatically not an area where one size fits all.

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[13] Gardner, *supra* note 7 at 157.

B. Definitions

Before turning to the world of Type C adjudication, this Report specifies some essential definitions.

1. Adjudication

The term "adjudication" refers to agency resolution of an *individualized* dispute that has *legally binding effect* on individual persons or entities. Such disputes are usually between a federal government agency and a particular private party, but occasionally they involve disputes between private parties. Adjudication is distinguished from rulemaking, which involves agency action of *generalized* application.[14]

The definition is intended to exclude a wide variety of government activity that is better classified as management or policy implementation, such as decisions involving the construction or operation of federal facilities, required approval of proposals by state or local government, investigative activity, management of

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[14] This definition does *not* track the definitions of adjudication and rulemaking contained in the APA because these definitions are defectively drafted. The APA's definition of "rule" includes agency statements of both "general and particular applicability" and "future effect." APA 551(4). The definition of "order" means an agency statement other than rulemaking but including licensing. APA §551(6). By these definitions, an FTC cease and desist order would be rulemaking, because it is of particular applicability and future effect). However, everyone treats such orders as adjudication. See ACUS Sourcebook, *supra* note 1 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 5 at 183-84; Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 383 "([T]he only responsible attitude toward the central APA definition is one of benign disregard").

hospitals or prisons, or advice-giving, because these functions do not generate a decision that is legally binding on individuals. Nor does it include the process of negotiation between the staff and a private party of a contract since contract-making does not resolve a dispute.

Adjudication also includes a broad category of agency action that is difficult to classify because it falls between polar models of adjudication (meaning resolution of a narrow private/government dispute) and rulemaking (meaning adoption of generally applicable standards of conduct). This category involves decisions whether to approve applications by particular parties that have a broad impact on the general public, such as 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,"[15] yet they entail environmental, public health, and economic impacts that fall on the general public.[16] These decisions involve both particular applicability (because a particular party applied for approval of the project) and general applicability (because the project in question affects vast numbers of people).

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[15] APA §551(8), (9).
[16] *See* Part II. D.

Agencies often employ structured procedures for conferences and disclosure during the preliminary investigative and prosecutorial stages of Type A or Type B adjudication. This Report does not include such procedures, though they often lead to settlement of the dispute or to a legally binding temporary decision (like emergency suspension of a license), because they are preliminary to an evidentiary hearing if the matter is not settled. This Report 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.[17] For that reason, the Report excludes schemes like patent and trademark examination despite the presence of procedural protections, since in such situations private parties who lose at the informal stage have recourse to de novo Type A or B adjudication procedures further down the line.[18]

The report includes administrative proceedings that can be followed by de novo judicial trials if the private party is dissatisfied with the administrative decision.[19] Typically, proceedings that can be followed by de novo trials are

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[17] For discussion of the informal process by which agencies decides to conduct enforcement action, see Michael Asimow, *Greenlighting Administrative Prosecution*, 75 ADMIN. L. REV. 227 (2023).

[18] A patent applicant rejected through the USPTO's patent examination process has recourse to a de novo hearing before the Patent Trial and Appeal Board. *But see* David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, & Mariano-Florentino Cuéllar, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE HEARINGS 46-51 (Feb. 19, 2020) (report to the Admin. Conf. of the U.S.) (treating patent applications as a Type C adjudicatory process).

[19] See Part II. G.

typically Type C adjudication since there may be less need for an evidentiary administrative hearing in such cases. However, fair informal adjudication procedures are important in such cases even though the administrative decision could be reconsidered in a de novo trial, since judicial review of informal agency decisions is usually infeasible as a practical matter.[20]

2. Evidentiary hearing

The term "evidentiary hearing" means a proceeding during which the parties have an opportunity to state their case before a neutral decisionmaker who must respect the exclusive record principle. This means that the decisionmaker can consider only oral or written evidence introduced before or during the hearing (or evidence of which the decisionmaker can properly take official notice).[21] An "evidentiary hearing" is usually a trial at which evidence is offered orally and witnesses are subject to cross examination, but it can consist of exclusively written

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[20] See Part III. H. The author's previous work on Type B adjudication excluded matters subject to de novo judicial review. *See* ACUS Sourcebook, *supra* note 1, at 9. This Report does include such schemes because of the practical importance of fair informal administrative procedures and the likelihood that judicial review of Type C decisions will be infeasible.

[21] See Asimow, 2016 ACUS Report, *supra* note 1 at 4; Bremer, *Lost Stages, supra* note 4, 99 WASH U. L. REV. at 417. The APA adjudication requirements include an exclusive record. "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision. . ." APA § 556(e). The APA contemplates that the decisionmaker can take official notice of a material fact not appearing in the evidence in the record, but the opposing party is entitled to an opportunity to show the contrary. *Id. See* Admin. Conf. of the U.S., Recommendation 2019-6, *Independent Research by Agency Adjudicators in the Internet Age*, [84 Fed. Reg. 71,350](https://www.federalregister.gov) (Dec. 27, 2019); Jeremy S. Graboyes, Independent Research by Agency Adjudicators in the Internet Age (Oct. 31, 2019) (report to the Admin. Conf. of the U.S.), *available at* https://www.acus.gov/report/final-report-independent-research-agency-adjudicators-internet-age.

presentations. Evidentiary hearings are usually adversarial in nature, meaning that the presentation of evidence is controlled by the parties and the decisionmaker is 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 trial. Regardless of whether an evidentiary hearing is adversarial or inquisitorial, the decisionmakers must be neutral and unbiased. They must not play conflicting roles in the same case or receive ex parte communications. 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 some elements of an evidentiary hearing but not others. Fortunately, for purposes of this Report, it is not necessary to describe the distinction between Types B and C adjudication with `contain precise and judicially manageable definitions.[22] It calls only for agencies to observe a set of best practices. ACUS Recommendation 2016-4 proposed a set of best practices for Type B adjudication that entail more formality than the

[22] See Part IV.A.1.

practices this Report recommends for Type C.[23] However, both this Report and ACUS Recommendation 2016-4 emphasize that proposed best practices be adapted to the particular circumstances of each adjudicatory system, in order to avoid both under- and over-proceduralization.

II. THE WORLD OF TYPE C ADJUDICATION

This section is intended to give the reader a sense of the vast universe of federal Type C adjudication. Of course, the Type C adjudication schemes discussed below represent only a small fraction of the total number of such schemes. [24]Nobody has ever attempted to identify and count them all. The only element these schemes have in common is that a federal agency resolves disputes through issuance of legally binding decisions without conducting evidentiary hearings. What follows is a brief description of about twenty-eight Type C adjudication schemes roughly grouped into nine somewhat overlapping categories. Some but not all of the descriptions include interview data from agency staff members who administer these schemes. The Report protects the anonymity of interviewees.

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[23] ACUS Recommendation 2016-4, *supra* note 1.

[24] Waiver decisions are an example of the vast number of proceedings that fit the definition of Type C adjudication but are not discussed in this Report. Most agencies entertain requests for waivers from the requirements of a statute or regulation and resolve these requests through informal adjudication. *See* Admin. Conf. of the U.S., Recommendation 2017-7, *Regulatory Waivers and Exemptions*, 82 Fed. Reg. 61742 (Dec. 29, 2017); Aaron L. Neilson, Regulatory Waivers and Exemptions (Nov. 1, 2017) (report to the Admin. Conf. of the U.S.).

A. Grants, Benefits, Loans and Subsidies.

1. National Science Foundation (NSF) Grant Applications. NSF provides Type C remedies for grant applicants whose proposals it declined after conducting a detailed peer review of competing applications. The dispute settlement process provides no opportunity for an evidentiary hearing.[25]

One Type C scheme applies to proposals declined for financial or administrative reasons. The proposer has an opportunity to obtain clarification by discussing the issue with a branch chief or the grants and agreements officer. The proposer can then submit a request for review to the Division Director. The request for review must contain a full statement of the proposer's position as well as the facts and reasons supporting the appeal and supporting documentation. The Division Director delegates the review to a staff person (but not one who had been involved with the original decision) who can request additional information. The staff reviewer forwards a report to the Division Director (or the Director's designee) who makes the NSF's final written decision.

[25] *See* NATIONAL SCIENCE FOUNDATION, PROPOSAL AND AWARD POLICIES AND PROCEDURES GUIDE Chapters III-F. 2. and IV-D (Oct. 4, 2021) (hereinafter PAPPG). *See generally* Thomas O. McGarity, *Peer Review in Awarding Discretionary Grants in the Arts and Sciences* (May, 1993) (Report to the Admin. Conf. of the U.S.); Admin. Conf. of the U.S., Recommendation 82-2, *Resolving Disputes Under Federal Grant Programs,* 47 FR 30704 (July 15, 1982); Admin. Conf. of the U.S., Recommendation 71-4, *Minimum Procedures for Agencies Administering Discretionary Grant Programs,* 38 FR 19,789 (July 23, 1973).

A second scheme involves proposals declined for programmatic reasons. NSF allows the proposer to request reconsideration to ensure that NSF's initial proposal review was fair and reasonable. The reconsideration procedure focuses on the scientific and technical merits of the proposal as well as defects in peer review, such as undisclosed conflict of interest. The proposer must first discuss the matter with the NSF Program Officer or Division Director. If that discussion does not remedy the problem, the proposer may request reconsideration by the NSF Program Officer or Division Director within 90 days of declination. The Program Officer or Division Director can delegate the matter to another NSF official who had no part in the initial decision. The reviewer can request additional information and may obtain additional peer reviews. If the Program Officer or Division Director does not grant reconsideration, the proposer can request further reconsideration by the Deputy Director of NSF who again can delegate the matter to a previously uninvolved staff member. The Deputy Director makes the final decision. NSF maintains a similar all-written dispute resolution system for suspension or termination of grants or accounting issues.[26]

2. Insurer Decisions under the Affordable Care Act (ACA). The ACA regulations provide for a "review of adverse benefit determinations by health

[26] See PAPPG, *supra* note 25, chap. XII B.

insurers or group health plans" based on medical judgments.[27] The first step is an internal review at the insurer or group plan level, followed by an external review at the state level. If no state external review procedure exists that meets federal requirements, a federal review procedure applies. A claimant's request for external review triggers this process. The review is conducted by a private "independent review organization" (IRO) rather than by federal officials. The IRO is permitted to consider non-record evidence, such as the report of its own clinical reviewer as well as practice guidelines developed by the federal government or by professional medical societies and clinical review criteria used by the plan.[28] The IRO must provide written notice of its decision within 45 days 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."[29]

3. U. S. Department of Agriculture (USDA) Anti-Discrimination.[30] USDA maintains a system of informal adjudication (known as the "15d procedure") to remedy prohibited discrimination in USDA programs.[31] The 15d procedure responds to a long and unfortunate history of discrimination against African-Americans in USDA's loan and grant programs, but it covers many other forms of

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[27] 45 C.F.R. § 147.136(d), implementing 42 U.S.C. § 300gg-19 (calling for "effective external review" at the federal level if no effective state external review program exists).
[28] 42 C.F.R. § 147.136(d)(5).
[29] 45 C.F.R. § 147.136(d)(7)(iv).
[30] Interview with USDA 1 provided data about USDA's anti-discrimination procedure.
[31] 7 C.F.R. Pt. 15d.5.

prohibited discrimination as well.[32] Persons who believe they were the victims of illegal discrimination in a loan program can bring suit under the Equal Credit Opportunity Act (ECOA).[33] The 15d procedure is intended to serve as a low-cost alternative to ECOA litigation as well as to remedy other forms of discrimination not covered by ECOA.

The 15d program is administered by USDA's Office of the Assistant Secretary for Civil Rights (OASCR). A typical complaint might allege that the Farm Services Agency (FSA) rejected a farmer's loan application because the FSA believed it is unlikely the loan would be repaid. The farmer, however, believes the rejection occurred because of prohibited discrimination. A complainant can initiate a 15d proceeding by filing a form in hard copy or online within 180 days of the adverse action.

OASCR's intake division determines whether it has jurisdiction, meaning that the complaint was filed within time deadlines and alleges a form of discrimination covered by the OASCR's regulatory authority. If OASCR has jurisdiction, it then informs the FSA. The FSA has an opportunity to settle the dispute before the investigation process begins. If the dispute is not settled and the complainant wants to proceed, the case is assigned to an investigator. The

[32] *See, e.g.*, Pigford v. Glickman, 206 F.3d 1212 (D. C. Cir. 2000).
[33] 15 U.S.C. §§ 1691-1691f.

investigator gathers the relevant documents and contacts the complainant and the FSA staff involved in the decision and other witnesses. The investigator lacks subpoena power. Witnesses are not sworn but must attest to the truthfulness of their statement. Interviews are by phone rather than face-to-face (but that will likely change post-COVID). The investigator considers demographic information and tries to compare the facts to similar transactions. The complainant has an opportunity to rebut statements made by agency personnel. Although not required, lawyers and non-lawyer lay representatives are welcome to assist complainants.

The investigator prepares the record of investigation (ROI) and transmits it to the Adjudication Division. The adjudicator can send the case back to the Investigation Division if additional evidence or data is needed. The adjudicator determines whether the evidence will support an inference of discrimination using the preponderance of the evidence standard. The adjudicator considers only information in the file and does not see or hear any of the witnesses or receive ex parte communications. About ten adjudicators are randomly assigned to cases (more experienced adjudicators receive more complex cases). No issues have arisen concerning the neutrality of adjudicators.

The Adjudicator's report goes to the Director of the Adjudication Division who makes the final determination. If there is a finding of discrimination, the matter is reviewed by the USDA's Office of General Counsel for legal sufficiency and the finding is ultimately issued by the Assistant Secretary for Civil Rights.

After the decision is rendered, the losing party has no opportunity for a further appeal (except for alleged discrimination due to disability in conducted programs, where an appeal right is provided). There is no ombudsman to receive complaints about the adjudicatory process. In the case of alleged discrimination in a USDA loan program, the complainant can obtain a de novo judicial trial under ECOA.[34]

In FY 2022, 279 complaints were filed under the 15d program. About 40 per cent of complaints were dismissed at the intake level because of jurisdiction or limitations issues. OASCR issued 82 final decisions on the merits in 2022 and closed 44 cases because of procedural defects. Of the 82 merit decisions, only one was in complainant's favor. The reason for the low number of sustained complaints is that it is difficult to prove discrimination in a system without trial-type hearings. Discrimination can be subtle—for example, staff might help white loan applicants fill out the application while failing to provide the same level of assistance to Black applicants. This sort of discrimination does not reveal itself in documents.

[34] 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."[34] Johnson v. Vilsack, 833 F.3d 948, 953-58 (8th Cir. 2016) (internal quotation marks and citation eliminated).

Thus, the 15d program might be more effective if converted into Type B adjudication so that complainants can attempt to provide discrimination in an evidentiary hearing.

The large percent of complaints dismissed due to jurisdiction or limitations issue suggests that complainants do not understand the procedural and substantive obstacles facing them. OASCR might consider preparation of an easy-to-read booklet (or web document) that would include examples of the types of discrimination covered and what is needed to prove discrimination. This booklet would be available at all USDA offices and sent to everyone who requests a claim form.

USDA has instituted a quality assurance program for 15d cases. An auditor evaluates the process by considering a random sample of OASCR cases.

4. Department of Energy (DOE) Loan Guarantees. DOE administers a loan guarantee program for the development of new technologies designed to reduce or sequester greenhouse gases.[35] Each application is ranked competitively against all others. The regulations indicate the many factors that DOE considers when it ranks the applications. The rejection of an application is final and not appealable. On request, DOE will meet with the applicant to address questions or concerns raised by the applicant. DOE shall advise the applicant of the reasons for denial of an

[35] *See* Energy Policy Act of 2005, 42 U.S.C. § 16511 et seq.

application and provide a list of items that may be corrected or amended to satisfy the requirements that would create an eligible application.[36]

5. Community Development Financial Institutions (CDFI) Programs. CDFI administers a number of different programs involving loans, grants, tax credits and other benefits to remediate lack of investment in low-income areas. The applicants are usually financial intermediaries. The regulations indicate the factors to be considered in evaluating applications and awarding benefits, but they create no remedy for rejected applicants.[37] After an applicant is selected to receive these benefits, CDFI and the recipient execute an Assistance Agreement that requires the recipient to comply with performance goals and abide by other terms and conditions of assistance. In the event of fraud, mismanagement, or non-compliance with regulations or the Assistance Agreement, CDFI can impose various sanctions including revocation of approval of the application, reducing or terminating assistance, or requiring repayment. Prior to imposing the sanction, CDFI must provide the recipient with written notice of the proposed sanction and an opportunity to comment. The regulations explicitly state that there is no right to

[36] 10 C.F.R. § 609.5(d).

[37] 12 C.F.R. § 1805.700 - .701. To the community that seeks CDFI assistance for various programs, the selection process is considered a black box in which CDFI's priorities and scoring protocols are not disclosed. *See* Michelle D. Layser & Andrew J. Greenlee, *Structural Inequality and the New Markets Tax Credit*, DUKE L.J. (forthcoming 2023), manuscript at 48.

any formal or informal hearing or comparable proceeding not otherwise required by law.[38]

B. Licensing and Permitting

The term "license" refers to any "form of permission" by a federal agency.[39] Agencies engaged in licensing and other permitting programs frequently resolve disputes through Type C adjudication.[40]

1. Licensing of National Banks. The Office of the Comptroller of the Currency (OCC) engages in an inquisitorial notice and comment-like process to determine whether to issue a bank charter (meaning a national bank license). 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.[41] OCC invites the public to submit comments on pending applications. OCC's 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

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[38] 12 C.F.R. § 1805.801(g).

[39] APA § 551(8).

[40] *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).

[41] *See* David Zaring, *Modernizing the Bank Charter*, 61 WM. & MARY L. REV. 1397, 1408-14, 1433 (2020). The Federal Deposit Insurance Corp. conducts a similarly intense scrutiny of the bank's application for deposit insurance. Judicial review of the OCC and FDIC chartering decisions is available but is extremely deferential. *Id.* at 1412-13.

with interested parties.[42] The process ends with a concise order including a cursory explanation of the decision granting or denying the charter.[43]

2. Food and Drug Administration (FDA) Licensing of Tobacco Products. The FDA is responsible for pre-marketing drug licensing and numerous other market authorization schemes.[44] 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 extensive scrutiny by expert committees of experimental data of safety and efficacy.[45]

For example, FDA conducts Type C adjudication when it considers whether to grant applicants permission to introduce new tobacco products such as various forms of vaping. The FDA must determine whether the benefit of particular vaping

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[42] 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). A court reviews OCC's bank charter decisions deferentially 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). For a detailed history of judicial review of bank charter decisions, see Kenneth E. Scott, *The Licensing Decisions of the Federal Banking Agencies*, 42 U. CHI. L. REV. 235 (1975) (criticizing OCC's failure to develop policies and state detailed reasons). Scott's article drew a withering rebuttal. C. Westbrook Murphy, *What Reason for the Quest? A Response to Professor Scott*, 42 U. CHI. L. REV. 299 (1975).
[43] Zaring, *supra* note 41 at 1433.
[44] *See* Adam I. Muchmore, *Marketing Authorization at the FDA: Paradigms and Alternatives*, 74 ADMIN. L. REV. 539 (2022); Daniel G. Aaron, T*he Fall of FDA Review*, 22 YALE J. OF HEALTH POL'Y, L. & ETHICS 95 (2023).
[45] Food & Drug Adm'n, Development and Approval Process/Drugs, https://www.fda.gov/drugs/development-approval-process-drugs (last updated Aug. 8, 2022).

products to adult users who are trying to stop smoking cigarettes outweighs the risk that young people may become nicotine addicted. The FDA 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.[46]

3. Choice of Portability Administrator by Federal Communications Commission (FCC). The 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).[47] The FCC selected Telcordia to replace Neustar as an LNPA after utilizing an informal adjudication process that resembled notice-and-comment rulemaking. A court described it as an "interactive public process."[48] The court decided that the FCC correctly used informal adjudication rather than rulemaking to make the selection, because the decision involved "licensing" and primarily involved choosing between two bidding parties.

4. Fish and Wildlife Service (FWS) Protection of Wild Animals. FWS operates various permitting systems relating to the protection of wild birds and

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[46] 21 U.S.C. § 387j(c)(4); 21 C.F.R. §§ 1114.25-1114.33. *See* Avail Vapor, LLC v. FDA, 55 F.4th 409 (4th Cir. 2022) (upholding FDA's denial of application to market flavored vaping products).
[47] 47 U.S.C. § 251(e)(1).
[48] Neustar, Inc. v. FCC, 857 F.3d 886, 895 (D.C. Cir. 2017).

animals, including permits for the import of wild animal trophies.[49] Under the regulations, there is an all-written system for consideration of permit applications, renewals, and amendments, as well as suspension and revocation of permits.[50] Decisional officials are instructed to use any relevant available information, so that there is no exclusive record.[51] The regulations provide for an appeal to the Regional Director. That official can permit oral argument if necessary to clarify the record.[52]

C. Immigration

The immigration process generates a high volume of Type C adjudication.

1. Expedited Removal of Undocumented Aliens by Department of Homeland Security (DHS). Front-line DHS immigration enforcement officers conduct most adjudication concerning removal of undocumented aliens.[53] Aliens removed as a result of expedited proceedings have no opportunity to challenge such decisions in Type B evidentiary proceedings conducted by the Immigration Court.

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[49] *See* 50 C.F.R. §§ 13.11-.12 for a list of the various conservation programs requiring permits; Marcum v. Salazar, N4 F.3d 123 (D.C. Cir. 2012) (judicial review by rejected permit applicant is premature as administrative appeal was pending). 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 if its decision is not supported by the record).
[50] 50 C.F.R. §§ 13.15-.28.
[51] 50 C.F.R. § 13.21(d).
[52] 50 C.F.R. §13.29(f).
[53] *See* 8 C.F.R. § 235.3.

Expedited removal proceedings arise when undocumented aliens are captured near the border.[54] They are frequently held in custody which makes access to counsel difficult. Aliens can avoid expedited removal by demonstrating to an asylum officer a "significant possibility" that they would qualify for asylum, meaning they have a "credible fear" of persecution. If an asylum officer rejects the "significant possibility" claim, that decision is reviewed by a supervisor. It may then be appealed to an immigration judge. The judge may receive into evidence any oral or written statement. The alien testifies under oath. Interpreters are provided if necessary. The immigration judge determines whether the review is conducted in person or through telephone or video. The judge provides a de novo determination of the "significant possibility" issue. The judge considers the credibility of the alien's statement, and such other facts as are known to the judge.[55]

2. U.S. Citizen and Immigration Services (USCIS) Review of Visa Applications. Visa applications give rise to millions of Type C adjudications each

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[54] *See* 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 in which no evidentiary hearing is provided because of waivers and other diversion mechanisms. *See* Jill E. Family, A *Broader View of the Immigration Adjudication Problem,* 23 GEO. IMMIG. L. REV. 595 (2009).

[55] 8 C.F.R. § 1003.42(c), (d)(1), (e), (f). See Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020) (holding due process does not apply to summary determinations and upholding preclusion of habeas relief).

year.[56] Under regulations relating to nonimmigrant visas, if a consular official knows or has reason to believe that a visa applicant is ineligible and refuses to issue a visa, the official must inform the applicant of the grounds of ineligibility and whether there is a mechanism (such as a waiver) to overcome the refusal. The consular officer's supervisor reviews decisions to refuse to issue a nonimmigrant visa. If the reviewing officer disagrees with the decision, that officer can assume responsibility and re-adjudicate the case. No hearing is provided.[57]

3. USCIS Naturalization Decisions.[58] A permanent resident seeking to become a naturalized citizen must meet various requirements, including knowledge of the English language and U.S. history and government. In addition, an applicant must be "a person of good moral character, attached to the principles of the Constitution of the United States, and well-disposed to the good order and happiness of the United States."[59] A USCIS officer conducts a personal interview

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[56] In addition to the Type C adjudication described in the text, USCIS conducts Type B adjudication through its Administrative Appeals Office (AAO). AAO has jurisdiction over 50 different immigration case-types, such as employment-based immigrant visa petitions. See Walker & Wiener, *supra* note 4 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-aao (last updated Jan. 5, 2021).

[57] 22 C.F.R. § 41.121. The provisions relating to rejected applicants for immigrant visas are similar. 22 C.F.R. § 42.81.

[58] See Emily Ryo & Reed Humphrey, *Citizenship Disparities*, 107 MINN. L. REV. 1 (2023) (criticizing disparities in naturalization decisions between different USCIS offices).

[59] 8 U.S.C. §§ 1423, 1424, 1427.

with the applicant that includes a language and history test.[60] The applicant is permitted to have counsel (including an attorney or other representative) at the interview. Applicants who are dissatisfied by the decision can apply for a de novo rehearing before a different USCIS officer who may receive new evidence and testimony.[61] Denial of the petition is subject to de novo judicial review in federal district court.[62]

4. State Department Review of Voluntary Expatriation. A U.S. citizen can voluntarily expatriate by obtaining naturalization in a foreign state with the intention of relinquishing United States nationality.[63] 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 prepare a form evidencing understanding of the consequences of expatriation. The consular officer should note the officer's recommended

[60] 8 C.F.R. § 1447; Policy Manual: Chapter 3: Naturalization Interview, U.S. CITIZENSHIP & IMMIGR. SERVS, https://www.uscis.gov/policy-manual/volume-12-part-b-chapter-3; https://www.uscis.gov/policy-manual/volume-12-part-b-chapter-4 (last updated Oct. 4, 2023).
[61] Policy Manual: Chapter 6: USCIS Hearing and Judicial Review, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/policy-manual/volume-12-part-b-chapter-6 (last updated Oct. 4, 2023).
[62] 8 U.S.C. § 1421(c); 8 C.F.R. § 336.9.
[63] 8 U.S.C. § 1401(a)(1).

disposition of the case.[64] There is no provision for any procedural protections other than this interview.[65]

D. Land Use Approvals—Federal Energy Regulatory Commission (FERC) approval of hydropower licenses

Federal government approval is required for numerous proposed land uses such as pipelines, airports, or power plants proposed by private parties. Land use permission proceedings are difficult to classify as adjudication or rulemaking. They are not rulemaking because they do not result in the adoption of a "rule" in the conventional sense of stating a generally applicable standard that persons must obey. The APA classifies such decisions as adjudication since it defines "licensing" as adjudication and "licensing" includes any form of "permission."[66] Using the more functional definitions discussed earlier,[67] land use approval proceedings are "adjudication" because they are triggered by a particular party's application. However, land use approvals resemble rulemaking 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.

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[64] DEPARTMENT OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1227(a).
[65] These procedures (described as "informal adjudication") were upheld in Farrell v. Blinken, 4 F.4th 124 (D.C. Cir. 2021), which found denial of the CLN was arbitrary because the Foreign Service had given conflicting instructions about the procedures needed to obtain it.
[66] APA, § 551(6), (8).
[67] *See* text at *supra* notes 15-16.

Rather, they are based primarily on environmental and engineering analyses and often involve difficult political choices.

The process in land use approval proceedings resembles notice-and-comment rulemaking and the approval process for highway routes.[68] Statutes require public notice to all stakeholders (including those who might be adversely affected by the proposed project), multiple opportunities for public input (written and usually oral), detailed evaluation by agency staff, an environmental impact statement, and a final decision at the agency 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. They do not resemble evidentiary hearings.

An example of federal permitting is the Federal Energy Regulatory Commission (FERC) Approval of Hydro Projects.[69] Numerous federal adjudicatory schemes involve agency consideration and approval of applications for development projects. The approval process resembles rulemaking more

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[68] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) which concerned the process for approval of a highway route proposed by state and local government. The decision to approve the route was preceded by a lengthy process that included multiple opportunities for written submissions and public 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) .

[69] Details of the FERC hydropower process were provided by interviews with FERC-1 and FERC-2.

closely than adjudication because the projects are likely to have significant environmental and economic impacts on many people. Nevertheless, because the process is triggered by an individual private-sector application, it requires the responsible agency to conduct informal adjudication. FERC's consideration of applications to construct hydropower projects (or, more commonly, relicensing of existing hydropower licenses) is an example of this process.[70] Hydropower applications require consideration of numerous complex and often controversial environmental, economic, and technical issues. The Integrated Licensing Process (ILP) is the default procedural scheme.[71]

Step 1 of 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.[72] The application provides detailed information

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[70] *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).

[71] FERC, HYDROPOWER PRIMER 29 (2017), 29, available at https://www.ferc.gov/media/hydropower-primer (hereinafter Primer). 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. A private contractor engaged by the applicant prepares a draft environmental document. ALP resembles negotiated rulemaking but 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.

[72] *See* 18 C.F.R. §§ 4.80-4.84.

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 to as long as eight years or even beyond in extraordinary circumstances). The permit application is subject to public notice of the application and interested stakeholders may comment on it. 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.

Step 2 is the pre-filing process.[73] It normally lasts about three years and is largely devoted to identifying and completing studies of technical and environmental issues. 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 (PAD) that describes the project and the studies proposed by the applicant. 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

[73] *See* Primer, note 71at 30-32.

to the project that will be addressed in the Commission's future NEPA document. The scoping document is issued for comment.

The applicant then 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 area of the project (one for members of the public, another for government agencies). Some public meetings deal with environmental scoping. Others concern 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. Public meetings are transcribed. Applicants and other agencies are often represented by consultants and by attorneys. 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. FERC commissioners may be available to meet with interested parties including the applicant during the pre-filing period.

Step 3[74] consists of staff review of the final license application, which contains the studies prepared during the pre-filing process. The Commission 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,

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[74] Primer, *supra* note 71, at 31.

protest, and provide alternative recommendations. Commission staff prepares 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.

Step 4 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 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 first request rehearing with the Commission. No ombudsman is available.

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 hydro projects under current consideration (mostly relicensing). 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 hydro licensing process since ILP was adopted in 2006.

E. Foreign Policy and National Security Determinations

1. Petitions to OFAC to Delist Persons Subject to Economic Sanctions.[75]

The Treasury Department's Office of Foreign Asset Control (OFAC) regulates in the area of embargoes, prohibited transactions with foreign entities, blocked assets, designation of foreign persons for sanctions, as well as international crime or terrorism. The provisions for economic sanctions generate a large volume of informal adjudication.[76]

OFAC designates foreign persons that will be subject to economic sanctions without prior notice. The designated person may then request delisting. The designated person may submit evidence or argument to OFAC that is intended to establish an insufficient basis for the designation. The designated person can also argue that circumstances have changed or can propose less severe remedial measures. Designated persons are usually represented by lawyers. OFAC will disclose unclassified material in its files to the designated person.[77] An

[75] Interview with OFAC 1 provided data about delisting procedure.

[76] See Elena Chachko, *Administrative National Security,* 108 GEO. L. J. 1063, 1112 (2020); 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.

[77] Some authority indicates that OFAC must provide an unclassified summary of the classified material on which it relies or disclose the classified information to an attorney with the necessary

investigatory team of OFAC staff members reviews the designated person's submissions as well as classified information in the file. The team may request clarifying, corroborating, or other additional information. Other government agencies, particularly the State Department, consult with OFAC about delisting petitions.

OFAC personnel may, but need not, meet with designated persons. Such meetings are unusual. The investigating team provides a memorandum to the director of OFAC who decides whether to grant the petition. The process ends when OFAC issues a written decision.[78] There is no further internal review of this decision, but the designated person can submit a new petition if circumstances change. The investigative memorandum along with OFAC's file serves as the record if the designated person seeks judicial review. There is no ombudsman to whom designated persons can complain about the OFAC process. We are unaware

security clearance. Al Haramain Islamic Found. Inc. v. U. S. Dep't of the Treasury, 686 F.3d 965, 980-84, (9th Cir. 2012). The D. C. Circuit upheld a designation and asset freezing order where virtually all of the information in the file was redacted for law enforcement reasons and the government provided only a summary of the classified evidence. Fares v. Smith, 901 F.3d 315 (D.C. Cir. 2018).

[78] 31 C.F.R. § 501.807. Due process requires adequate post-deprivation notice of the reasons for economic action and opportunity to be heard in response. Al Haramain Islamic Found., *supra* note 77, at 984-88. In a later case, the D. C. Circuit upheld OFAC's decision on due process grounds, holding that OFAC was entitled to rely on hearsay evidence such as newspaper articles. On the merits, the court upheld the decision using the APA's deferential arbitrary and capricious standard. Zevallos v. Obama, 793 F.3d 106 (D.C. Cir. 2015) (upholding asset freezing order against drug kingpin).

of the volume of delisting petitions considered by OFAC or the number of such petitions that are successful in whole or in part.

2. Prevention of Takeovers by CFIUS. The Committee on Foreign Investment in the United States (CFIUS) investigates proposed acquisitions of American companies by foreign nationals that might impair national security. CFIUS submits a report to the President who can order suspension or prohibition of the takeover. Such presidential action is not subject to judicial review. Neither statutes nor regulations provide any procedural protections. However, due process applies and judicial opinions establish that the parties have the right to access the unclassified evidence on which CFIUS and the President relied. In addition, the parties must be given an opportunity to rebut that evidence.[79]

3. Transportation Security Administration (TSA) No-fly List. TSA maintains a watch list of persons who are prevented from traveling by air because of national security concerns. The administrative procedure for seeking removal from the watch list is purely written.[80] A number of cases apply due process analysis to no-

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[79] Ralls Corp. v. CFIUS, 758 F.3d 296, 317-21 (D.C. Cir. 2014). The fact that Ralls (the acquiring party) had an informal opportunity to present evidence to CFIUS was not sufficient, because it had no opportunity to tailor its submission to the government's concerns or rebut the factual premises underlying its action. Similarly, see National Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 208-09 (D.C. Cir. 2001), concerning procedures for designation of a Foreign Terrorist Organization.

[80] The regulations provide that TSA will review the documentation and information requested from the individual, correct any erroneous information, and provide the individual with a timely written response." 49 C.F.R. § 1560.205.

fly determinations. These decisions require the agency to provide access to unclassified information that would enable the listed person to rebut the listing decision.[81]

F. Inspections, Grading, and Testing

A large number of disputes between private parties and government agencies are resolved by inspections or tests.[82]

1.Bank Supervision. Banks and bank holding companies are closely supervised by several federal agencies, depending on the size of the bank and whether it is federal or state-chartered. These agencies include the Office of Comptroller of the Currency (OCC), Federal Deposit Insurance Corp (FDIC), Board of Governors of the Federal Reserve System (FRS), and National Credit Union Administration (NCUA). Bank examiners raise issues in the form of Material Supervisory Determinations (MSDs) about the institution's financial health and compliance with banking law. MSDs can lead to orders to banks to change their practices or to enforcement proceedings. The examiners also determine confidential ratings of bank soundness (often called CAMELs). A bad CAMEL score can lead to enforcement action and can increase the cost of deposit insurance together with other negative business consequences.

[81] Chachko, *supra* note 76 at 1105-09.
[82] *See* Final Report, *supra* note 6 at 35-38. The APA exempts from its Type A requirements "proceedings in which decisions rest solely on inspections, tests, or elections." APA, § 554(a)(3).

By statute, MSDs and CAMEL ratings are subject to an independent intra-agency appellate process, meaning that the appeal is conducted by agency officials who do not report to the official who made the initial decision.[83] The appeal must be heard and decided expeditiously.[84] The four agencies have different approaches to conducting appeals, but none of them involve evidentiary hearings. FRS, for example makes use of a panel of employees who did not participate in preparation of the MSD. The appellant may appear before the panel to present testimony and witnesses if the panel consents to the appearance. The panel solicits the views of the staff who made the determination and other FRS staff. The appellant may appeal a panel decision to the Reserve Bank president and may further appeal to the FRS governor.[85]

The banking regulatory agencies also engage in stress testing to determine the adequacy of a bank's capital.[86] This exercise calls for a highly discretionary multi-factor determination. The regulations provide for notice of the annual capital requirement as determined by stress testing. Banks can request reconsideration of

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[83] *See* 12 U.S.C. § 4806(a), (b), (f)(1) and (2).

[84] *See generally* Julie Anderson Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations,* 92 WASH. UNIV. L. REV. 1101 (2015). Hill is critical of inconsistencies between the practices of the four agencies, especially concerning scope of review, and a lack of transparency. She also shows that as of 2015 the appellate procedures were underutilized.

[85] Notice, Internal Appeal Process, 60 Fed. Reg. 16470 (1995).

[86] *See* Daniel K. Tarullo, *Bank Supervision and Administrative Law,* 2022 COLUM. BUS. L. REV. 279.

these determinations and can also request an informal oral hearing to determine disputed material facts. Whether to hold a hearing is discretionary with regulators. The bank must be notified of the final decision within 60 days of the oral hearing.[87]

2. Fish inspections. A voluntary fish inspection program by the Department of Commerce depends entirely on inspections. A manufacturer that disagrees with the report of the original inspector is entitled to an appeal in the form of a re-inspection conducted by different inspectors.[88]

3. Federal Aviation Administration (FAA) Medical Approvals for Pilots. An airman seeking a first-class pilot certificate who is ineligible because he or she has diabetes can apply for a special medical certificate. The decision to issue or deny a certificate is made by an Aviation Medical Examiner from available records. The examiner can order additional flight or medical tests. If an application for the certificate is denied, the applicant can seek reconsideration from the Federal Flight Surgeon. No further procedures are provided.[89]

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[87] 12 C.F.R. § 225.8(h), (i), (j); *see* Tarullo, *supra* note 86, at 322-25. 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 where Metlife submitted additional materials.

[88] 50 C.F.R. §§ 260.36, .40. *See* Verkuil, *supra* note 4, at 770.

[89] *See* 14 C.F.R. §§ 67.401, .407, .409.

4. Adulterated Food. The Department of Health and Human Services relies on inspections to determine whether imported food that is adulterated or unfit for human consumption. It must provide the importer with notice and an opportunity to appear before a designee of the Secretary and introduce testimony.[90] 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.[91] However, there must be proper notice so that the opportunity to appear and introduce testimony will be meaningful.[92]

5. TSA Aircraft Security.[93] Aircraft operators must comply with TSA security directives and file their own security programs that follow TSA directives. TSA can disapprove these programs and can reject modifications or amendments to these programs. Operators can petition the administrator to reconsider and submit written views and arguments. After considering all relevant material, the designated official adopts or rescinds the notice. No other procedural protections are provided.

G. Orders Subject to De Novo Judicial Review

[90] 21 U.S.C. § 381(a); 21 C.F.R. § 1.94(a).
[91] Sugarman v. Forbragt, 267 F. Supp. 817 (N.D. Cal.1967), *aff'd*, 405 F.2d 1189, 1190 n.3 (9th Cir. 1968).
[92] L&M Industries v Kenter, 458 F.2d 968, 970 (2d Cir. 1972).
[93] *See* 49 C.F.R. § 1544.105; Amerijet International, Inc. v. Pistole, 753 F3d 1343 (D.C. Cir. 2014).

When an agency order is subject to de novo judicial review, agencies typically do not conduct evidentiary hearings prior to rendering adjudicatory decisions.[94]

1. Retailer Disqualification. Disqualification of SNAP vendors is an example of informal adjudication followed by de novo judicial review. The Food and Nutrition Service (FNS) of the Department of Agriculture (USDA) operates a series of federal-state programs that supply food to the poor, including SNAP (formerly known as food stamps). Local food vendors can be disqualified from these programs for various offenses. The statute authorizes USDA to adopt regulations providing for administrative review.[95] Under these regulations, a vendor may file a written request to submit information in support of its position to a reviewer who considers the submitted information along with other available information and makes a final determination.[96] Decisions disqualifying vendors are subject to de novo judicial review.[97]

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[94] 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). For additional examples of Type C adjudication subject to de novo judicial review, see discussion of naturalization disputes, Part II C.3 and revocation of taxpayer's passport for delinquent tax debts, Part II. H. 3.

[95] 7 U.S.C. §§2021, 2023(a)(3); 7 C.F.R. § 279.1 et seq.

[96] 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).

[97] 7 U.S.C. § 2023(a)(14). See Broad St. Food Market v. United States, 720 F.2d 217 (1st Cir. 1983) (court conducts de novo review of whether vendor committed violations but does not review sanctions imposed by USDA).

2. FOIA Requests. When an agency declines to provide records requested under FOIA on the basis that the record is subject to a FOIA exemption, the agency typically provides for an informal written procedure. In the Department of Energy (DOE) , for example, a FOIA officer is responsible for processing a request for records. The FOIA officer forwards the request to an Authorizing Official who prepares a written response granting or denying the request or informing the requester that the record cannot be located. The response states the reasons for denial including a brief explanation of how a specific applicable exemption applies to the record and why a discretionary release is not appropriate.[98] This decision can be appealed to DOE's Office of Hearings and Appeals which provides a written-only reconsideration and a decision stating the reasons why the document will or will not be disclosed. A rejected FOIA request is subject to de novo judicial review in the federal district court.[99]

H. Orders Relating to Tariffs, Tax, and Debt Collection

1. Tariff Classification Rulings by the Customs and Border Protection Service (CBP). An importer can request CBP to issue a tariff classification ruling (TCR).[100] Most TCRs are issued by local CBP field offices, but either the staff or

[98] 10 C.F.R. § 1004.5, .7
[99] APA § 552(a)(4)(B).
[100] *See* 19 C.F.R. §§ 177.0-177.13.

the importer can request a TCR from CBP headquarters.[101] A TCR is binding on CBP with respect to the proposed import transaction and to all identical future imports until the TCR is modified or revoked. TCR's are not binding on applicants.[102] At either local or headquarter levels, an applicant can request an oral "discussion" of the issues, which provides for an opportunity "to freely and openly discuss the matters set forth in the ruling request."[103] At the conference, the applicant can present additional documents, arguments, and exhibits. Either the local field 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. Internal Revenue Service (IRS) Collection Due Process (CDP).[104] The IRS must provide a "hearing" to taxpayers (TPs) when it imposes a tax lien on a

[101] The Supreme Court denied *Chevron* deference to a TCR issued at the headquarters level, but such rulings may qualify for *Skidmore* deference. United States v. Mead Corp., 533 U.S. 218 (2001).
[102] If CBP wishes to modify or revoke an interpretive ruling that has been in effect for more than 60 days, it must follow a public notice and comment procedure. 19 C.F.R. § 177.12(b). The regulations protect the reliance interest of third parties on TCRs that are modified or revoked. 19 C.F.R. § 177.12(c)-(e).
[103] 19 C.F.R. § 177.4(a).
[104] 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. Another system of Type C adjudication maintained by the IRS concerns determination of whether a TP qualifies as an "innocent spouse" who can avoid joint and several liability arising from a joint return. I.R.C. § 6015. IRS technicians who make these determinations are instructed to use all resources at their disposal to resolve the many factual questions arising under the innocent spouse provisions. Innocent spouse terminations are reviewable in a de novo proceeding before the Tax Court on a closed record (except for newly discovered or previously unavailable evidence). See I.R.C.

TP's property or levies on a TP's assets such as TP's wages or bank accounts. A TP must file Form 12153 within 30 days after notice of a lien or levy to trigger CDP.[105] Before or after filing Form 12153, TP can continue to negotiate with the Collection Division (CD) towards an appropriate resolution.

An appeal officer (AO) in the Independent Office of Appeals (Appeals) provides CDP. Appeals is organizationally separate from the IRS Collection Division (CD) that initiated the collection action. It is currently staffed by approximately 1,500 total employees, including management and support personnel, hearing appeals about tax deficiencies and other appealable issues.) By statute, an AO hearing a CDP case must be "impartial," meaning that the AO had no previous involvement in the dispute.[106] An AO may not receive ex parte communications from other IRS officials if such communications might "appear to compromise the independence" of the AO.[107]

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§6015(e)(7); Thomas v. Commissioner, 160 T.C. No. 4 (2023); INTERNAL REVENUE MANUAL § 25.15.

[105] I. R.C. § 6330(b); IRS Pub. 1660 (rev. 01-2020), *Collection Appeal Rights.* 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 it 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, supra* at 3-4.

[106] I.R.C. § 6330(b)(3).

[107] 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

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 AO "balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive then necessary."[108] 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 AO 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. However, the IRS will deny an in-person hearing if the taxpayer attempted to raise frivolous issues or made the request solely to delay or impede collection.[109]

(2012) (rejecting claim that ex parte communication to AO was prohibited because the attorney making the communication was not previously involved in the dispute).

[108] 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 105.

[109] *Collection Appeal Rights*, *supra* note 105.

An AO's goal in conducting CDP is to resolve the case through compromise, not to collect the maximum possible amount. The AO anticipates potential Tax Court review and considers litigation hazards as well as the nature of the underlying tax dispute. For example, an AO may exercise discretion differently if the deficiency arose from the incompetence of TP's or TP's representative or arose from a borderline claim to a deduction as opposed to more egregious tax evasion. ACUS was informed that a TP has a good chance of benefiting from pursuing a CDP appeal because Appeals prefers to resolve collection cases without using a lien or levy when possible. There are roughly 30,000 CDP appeals per year.

An AO will check the internal IRS database to ascertain the status of the TP's account. The database provides information about whether returns were filed and whether TP paid the required deposits and estimated taxes. Both the CD and Appeals provide an opportunity for TP to present a Collection Information Statement (CIS) that includes TP's statement of assets and liabilities and TP's ability to make payments in order to support their request for a collection alternative. If the TP presents new information (through a CIS or otherwise), the AO will send an Appeals Referral Investigation (ARI) to CD requesting it to review and verify on that information.[110] The AO shares such comments with the TP and provides TP with an opportunity to respond to them. The AO's

[110] *Id.*

determination is not based on an exclusive record of documents or testimony presented at the hearing.[111] The AO issues a determination letter after conclusion of the CDP hearing.

TPs may be represented by an authorized representative, including an attorney, certified public accountant, enrolled agent, or a Low Income Taxpayer Clinic. TPs 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 fide officers.[112] About half of TPs represent themselves. The AO's determination can be appealed to the Tax Court which reviews it for abuse of discretion.[113]

The Taxpayer Advocate Service (TAS) could serve an ombudsman function in connection with the CDP process if a TP complains about a failure to protect rights or to furnish fair and equitable treatment.[114] We were informed, however, that TAS is rarely involved in collection disputes. The IRS maintains a quality review

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[111] 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 AO and any other documents or materials relied on by the AO.
[112] *Collection Appeal Rights*, *supra* note 105.
[113] This burden to show that the AO's decision was arbitrary and capricious is difficult to meet. *See, e.g.* Hinerfeld v. Commissioner, 139 T.C. 277, 289-90 (2012). In that case, the Tax Court ruled that the AO did not abuse his discretion in rejecting an offer in compromise because a greater amount was collectible from potentially liable third parties.
[114] Taxpayer Advoc. Serv., *Can TAS Help Me with my Tax Issue?* www.taxpayeradvocate.irs.gov/can-tas-help-me-with-my-tax-issue/ last visited Oct. 6, 2023). *See* further discussion of the TAS in Part V. G.

system that samples disputes handled by Collection and Appeals, but the quality review cannot overturn an AO decision.

3. Denial or Revocation of Passports for Seriously Delinquent Tax Debts—Internal Revenue Service (IRS) and Department of State (DOS). A taxpayer's application for a passport (or renewal of a passport) can be denied if the Commissioner of Internal Revenue (CIR) certifies to DOS that the taxpayer has a "seriously delinquent tax debt."[115] 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 DOS to 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 used to pay the debt, but the assets were not used.

There are no administrative procedures to challenge IRS certifications. DOS 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

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[115] I.R.C. § 7345; I.R.S. Pub. 594; *Revocation or Denial of Passport in Cases of Certain Unpaid Taxes*, https://www.irs.gov/businesses/small-businesses-self-employed/revocation-or-denial-of-passport-in-cases-of-certain-unpaid-taxes (last updated Apr. 4, 2023). *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 $59,000, including penalties and interest, an amount adjusted for inflation. *Id.* 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.

erroneous certification issues.[116] 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.[117] It is unsettled whether the scope of review in such actions is de novo or arbitrary and capricious.[118]

I. Other Discretionary Actions

Countless administrative disputes (including many already discussed in this Part) involve discretionary actions by federal agencies. Statutes often do not prescribe any procedures that agencies must follow in making such decisions. This subsection covers some discretionary programs that do not fit easily into other categories identified in this Part of the Study.

1. U.S. Parole Commission (USPC) Decisions to Deny Parole. Prior to the introduction in 1982 of determinate sentences for federal crimes,[119] USPC set the dates for parole release of federal prisoners. The regulations described an informal hearing procedure in which a hearing examiner (or a panel of examiners)

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[116] *Revocation or Denial of Passport in Cases of Certain Unpaid Taxes, supra*, note 115.
[117] I.R.C. § 7345(e).
[118] Adams v. Commissioner, 160 T.C. 1 (2023). The *Adams* decision states that the result would have been the same regardless of which standard of review applies. It also states that the Tax Court lacks jurisdiction to consider the correctness of the underlying tax deficiency or the constitutional issues.
[119] *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* Admin. Conf. of the U.S., Recommendation 72-3, *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 regulation.

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 the contents of the file. 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.[120] 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.[121] The prisoner could appeal the decision to the National Appeals Board.[122] The prisoner could seek review of the parole decision by bringing a writ of habeas corpus, but the courts upheld the decision if it had a rational basis.[123]

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[120] 28 C.F.R. § 2.13, 2.18, 2.19. *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).
[121] 28 C.F.R. § 2.24.
[122] 28 C.F.R. § 2.26.
[123] Furnari v. Warden, 218 F.3d 250, 254 (3d Cir. 2000).

2. Securities Exchange Commission (SEC) Whistleblower Awards. The 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.[124] Payment of such awards is "at the discretion of the Commission."[125] Under the SEC's regulations,[126] claims must be filed with the Office of the Whistleblower within 90 days of the date of notice that a monetary sanction has been ordered. The Claims Review Staff makes a "preliminary determination" of whether the claim should be allowed and, if so, the amount that should be paid.[127] 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. The claimant may also request a meeting with the Office of the Whistleblower. Such meetings are not required and the Office may, in its sole discretion, decline the request.[128]

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[124] 15 U.S.C. § 78u-6. The whistleblower award shall be between 10% and 30% of the amount collected.
[125] 15 U.S.C. § 78u-6(f).
[126] 17 C.F.R. § 240.21F-10.
[127] The regulations also provide for a short-cut procedure for award applications that clearly do not meet the requirements for an award. This is called a "preliminary summary disposition." 17 C.F.R. § 240.21F-18.
[128] 17 C.F.R. § 240.21F-10(d), (e), (f).

The Claims Review Staff considers the issues and makes a proposed final determination. If any commissioner requests review at the Commission level, the Commission makes the final decision. If no Commissioner requests review, the proposed final determination becomes final. Judicial review of the final determination is available.[129] Fact findings are reviewed based on substantial evidence and the ultimate decision is reviewed for abuse of discretion.[130]

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

Part III describes the trans-substantive legal requirements for conducting Type C adjudication, as opposed to the agency-specific statutes or procedural regulations discussed in Part II. Part III concentrates on consultative due process, government ethics, the right of representation, APA sections 555 and 558, ombuds, the Freedom of Information Act, and judicial review. Of course, these trans-substantive procedural protections 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 many of the statutory and regulatory constraints and private-party protections that apply to Types A and B adjudication.

[129] See 17 C.F.R. § 240.21F-13. 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.*
[130] Kilgour v. SEC, 942 F.3d 113, 120 (2d Cir. 2019).

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.[131] For present purposes, it is sufficient to note that the definitions of "liberty" and "property" are both capacious and controversial.[132] The term "property" includes non-discretionary benefits conferred by statutes, which are 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 occupational and drivers' licenses. However, "property" does not include *discretionary* government actions or benefits such as at-will or probationary government jobs.[133] "Liberty" means freedom from physical confinement or abuse by government agencies as well as benefits provided by other constitutional provisions (such as freedom of speech). It also covers freedom from governmentally-imposed stigma as well as various traditional freedoms such as the

[131] For an overview of procedural due process, see ABA SECTION ON ADMINISTRATIVE LAW AND REGULATORY PRACTICE, A GUIDE TO FEDERAL AGENCY ADJUDICATION 11-40 (2d ed. 2012) (hereinafter "Adjudication Guidebook") [update to forthcoming 3d edition].

[132] 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" for due process purposes as wildly over-inclusive. *Kerry* signals that the Supreme Court may redefine these terms, sharply narrowing the universe of disputes to which due process applies.

[133] Bd. of Regents v. Roth, 408 U.S. 564, 575-78 (1972).

right to marry, engage in various occupations, and enjoy "those privileges long recognized…as essential to the orderly pursuit of happiness by free men."[134]

Due process is inapplicable to many Type C adjudication schemes because decisionmakers exercise discretionary power, so their decisions do not entail a deprivation of property. Nor do Type C adjudications often concern any of the interests included in "liberty." Nevertheless, the procedures required to comply with due process suggest best practices in Type C adjudication even though due process does not apply to most such adjudications.

Early procedural due process cases called for trial-type hearings and spelled out the timing and precise ingredients of such hearings. A hearing required by due process included cross-examination of witnesses, a neutral decisionmaker, a right to counsel, an exclusive record, separation of functions, and other protections.[135] More recent decisions avoid one-size-fits-all prescriptions. They require only that the agency provide "some kind of hearing at some time before a person is finally deprived" of liberty or property.[136] The same idea is conveyed by the requirement that due process requires a hearing that is "granted at a meaningful time and in a meaningful manner."[137] Courts determine the required elements of due process on

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[134] *Id.* at 572-75.
[135] Goldberg v. Kelly, 397 U.S. 254, 268-71 (1970).
[136] Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974); *see* Friendly, *supra* note 6 at 1294-1304.
[137] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

a case-by-case basis using utilitarian analysis. This analysis determines both the timing and the ingredients of the hearing by balancing the stakes to the private party, the value of the procedure in question in producing an accurate result, and the cost to government of providing that procedure.[138]

A number of procedural due process cases involve governmental action that carried relatively low stakes or that was preliminary or otherwise not suitable for judicialized trial-type hearings. These cases call for abbreviated procedure that might be called "consultative" due process. The leading case in this line, *Goss v. Lopez*,[139] 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 judicialized trial-type hearing. Instead, the school satisfied its due process obligation if it gave the student "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." But the student does 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."[140] In other words, the school

[138] Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).
[139] 419 U.S. 565 (1975).
[140] *Id.* at 581-83. This bare-bones procedure can be dispensed with if a de novo judicial hearing is available. Ingraham v. Wright, 430 U.S. 651 (1977).

needed only to provide oral notice of the charges 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 requirements.

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-payment of utility bills,[141] prison disciplinary proceedings,[142] and pre-termination employment discharges.[143] Although the specifics differ, the common core of the consultative due process cases is notice sufficient to permit the private party to challenge the decision,[144] an opportunity to confer or submit documents to the decisionmaker, and a statement of reasons for the decision.

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[141] 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."

[142] 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).

[143] 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.

[144] The notice must be reasonably calculated to apprise parties of the action government intends to take and to afford them an opportunity to present evidence. Dusenbery v. United States, 534 U.S. 161, 167-69 (2002) (holding that letter sent to petitioner in prison by certified mail was

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.[145] The regulations adopted by the Office of Government Ethics also create an aspirational standard: “Employees shall act impartially and not give preferential treatment to any private organization.”[146]

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) have a financial interest in the matter and the decision will have a “direct and predictable effect on that interest.”[147] The definition of “particular matter” makes clear that the

adequate notice of a pending foreclosure action even though never delivered); Jones v. Flowers, 547 U.S. 220, 226-34 (2006) (notice of tax foreclosure not sufficient when sent by certified mail and returned as unclaimed).

[145] 5 U.S.C. § 404; 5 C.F.R. § 2635.101 et seq. This Report does not describe these rules in detail. See discussion in Louis J. Virelli, *Recusal Rules for Administrative Adjudicators*, pp. 12-14 (Nov. 30, 2018), (report to the Admin. Conf. of the U.S.), available at https://www.acus.gov/sites/default/files/documents/Recusal-Rules-for-Administrative-Adjudicators-Final-Report-11.30.2018.pdf

[146] 5 C.F.R. § 2635.101(b)(8).

[147] 5 C.F.R. § 2635.502(a). More precisely, “Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality

disqualification rule apply to employees engaged in resolving adjudicatory disputes.[148] The regulations permit agencies to adopt a conflict of interest code that supplements the across-the-board ethics provisions.[149]

C. Right to Counsel Under Administrative Practice Act and Administrative Procedure Act (APA)

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."[150] This provision insures a right of representation by counsel in all agency proceedings, including Type C adjudication.

The Administrative Practice Act supplements the requirements of APA section 555(b) which provides: "A person compelled to appear in person before an

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in the matter, the employee should not participate in the matter" without having received authorization to do so. *Id.*

[148] 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). 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).

[149] 5 C.F.R. § 2635.105.

[150] 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).

agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative."[151] The most obvious applications of § 555(b) are to provide a right to counsel for persons compelled by subpoena to appear and testify before agency investigators or required to appear as witnesses at agency hearings or other proceedings.

Case law under § 555(b) stresses that agencies need a concrete and particularized reason to deny a person's choice of counsel.[152] In addition, § 555(b) requires an agency to allow an attorney to be accompanied by an expert to assist counsel, such as an accounting expert in a complex Securities and Exchange Commission investigatory proceeding involving accountant misconduct.[153]

The Administrative Practice Act and § 555(b) neither grant nor deny a private party the right to be represented by a non-lawyer.[154] The *Attorney*

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[151] *See* DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 61 (1947) (hereinafter ATTORNEY GENERAL'S MANUAL); Suess v. Pugh, 245 F. Supp. 661 (D.W.V. 1965).

[152] *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 (citing 55 Fed. Reg. 247-48 (1990)).The court held that counsel of the witness' choice cannot be excluded absent "concrete evidence that his presence would obstruct and impede the investigation."

[153] Laccetti v. SEC, 885 F.3d 724 (D.C. Cir. 2018); Whitman v. SEC, 613 F. Supp. 48 (D.D.C. 1985).

[154] 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

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.[155]

The procedural regulations of many agencies permit lay representation, often by law students in supervised clinical programs. For example, immigration agencies permit representation by accredited representatives and by supervised law students in detention hearings.[156] 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.[157] Indeed, the Supreme Court upheld the constitutionality of a statutory prohibition on paying attorneys to represent veterans in part because that system of lay representation provided an adequate substitute for counsel.[158]

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

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represent a person before an agency or in an agency proceeding." 5 U.S.C. § 500(d)(1). Similarly, APA § 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."

[155] ATTORNEY GENERAL'S MANUAL, *supra* note 150, at 65–66; *see also* Herman v. Dulles, 205 F.2d 715, 717 (D.C. Cir. 1953).

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

[157] *See* ACUS Sourcebook, *supra* note 1 at 181-82.

[158] Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985).

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 issue as provided by law.[159] Obviously, the scatter-shot provisions of § 555 do not set forth a code of procedure for Type C adjudication,[160] but they provide raw material that is helpful in designing a set of best practices.

1. Right to Appear

Under § 555(b), "So 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."[161] This provision allows an interested person to make a

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[159] APA § 555(b), (c), (d). The various requirements set forth in § 555 are discussed in Chapter 17 of the forthcoming A GUIDE TO FEDERAL AGENCY ADJUDICATION (American Bar Ass'n, 3d ed. 2023)

[160] Bremer, *The Exceptionalism Norm in Administrative Adjudication*, *supra* note 1, at 1400-01.

[161] APA § 555(b) contains a second, apparently redundant, right to appear applicable 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." APA § 555(b). This provision is not subject to the "orderly conduct of public business" provision that conditions the right to appear by interested persons. *Id.*

submission to agency heads or to relatively high-level staff members[162] in informal adjudication (as well as in other agency functions).[163]

It is unclear whether the right to "appear" means the right to appear physically or by electronic means and the right to make an oral presentation, as opposed to a right only to submit written materials. The *Attorney General's Manual on the APA* suggests that section 555(b) entitles interested persons to make an oral presentation. It 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."[164] Thus, the right to "appear" in § 555(b) might extend consultative due process rights[165] to informal adjudication contexts even though due process does not apply.[166] The right to appear in the APA is limited by the

[162] 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 150, at 63.
[163] *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) (Army violated § 555(b) by not allowing one of two competing vendors to participate in arbitration proceeding).
[164] ATTORNEY GENERAL'S MANUAL, *supra* note 150, at 63.
[165] *See* Part III. A.
[166] *See* Miles Construction, LLC v. United States, 108 Fed. Cl. 792, 805 (2013). The *Miles* 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

phrase “[so] far as the orderly conduct of public business permits…” The *Attorney General’s Manual* states that “the right and its limitation should be construed to achieve practical and fair results.”[167] Consequently, the right to make submissions to an agency would be affected by such factors as whether an oral presentation would be useful and by availability of staff to engage in consultation.

2. Reasons for Denial of Applications

Under APA § 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.”[168] This reason-giving requirement has broad application and may be the most significant portion of § 555. It seems similar to the requirement of reason-giving imposed by due

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Miles decision relies on a Supreme Court opinion that does not support it. Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 655-56 (1990).

[167] ATTORNEY GENERAL’S MANUAL, *supra* note 150 at 63.

[168] *Id.* at 70.

process[169] but is less demanding than the reason-giving requirements imposed by the APA in Type A adjudication.[170]

A good illustration of the significance of the reason-giving requirement in section 555 is the D.C. Circuit's *Roelofs* decision. There, 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. It linked this requirement to fundamental rights of procedural justice. Quoting an earlier case, the *Roelofs* opinion stated that § 555(e) embodies "the simple but fundamental requirement that an agency or official set forth its reasons, a requirement that is essential to the integrity of the administrative process, for it tends to require the agency to focus on the values served by its decision, hence releasing the clutch of unconscious preference and irrelevant prejudice." [171] Numerous additional cases have applied the reason-giving requirements of section 555(e).[172]

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[169] "The decisionmaker 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." Goldberg v. Kelly, 397 U.S. 254, 271 (1970).
[170] 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." APA § 557(c)(A; *see* George Transfer & Rigging Co. v. United States, 380 F. Supp. 179, 186 (D. Md. 1974).
[171] Roelofs v. Sec'y of the Air Force, 628 F.2d 594, 599-600 (D.C. Cir. 1980); s*ee also* Matlovich v. Sec'y of the Air Force, 591 F.2d 852, 857–61 (D.C. Cir. 1978); Remmie v. Mabus, 898 F. Supp. 108, 119–21 (E.D.N.Y. 1995).
[172] King v. United States, 492 F.2d 1337, 1343 (7th Cir. 1974) (parole board must 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 OCC, 856 F.2d

The reason-giving requirement of § 555(e) overlaps with the reason-giving requirement for judicial review which is discussed below.[173] An unexplained agency action violates both § 555(e) and the APA's arbitrary and capricious test. Several cases equate the two reason-giving requirements.[174] 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 onerous than the explanation requirement imposed by the arbitrary and capricious test as applied on judicial review.[175]

E. APA § 558(c)--Licensing Disputes

1507, 1513 (11th Cir. 1988) (Comptroller of Currency must state reasons for rejecting a public hearing on bank merger); Butte Cnty. v. Hogen, 613 F.3d 190, 193-95 (D.C. Cir. 2010) (official 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 v. TSA, 20 F4th 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 F3d 1343, 1349–50 (D.C. Cir. 2014) (TSA must explain decision to use alternative procedures); SecurityPoint Holdings v. TSA, 769 F.3d 1184, 1187–88 (D.C. Cir. 2014) (TSA must explain rejection of requests to modify its bin advertising program).

[173] See Part III. H.

[174] *See* United Airlines 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); Friends of the Bow v. Thompson, 124 F.3d 1210, 1219-20 (10th Cir. 1997).

[175] *See* Dunlop v. Bachowski, 421 U.S. 560 (1975). *Dunlop* drew a distinction between the two reason-giving requirements. "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.

APA § 558(c) of the APA provides procedural protections for private parties engaged in licensing disputes with federal agencies, whether such disputes are Type A, B, or C adjudication. The section has three distinct components— license applications, withdrawals, and renewals. This discussion focuses on the withdrawal provision, which covers decisions to withdraw, suspend, revoke, or annul a license. This provision has broad application, because the APA defines the term "license" to include any "form of permission."[176]

APA § 558(c) does not provide a right to a hearing (formal or informal) in the case of a license withdrawal.[177] Instead, it requires written notice of the problem and an opportunity to demonstrate or achieve compliance. Written notice to the licensee must list the facts or conduct that may warrant the action, as opposed to a bland statement that "permit action is warranted."[178] In addition, § 558(c) requires that the licensee have an opportunity to demonstrate or achieve compliance with the defects identified in the warning letter.[179] But the second

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[176] APA § 551(8).

[177] *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).

[178] 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)."

[179] 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).

chance provision does not apply in cases of "willfulness"[180] or when public health, interest, or safety requires otherwise.[181]

F. Ombuds

Ombuds are officials situated within an agency who enjoy significant independence. So-called external ombuds have legal power to investigate and attempt to resolve complaints made by persons outside the agency. Ombuds can advocate in favor of complainants and engage in mediation, but they lack power to compel the agency to do anything.[182] Nevertheless, ombuds have "soft power," because agency officials wish to avoid their criticism. Consequently, ombuds can play a significant role in achieving informal adjudication that is both fair and perceived to be fair and to compensate for the absence of evidentiary hearings. ACUS Recommendations strongly endorse the use of external ombuds.[183]

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180 See Hutto Stockyard, Inc. v. USDA, 903 F.2d 299, 304–05 (4th Cir. 1990); Lawrence v. CFTC, 759 F.2d 767, 772 (9th Cir. 1985); Halvonik v. Dudas, 398 F. Supp. 2d 115, 125 (D.D.C. 2005).

181 ATTORNEY GENERAL'S MANUAL, *supra* note 150 at 91 (citing withdrawal of a pilot's license after an accident); Tucson Rod & Gun Club v. McGee, 25 F. Supp. 1025, 1030 (D. Ariz. 1998).

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

183 Admin. Conf. of the U.S., Recommendation 90-2, *The Ombudsman in Federal Agencies*, 55 Fed. Reg. 34,211 (Aug. 22, 1990); Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94,316 (Dec. 23, 2016). The lengthy ACUS consultant reports provide detailed studies of the use of ombuds across the federal government. *See e.g.* Carole S. Houk et al., *A Reappraisal—The Nature and Value of Ombudsmen in Federal Agencies: Part 1: Executive Summary* (Nov. 14, 2016) (Report to the Admin. Conf. of the U.S.) (hereinafter Houk, Executive Summary); *A Reappraisal—The Nature and Value of Ombudsmen in Federal Agencies* Part II: Research Report (Nov. 14, 2016) (report to the Admin. Conf. of the U.S.) ACUS 2016) (hereinafter Houk Part II). There is a substantial literature on ombuds. Amy

Countless ombuds exist within federal, state and local government, academic and other non-profit institutions, and elsewhere. An ACUS study identified about 150 of them in the federal government alone.[184] Some are authorized by legislation and others were established by administrative decisions.

The Internal Revenue Service (IRS) National Taxpayer Advocate (NTA) Is an example of a successful ombuds program.[185] 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 the complaint is justified, it advocates on behalf of the taxpayer. In addition, the NTA advocates for systemic changes in the Internal Revenue Code or IRS procedures and is empowered to file reports with Congress without prior review by the Commissioner or other officials. 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 (whether or not the taxpayers received the requested relief).[186] When an NTA

Widman, *Inclusive Agency Design*, 74 ADMIN. L. R. 23, 54-58 (2022); BRYAN GILLING, THE OMBUDSMAN IN NEW ZEALAND (1998).

[184] Houk, Executive Summary, note 183, at 6.

[185] *See* I.R.C. § 7803(c). See Houk, Part II, note 183 at 141-163; www.taxpayeradvocate.irs.gov/can-tas-help-me-with-my-tax-issue/. *See also* discussion of the NTA at text accompanying Part II. H. 2. *supra*.

[186] Houk Part II, *supra* note 183, at 153. 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).

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 that the case be elevated to a higher level of review within the agency.

The Office of National Ombudsman (ONO) within the Small Business Administration (SBA) is another important ombuds model.[187] The ONO serves an ombuds function on behalf of small business in its relationships with all federal agencies, including but not limited to SBA. The ombuds deals with complaints arising out of adjudication and enforcement as well as other administrative functions. In FY 2020, ONO handled 484 complaints, up from 292 in FY 2019. The increased caseload was probably the result of complaints arising from business support programs during the COVID emergency. Of the 2020 complaints, 272 were against the SBA and the balance against numerous other agencies. Out of the total of 484 matters, 73 were enforcement related and 411 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.[188]

G. Freedom of Information Act Pro-Active Disclosure

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[187] 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.

[188] Office of National Ombudsman, 2020 Annual Report to Congress, https://www.sba.gov/sites/sbagov/files/2022-04/SBA_ONO_AnnualReport_2020-508_0.pdf

Most Freedom of Information Act (FOIA) disputes concern requests to agencies to disclose particular records; an agency's decision whether to comply with the request or to claim an exemption is itself a form of Type C adjudication. See Part II.--. FOIA also 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…" [189] This provision requires agencies to make "pro-active disclosures" since it does not depend on a prior request.

On its face, FOIA's pro-active disclosure provision applies to a vast array of decisions generated through Type C adjudication, since by definition such decisions are "made in the adjudication of cases."[190] A requirement of pro-active disclosure and indexing of every Type C decision, no matter how trivial, would be extremely burdensome. Consequently, the pro-active disclosure requirement might apply only to adjudicative decisions with "precedential effect," meaning those that an agency considers binding in future decisions.[191] A recent ACUS draft Report

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[189] APA § 552(a)(2)(A) and (i).

[190] *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").

[191] *See* DEPARTMENT OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURE (2019); *Daniel J. Sheffner*, *Adjudication Materials on Agency Websites* 5-6 (April 10, 2017) (report to the Admin. Conf. of the U.S.); Gardner, supra note 6 at 161-62; American

favors a more expansive interpretation of the disclosure requirement for informal adjudication decisions.[192] Further discussion of the murky relationship between FOIA pro-active disclosure and Type C adjudication is beyond the scope of this Report.

H. Judicial Review

Agency decisions reached through informal adjudicatory processes are usually subject to judicial review.[193] Reviewing courts consider whether informal agency decisions contain errors of substantive law, fail to adhere to binding procedural requirements, or flunk the arbitrary and capricious test.[194]

The potentiality of judicial review of a Type C adjudicatory decision constrains agency procedural choices. Reviewing courts require agencies to provide a reasons statement so that the court can decide whether the decision is rational and is supported by evidence in the record,[195] although the decisions vary

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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).

192 Bernard Bell et al., *Disclosure of Agency Legal Materials* 96-102 (June 2, 2023) , (report to the Admin. Conf. of the U.S.)., -- MICH. J. OF ENVIR. & ADMIN LAW. --, SSRN 4382229.

193 Some Type C decisions fall within judicial review exceptions such as statutory preclusion 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 Report.

194 APA § 706(2)(A) requires a finding that the choice was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

195 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 that are subject to "substantial evidence" review under APA 706(2)(E) . "But the standards do differ as to the allowable origins of factual support and, as a consequence, how

in how strictly they enforce this prescription. Even a "curt" conclusory statement may suffice if it enables the reviewing court to determine the rationale for the agency decision.[196] 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 on judicial review or reasons that the court might supply for itself.[197]

Moreover, the closed-record requirement means a reviewing court can consider only unprivileged materials that were directly or indirectly considered by agency decisionmakers or staff members who worked on the matter.[198] As a result,

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those facts are assessed. . . is therefore permissible. . . or 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) (citing Ass'n of Data Proc. Serv. Orgs. v. Federal Res. Sys., 745 F.2d 677, 683-85 (D.C. Cir. 1984)). .

[196] *See* Camp v. Pitts, 411 U.S. 138, 143 (1973), which reviewed a decision denying an application for a bank charter. The agency's statement of reasons 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." 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 System, Inc., 419 U.S. 281, 286, "On the other hand, a court will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned").

[197]Calcutt v. Fed. Dep. Ins. Corp., 143 S.Ct. 1317 (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).

[198] Michael Asimow & Yoav Dotan, *Open and Closed Judicial Review of Agency Action: The Conflicting U. S. and Israeli Approaches*, 64 AMER. J. OF COMP. L. 521, 523-36 (2016); Leland E. Beck, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking* 19, 29-34 (May 14, 2013) (report for Admin. Conf. of the U.S.)' Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts,* 67 U. KAN. L. REV. 1 (2018); Peter Constable Alter, *A*

the agency must maintain and organize the documents and testimony that the staff and the decisionmaker considered, so these materials will be conveniently accessible if the case goes to court.

Judicial review even of mass justice adjudicatory systems provides valuable oversight of the administrative process.[199] However, as a practical matter, judicial review is not a feasible remedy for the vast majority of private parties who are dissatisfied with agency decisions in Type C adjudication.[200] 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 attendant on judicial review mean that any court-ordered relief would come too late. And in many

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 5 at 208-09.

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

[200] *See* Michael Asimow et al., *Between the Agency and the Court: Ex Ante Review of Regulations*, 68 AM. J. OF COMP. 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).

situations, the private party and the government have a continuing relationship that could be jeopardized by an attempt to secure judicial relief.[201]

In addition to these practical constraints, 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.[202] Courts are prohibited from mandating procedures that are not otherwise legally required.[203] Even if a private plaintiff is successful and the 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 Report.

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[201] See Asimow et. al. note 200 at 359; Tarullo, note 86 at 1299; Douglas v. Reeves, 964 F.3d (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. Wisc. Dep't of Nat. Res., 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).

[202] *See* Part III. H.

[203] 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, 96 (2015); Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 655-56 (1990).

Because ex post judicial review is unlikely to achieve fair procedure in most informal adjudication, Part IV of this Report turns to a different approach—agency adoption of procedural regulations that adhere to and adapt best practices for informal adjudication. Part IV justifies this approach and Part V identifies recommendations for those best practices.

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

A. Public Administration and Best Practices

1. Infeasibility of Statutory Solutions

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 having conducted evidentiary hearings. Most Type C adjudications involve inquisitorial schemes in which investigators serve as decisionmakers. There is nothing resembling an oral trial-type hearing 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 consider materials not introduced as evidence. Some Type C adjudications have large stakes, such as banking regulation, land-use approval adjudications, government grants, tax collection by the IRS, or business subsidies.

Others are as trivial as the decision of a forest ranger to allocate a campsite, assignment of an undesirable parking place to a government employee, or a minor disciplinary action against a government employee or student.[204]

Although Type B adjudication schemes are also disparate, they have in common a legally required evidentiary hearing. This commonality makes it feasible to suggest trans-substantive best practices for Type B adjudication that can be implemented through procedural regulations. ACUS adopted a proposal for best practices in Type B adjudication in Recommendation 2016-4, although it noted that Type B adjudication schemes differ markedly and not every recommended practice would work in every situation.[205] It might even be feasible to extend the APA adjudication provisions to some Type B adjudication.[206] Type C adjudication, in contrast, has no such commonality.

Because ex post judicial review of Type C adjudication is usually infeasible and useless,[207] ex ante procedural protections provide the best approach to achieving careful consideration of disputes by agency staff and generating private party satisfaction with the process. Yet the Supreme Court has made clear that

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[204] *See* 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).

[205] Recommendation 2016-4, supra note 1, ¶ 3.

[206] Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, *supra* note 1, at 1792-1802; Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003 (2004).

[207] *See* Part III. H.

courts cannot impose procedural requirements on agencies conducting Type C adjudication beyond those provided by statutes, regulations, or due process.[208]

Several authors have suggested statutory solutions to the problem of prescribing procedures for informal adjudication, but these proposals have gained no traction.[209] And for good reason. 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. A statute would have to somehow define 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

[208] *See* text at *supra* note 203.
[209] Krotozynski, *supra* note 6 at 1069-75; Gardner, *supra* note 6 at 158-66 (tentatively proposing an "Informal Procedure Act of 1980" based on required rulemaking to achieve statutory goals).

procedural goals[210] would generate judicial claims that the rules failed to achieve the statutory goals. 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.[211]

2. Public Administration and Internal Administrative Law

It is possible to avoid the obvious difficulties that beset a statutory solution to the problem of achieving fair procedure in informal adjudication by employing a best practice approach that is grounded in the discipline of public administration. 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. It relies heavily on the expertise and professionalism of the officials who manage these institutions, as well as the norms

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[210] As recommended by Gardner, *supra* note 6.

[211] *See* Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, *supra* note 1, at 1786-90. Bremer generally favors trans-substantive procedural norms. She observes, however, that exceptionalism has benefits 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* Bremer, *The Exceptionalism Norm in Administrative Adjudication*, *supra* note 1, at 1409–16; David Marcus, *Trans-Substantivity and the Processes of American Law,* 2013 BYU L. REV. 1191 (2013).

and practices previously developed within the agency.[212] Administrative law concentrates on imposing legally binding procedural constraints on agency action that are enforced through judicial review, while public administration concentrates on finding solutions to procedural problems that are generated by the agencies themselves. Harlow and Rawlings call these mechanisms "green light" rather than "red light" approaches to establishing fair and efficient procedures.[213] Shapiro refers to these as "inside-out" rather than "outside-in" administrative practices.[214]

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 are not legally required to adopt and that they may or may not be legally required to follow after being adopted.[215]

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[212] 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. OF MIAMI L. REV. 577 (2011) (urging public administration approach to constraining administrative discretion).

[213] *See* CAROL HARLOW AND RICHARD RAWLINGS, LAW AND ADMINISTRATION (2004).

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

[215] There is a rich literature on internal administrative law. *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); 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 212 (advocating reliance on internal rather than external controls on agency discretion); Nicholas R. Parrillo, *Jerry 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.

Proponents of internal administrative law do not assume that agencies invariably seek to avoid or minimize procedural constraints. Instead, they observe that agencies often decide to procedurally self-regulate. An agency, for example, might find its interest are served by adopting cost-justified procedures intended to produce more accurate, consistent and well-reasoned adjudicatory outcomes, improve procedural transparency, enhance stakeholder satisfaction, and heighten the confidence of reviewing courts in the soundness of its adjudicatory decisions.[216] Agency managers often self-regulate for reasons rooted in a positive public-interest seeking institutional culture. 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.

B. Best Practice Methodology

This Report 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

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MASHAW," (Nicholas R. Parrillo ed.) (2017) (discussing Mashaw's emphasis on agency-generated law rather than externally imposed law); Tarullo, *supra* note 86, at 379-98 (proposing judicial review of adequacy of agency's adoption of internal controls on bank supervision) .

[216] *See* Magill, *supra* note 215 at 882-91 (2009), for discussion of reasons why an agency might decide to self-regulate by adopting non-required procedures. *See also* Metzger & Stack, *supra* note 215, 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).

binding on the agency until the regulations are changed.[217] As discussed in Part III, the proposed best practices are grounded in existing statutory and constitutional law, and 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 schemes the practices 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. If a particular scheme fails to function as expected, it can be quickly modified or scrapped.[218] However, the voices of agency stakeholders (including attorneys who represent disputants, beneficiaries of the agency program, and other government agencies) should also be heard when it comes to adopting or modifying Type C adjudication procedures. As discussed below,[219] agencies should utilize notice and comment rulemaking for

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[217] See Magill, *supra* note 215 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 Report.

[218] 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 Board of Veterans' appeals decisions 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 and learning from experience).

[219] *See* Part V. H.

the adoption and revision of Type C adjudicatory procedures, even though this is not required by the APA.

Agencies considering adoption or modification of informal adjudication procedures must engage in a situation-specific analysis. The analysis would determine whether to adopt a particular best practice and how that practice should be structured. Each agency is an expert on its own regulatory scheme and its own resource constraints and is better qualified than Congress or the courts to design appropriate informal adjudication procedures.[220]

Agencies must balance a group of incommensurate factors in order to determine how to implement a menu of best 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 the degree to which it would enhance stakeholder satisfaction with the fairness of the adjudication.[221] The various factors that must be balanced often run in different directions, making tradeoffs inevitable. Precise information about costs and benefits is lacking. Input from agency stakeholders is essential. Whether a particular solution is "optimal" in the sense of producing the

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[220] *See* Vermeule, *supra* note 216; Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 692-94 (2015).

[221] *See* Roger C. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591-93 (1972) (balancing accuracy, efficiency, and acceptability); Verkuil, *supra* note 4 at 740 (balancing fairness, efficiency, and party satisfaction); Family, *supra* note 54 at 633-34.

greatest net benefit to the agency and to the public is obviously difficult to determine, but the agency itself is better equipped to calculate them than Congress or courts. Agencies should periodically re-examine their informal adjudication procedures since circumstances may change and experience can reveal that the procedures need to be improved or pruned.

2. Factors that Agencies Must Balance in Designing Informal Adjudication Procedures

a. Stakes. The stakes to the private party are clearly 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. But the personal and financial issues at stake can scale up rapidly. Many Type C adjudications involve significant amounts of money or significant personal impacts, calling for a set of defined procedural protections.

b. Accuracy. The term “accuracy” (often referred to as the “quality” of the decision) refers to increasing the probability that agency decisions will be “correct.” This means that the decisions correctly ascertain the facts, properly determine and apply the applicable law and agency policy, reach results consistent with similar cases, and exercise discretion wisely.[222]

c. Efficiency. Agencies must take account of efficiency concerns when designing informal adjudication procedures. Additional dispute-resolution procedures necessarily impose increased marginal costs. These increased costs decrease allocation to other agency initiatives, given limited staff availability and fixed and often inadequate budgets. Additional procedures can swell backlogs by increasing the time necessary to dispose of each matter. Because the procedures are incorporated in regulations, agencies must comply with them even when they are inconvenient or seemingly unnecessary. Additional procedural requirements also increase the likelihood that agency action will be challenged on judicial review by parties that allege that the required procedures were not observed in every detail.[223]

d. Fairness and Acceptability. Adjudication procedures should be designed with stakeholder satisfaction as an important factor. There is a considerable social psychology literature on the subject of procedural justice. Procedural justice refers to insuring availability of administrative procedures that are most important to non-

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[222] *See* Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (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.

[223] Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 361-64 (2019) (sketching increased agency costs from adoption of additional procedural requirements). .

governmental parties. Generating a sense of fairness in the dispute settlement process is critical to building legitimacy of the underlying institution. Legitimacy means that people will respect the institution by respecting its decisions, following the law without being forced to do so, and continuing to seek benefits from the agency.

The work of Tom Tyler is particularly useful in determining the contours of procedural justice.[224] Tyler conducted an ethnographic study of Chicago residents who had actual experience with the police and courts. In general, Tyler found that people's satisfaction with the procedures they encounter depends on non-instrumental or "normative" or "value-expressive" concerns. This means that the perceived fairness of the procedures does not depend on whether people think the procedures are likely to influence the outcome of the dispute or depend on the actual outcome.[225]

Tyler found that the factors that matters most to people are the decisionmaker's apparent effort to be neutral and fair and an absence of decisionmaker bias, meaning no conflict of interest or prejudgment of the facts.

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

[225] See TYLER, *supra* note 224, taking exception to earlier instrumental theories of procedural justice. Under these theories, the participant satisfaction depends on whether they think the procedures will influence the outcome of the dispute. *See, e.g.*, JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

The second place factor was "ethicality," meaning civility and respect for all parties. In third place was "representation," meaning the extent to which the disputants have an opportunity to present 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 an opportunity to correct perceived errors. The best practices for informal adjudication should build on Tyler's insights about procedural justice.[226]

Another interesting element of Tyler's findings is that people were equally satisfied by informal and formal procedures. In other words, they were as satisfied by the procedures involved in plea bargains or mediation as in formal trials. Informal procedures might even be preferred because they cost less. In addition, informal procedures may give disputants more opportunity to be heard by decisionmakers than occurs in formal hearings and they may allow decisionmakers to be more sensitive to people's interpersonal concerns.[227] 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

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[226] TYLER, *supra* note 224 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).
[227] *Id.* at 154-56.

satisfaction as the trial-type formal hearings required in Types A and B adjudication.

3. Criticisms of Best Practice Methodology

The use of best practice methodology has been subject to criticism.[228] These critics points out that so-called best practices are often little more than qualitative suggestions based on experiences of their proponents but that are not backed by empirical research. This criticism does not seem persuasive when applied to the approach taken in this Report. The set of best practices recommended in Part V of this Report generalize existing statutory and constitutional models applicable to Type C 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 for the sprawling universe of Type C adjudication, a result that would be neither possible nor desirable. Instead, the best practice approach advanced by this Report suggests that agencies should utilize the basic and generally accepted norms for informal adjudication and to tailor them n by crafting procedures appropriate to their unique situations.

C. Sources for Best Practices in Type C Adjudication

[228] *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).

The best practice requirements that follow in Part V are grounded in the various sources of legal norms applicable to informal adjudication that were discussed in Part III. These include consultative due process, statutes regulating attorney representation and regulatory ethics, ombuds provisions, §§ 555 and 558 of the APA, and the APA's rulemaking requirements. Several of them are based on earlier ACUS recommendations. A set of best practices rooted in these sources of law and policy would enhance the legitimacy of the best practice recommendations. It would build on and honor the work of the drafters of the APA and other relevant statutes and reinforce the work of ACUS, while providing an undemanding and flexible template for agencies to employ in structuring their Type C adjudication.

Of course, there is no guarantee that these practices will generate more accurate and consistent decisions or more stakeholder satisfaction than existing approaches at an acceptable cost to agencies.[229] If things do not work out as expected, it may be necessary to modify the procedures. But it seems likely that these low-cost approaches to decisionmaking will improve accuracy and consistency and cause private parties to feel they have been dealt with fairly. And they will do so more efficiently than by conducting evidentiary hearings.

[229] Thus, an elaborate quality assurance program adopted by the Board of Veterans Appeals turned out to be a costly failure. *See* Ames et al., *supra* note 218.

V. PROPOSALS FOR BEST PRACTICES IN TYPE C ADJUDICATION

This section spells out nine proposed best practices for Type C adjudication. Each practice is stated in general terms and must be tailored to the particular circumstances of each individual adjudicatory scheme.

A. Notice

Appropriate notice is the foundation of every scheme of administrative procedure.[230] Agencies conducting Type C adjudication should furnish notice to private disputants and other stakeholders in sufficient time and in sufficient detail to enable them to challenge the agency's front-line decision. The notice should include the reasons for rejection of an application or for imposition of a sanction. The notice should include access to materials in the agency's file when this is needed in order to mount an effective challenge.

This best practice recommendation is grounded in due process authorities requiring 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."[231] Consultative due process cases stress the importance of timely notice in relatively low-stakes disputes.[232] The

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[230] *See* Gardner, *supra* note 6, at 163-64; Friendly, *supra* note 6, at 1279-81.
[231] See Part III. A.
[232] 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, "We hold that written notice of the charges

recommendation also finds support in APA § 558(c), which applies to Type C licensing disputes. That provision requires, in cases of withdrawal of a license, "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."[233]

This recommendation is also grounded in notice-and-comment rulemaking procedure, which 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 or drug marketing applications). Notice of a proposed rule is provided through federal websites like regulations.gov. In addition, notice is transmitted through mailings and other methods of communication designed to reach persons known to be interested in the matter, as well as associations and other non-profits that protect the populations that might be affected.

An agency's procedural regulations and manuals governing particular schemes of Type C adjudication should spell out the details of how notice and

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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, Sandin v. Conner, 515 U.S.472 (1995) (holding that with some exceptions prisoners are not deprived of liberty when subjected to prison discipline).

[233] The notice in APA § 558(c) does not apply to "cases of willfulness or those in which public health, interest, or safety requires otherwise."

access to material in the agency's file are 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 action involves rejection of an application or approval of a land use project as opposed to imposition of a sanction. The type and detail of the notice should be quite different in a high stakes dispute as opposed to disputes having small stakes. The material provided to the private party obviously is limited by the need for security or by privilege including the deliberative process privilege. The agency rule or guidance should spell out such matters as:

- the required detail of the notice,
- the procedural details by which the agency's preliminary decision can be challenged and later levels of appeal and judicial review
- whether it should be in languages other than English
- the means used to publicize it to affected populations
- what material should be withheld or redacted
- whether the notice should provide the recipient with a second chance to achieve compliance
- the amount of time that the notice must precede further agency action
- deadlines,
- how the notice requirements apply to emergency situations.

B. Opportunity to Submit Evidence and Argument

The ability to tell your story to the person who decides your fate is foundational in every scheme of fair procedure. Thus, best practices must include an appropriate opportunity for non-governmental parties to furnish agency decisionmakers with evidence and argument.

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.[234] Moreover, the right to offer evidence and argument can be inferred from the second sentence of APA § 555(b) that allows a party "to appear."[235] 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.[236]

Finally, Executive Order 13,892 provided: "[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

[234] See Part III. A; Goss v. Lopez, discussed in text at *supra* note 139, involved a short-term suspension of a high school student. Goss required "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." 419 U.S. at 565.
[235] See Part III. D. 1.
[236] APA § 553(c).

legal and factual determinations."[237] Executive Order 13,892 was revoked by President Biden on the day he took office, along with numerous other Trump administration executive orders, probably because of their perceived anti-regulatory bias and their inflexibility.[238] The provision for opportunity to be heard in EO 13,892 was sound.

Of course, the contours of the opportunity to furnish evidence and argument will vary greatly depending on the nature of the dispute, such as whether the dispute concerns credibility issues as opposed to issues of broad legislative fact or the exercise of 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 way in which a disputant can attempt to rebut information provided by adverse

[237] "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication," Exec. Order No. 13,892, § 6(a), 84 Fed. Reg. 55,239 (Oct. 9, 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).

[238] "Revocation of Certain Executive Orders Concerning Federal Regulation," Exec. Order 13,992, § 2, 86 Fed. Reg. 7049 (Jan. 20, 2021). Section 1 of Exec. Order 13992 states: "It is the policy of my Administration to use available tools to confront the urgent challenges facing the Nation, including the coronavirus disease 2019 (COVID-19) pandemic, economic recovery, racial justice, and climate change. To tackle these challenges effectively, executive departments and agencies (agencies) must be equipped with the flexibility to use robust regulatory action to address national priorities. This order revokes harmful policies and directives that threaten to frustrate the Federal Government's ability to confront these problems and empowers agencies to use appropriate regulatory tools to achieve these goals." *Id.*

witnesses. However, an evidentiary hearing involving oral presentation of witness testimony and cross-examination of adverse witnesses is seldom necessary or desirable in Type C adjudication.

C. Representation

Best practices include a right to be represented by a lawyer. As noted above, APA § 555(b) guarantees a right to be represented by counsel in connection with the right to "appear."[239] Due process authorities mandate a right to counsel,[240] although not in cases involving small stakes.[241] The Administrative Practice Act provides a right of representation in Type C adjudication and prevents agencies from creating a specialized bar.[242]

The Administrative Practice Act and APA § 555(b) take no position on whether the right to be represented by counsel includes a right to lay representation, leaving this issue to be decided by agencies.[243] Best practices, however, should include a right to be assisted by a friend or family member or by a

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[239] *See* Part III. D. 1.
[240] 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).
[241] Goss v. Lopez, 419 U.S. 565, 581-82 (1975).
[242] See Part III. C.
[243] *See* Part III. C.

lay person who has expertise in the program administered by the agency. ACUS Recommendation 2016-4, which sets forth best practices for Type B adjudication, includes lay representation.[244] ACUS Recommendation 86-1 urged agencies to permit lay representation in mass justice adjudication.[245] For parties who cannot afford or cannot obtain a lawyer, having the assistance of a knowledgeable lay representative is far superior to self-representation.[246] Regulations that recognize a right to lay representation preempt state unauthorized practice laws that prohibit lay representation in civil and criminal cases.[247]

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[244] *See* Recommendation 2016-4, *supra* note 1, ¶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."

[245] 51 Fed. Reg. 25,641 (1986).

[246] *See* DEBORAH L. RHODE, ACCESS TO JUSTICE 90-91 (2004); Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C.L. REV. 429 (2016); Paul R. Tremblay, *Surrogate Lawyering: Legal Guidance, sans Lawyers*, 31 GEO. J. LEGAL ETHICS 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. Although prisons can prohibit the appearance of counsel, prisoners should be permitted to seek the aid of fellow prisoners where the issues are sufficiently complex.

[247] *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).

In addition to providing for lay representation, agencies should make their proceedings as accessible as possible to self-represented parties by providing plain language resources, such as FAQs and other appropriate assistance.[248]

D. Decisionmaker Neutrality

Best practices for C adjudication should include provisions relating to decisionmaker neutrality. [249] Tyler found that an important element of participant satisfaction with adjudicatory process is the perceived neutrality of the decisionmaker.[250] However, the recusal standards applicable to Types A and B adjudication must be relaxed in many Type C situations.[251] The requirement of decisionmaker neutrality, enforced through recusal rules and through due process,[252] must be appropriately tailored to a system of adjudication that is

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[248] Recommendation 2016-4, *supra* note 1, ¶16; Admin. Conf. of the United States, Recommendation 2016-6, *Self-Represented Parties in Administrative Proceedings*, 81 Fed. Reg. 94319 (Dec. 23, 2016). Another option to facilitate self-representation is to institutionalize it through an office like FERC's Office of Public Participation. See Part II. D.

[249] Friendly ranks an unbiased decisionmaker as the most important procedural safeguard for Type B adjudication. Friendly, *supra* note 6, at 1279.

[250] *See supra* text at note 224-27.

[251] *See* Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019), which applies only to Types A and B adjudication.. Recommendation 2018-4 distinguishes recusal rules from the ethical rules administered by the Office of Government Ethics that apply to Type C adjudication (discussed in Part III. B.). See Louis J. Virelli, *Recusal Rules for Administrative Adjudicators* 6 (Nov. 30, 2018) (report to the Admin. Conf. of the U.S.), available at https://www.acus.gov/sites/default/files/documents/Recusal-Rules-for-Administrative-Adjudicators-Final-Report-11.30.2018.pdf.

[252] 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 Court upheld a decisionmaker panel that did not include anyone

inquisitorial rather than adversarial, is not based on evidentiary hearings, and is often conducted by decisionmakers who participated in the investigatory process or have some other prior involvement in the matter.

As discussed above,[253] 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.[254]

The 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 such supplemental regulations must be approved by the Office of Government Ethics.[255]

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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, note 247, at 7-8.

[253] *See* Part III. B.

[254] *See* Part III. B.

[255] 5 C.F.R. § 2635.105.

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, such as the existence of personal animosity between the private party and the decisionmaker.

Other aspects of the normal neutrality rules for administrative hearings must be modified or dispensed with in Type C adjudication. Most Type C adjudication is inquisitorial, so that particular staff members below the agency head level often engage in both investigation and decisionmaking in the same case. Such combination of functions is prohibited by the APA in most Type A adjudication[256] and by regulations in most Type B cases.[257] However, it would not be realistic or efficient to require separation of functions in Type C cases. The same is true of rules prohibiting ex parte communications to decisionmakers in Types A and B adjudication.[258] An ex parte rule of this kind would not work in the sort of inquisitorial decisionmaking common in Type C cases where informal communications between stakeholders and decisionmakers is common. Where

[256] APA § 554(d). *See* Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COL. L. REV. 759 (1981).
[257] ACUS Report, *supra* note 1 at 20. Recommendation 2016-4, *supra* note 1, calls for adoption of separation of functions in Type B adjudication. ¶3.
[258] APA § 557(d); ACUS Report, *supra* note 1 at 18-19; ACUS Recommendation 2016-4, *supra* note 1, ¶2.

Type C adjudication is accusatory in nature and could involve serious sanctions, however, agencies should consider adoption of internal separation of functions and limitation on outside ex parte communications as well as stricter rules relating to bias.

E. Statement of Reasons

An agency conducting Type C adjudication should provide an oral or written statement of the facts and reasons on which its decision is based that is comprehensible to persons involved in the dispute. This statement should explain why the private party's arguments were rejected as well as setting forth the rationale for the agency's discretionary choices.[259] Obviously, 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.

Requiring the decisionmaker to furnish a statement of reasons is likely to improve the quality of discretionary decisions and, as the work of Tom Tyler showed, is an important factor in enhancing stakeholder satisfaction with the process.[260] Having a statement of reasons is also necessary if the private party

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[259] *See* Verkuil, *supra* note 4 at 790-92; Friendly, *supra* note 6 at 1292.
[260] See *supra*, text at notes 224-27.

decides to appeal the case to a higher level within the agency or seeks judicial review.

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.[261] 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."[262] For judicial review purposes, a court can consider only materials contained in the administrative record and the reasons for the decision stated by the agency when it made the decision under review.[263] Similarly, the broadly accepted rulemaking process requires that final rules contain a "concise general statement of their basis and purpose."[264] FOIA requires agencies to make available and index its adjudicatory decisions.[265] Finally, Executive Order 13,892, mentioned earlier,[266] required that

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[261] "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) (referring to prison disciplinary proceedings).
[262] *See* Part III. D. 2.
[263] *See* Part III. H.
[264] APA § 553(c).
[265] *See* Part III. G.
[266] *See supra* text at note 237.

"[t]he agency must respond in writing and articulate the basis for its action." Although the Executive Order was revoked, this principle was sound.[267]

F. Administrative Review

Most adjudicatory schemes provide for a second look at the decision of the primary decisionmaker.[268] In Type C adjudication, a staff member superior to the primary decisionmaker in the agency hierarchy usually provides the second look. Best practices for Type C adjudication includes administrative review of primary decisions where it is practicable to provide it.

The purpose of adjudicative 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. A review process invokes the so-called sentinel effect, which holds that decisions may be better when decisionmakers know their work will be scrutinized.[269] In addition, a system of internal review facilitates quality assurance mechanisms by creating a database of potentially problematic

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267 Executive Order 13,892, § 6(a), revoked by Executive Order 13,992, § 2, *supra* note 238.

268 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. 57,461 (Dec. 30, 1983). There are hundreds of appellate review schemes in federal agencies. These schemes are diverse and many do not conform to the APA's Type A appeal scheme. APA § 557(b). *See* Walker & Wiener, *supra* note 4. 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.

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

situations, as discussed in Best Practice I. Finally, the ability to get someone to take a second look at a negative decision in order to correct errors enhances user satisfaction with the administrative process.[270]

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.

G. Ombuds

As discussed earlier,[271] the Administrative Conference has recommended that federal agencies consider the institution of ombuds. An external ombuds is empowered to receive and investigate and attempt to resolve complaints from persons outside the agency, but not the power to compel the agency to do anything. Ombuds in numerous federal agencies are empowered to consider complaints arising in the informal adjudication process.[272] An ombuds can play a significant

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[270] TYLER, text at *supra* note 226.
[271] Part III. F.
[272] In addition to the National Taxpayer Advocate and the Small Business Administration's Office of National Ombudsman, discussed in text at notes 185-88, Lubbers identifies numerous federal ombuds whose powers include investigation of informal adjudication, such as the Department of Education Student Loan Ombudsman. Lubbers, *supra* note 186 at 17-19.

role in achieving fair and acceptable informal adjudication, because the ability to complain to an ombuds can compensate in part for the absence of an evidentiary hearing. Moreover, an ombuds who hears recurring complaints about a particular administrative scheme can suggest reforms of the adjudication process, as discussed in Best Practice I.

As previously discussed,[273] judicial review is not a feasible or affordable remedy for most Type C disputants. Many instances of abuse of discretion or procedural errors in initial Type C decisions can be corrected at the level of internal agency review, as suggested in Best Practice F. However, the value of such review is limited since reviewers may be reluctant to criticize or second-guess the work of initial Type C decisionmakers.[274] Moreover, internal agency reviewers are unlikely to initiate wide-scale investigations into issues raised by the appeals that come before them. Thus, the internal review process is unlikely to lead to changes in agency rules and procedures. Many Type C litigants, especially if unrepresented, lack the necessary skills to manage a persuasive appeal. And the issues they raise, such as disrespect or incivility by the agency decisionmaker, may be beyond the power of internal reviewers to consider and remedy.[275] Yet in the minds of private disputants, the decisonmaker's perceived respect and civility is

[273] Part III. G.
[274] Ames et al., *supra* note 218 at 61-62.
[275] Hauk, Part I, 26-27, *supra* note 183.

the second most important element of procedural justice behind decisionmaker neutrality.[276]

Best practice is for an agency conducting informal adjudication to have in place an ombuds empowered to receive complaints, investigate, mediate, and advocate. The ombuds should have authority to receive complaints about a broad range of actions taken by agency officials, including but not limited to Type C adjudication. Complaints might concern failure to follow required procedures, disrespect or incivility. The ombuds acts informally and charges no fees. The ombuds must have independence and stature within the agency structure and be equipped to handle complaints confidentially and impartially.[277] The ombuds must have a sufficiently large staff to handle the volume of complaints in a timely manner. Smaller agencies should be able to share a single ombuds.

If the ombuds believes that a complaint is justified, he or she could mediate the dispute, recommend that the matter be reconsidered by a different decisionmaker or a new appellate reviewer, or take some other appropriate remedial action. 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 could advocate for such changes.

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[276] *See* text at *supra* note 227.

[277] Independence, confidentiality, and impartiality are the three core standards of ombudsman practice. Houk Part I, *supra* note 183.

H. Procedural Regulations

It should go without saying that 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.[278] Although the APA does not require agencies to use the usual notice-and-comment process for adopting procedural regulations,[279] agencies should nevertheless use that process for the adoption of significant procedural regulations. This process enables affected stakeholders a chance to weigh in on the tradeoffs necessarily inherent in adopting adjudicatory procedures.[280]

Such regulations should include details relating to the best practices already mentioned. Other essential details include the identity and assignment of decisionmakers, disclosure of the agency's file, opportunities for negotiation with

[278] Gardner's proposed "Informal Procedure Act of 1980" relied primarily on provisions that required agencies to adopt procedural regulations. Gardner, *supra* note 6 at 158-66.
[279] 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). These categories are frequently the subject of Type C adjudication. And notice and comment is not required for adoption of guidance documents. APA § 553(b)(A).
[280] *See* Admin. Conf. of the U.S., 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 procedures in promulgating procedural rules except in situations in which the costs of such procedures outweigh the benefits of receiving public input).

the staff before the dispute goes to the agency decisionmaker, forms, and deadlines.

Agencies should follow up procedural regulations with guidance documents, staff manuals, and plain-English FAQs that are easily accessible on the internet and more user-friendly than regulations.[281] 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. And, of course, agencies are obligated to follow their procedural regulations, even if the regulations provide protections that the agency was not legally required to adopt.[282]

This recommendation is based on 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."[283] In addition, the APA requires that the agency publish "rules of procedure, descriptions of forms available or the places at which forms

[281] *See* Walker & Wiener, *supra* note 4 at 23-27 for discussion of the need for agencies to adopt both regulations and guidance documents concerning appeals within the agency.
[282] Service v. Dulles, 354 U.S. 363, 388 (1957); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).
[283] APA § 552(a)(1)(B).

may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations."[284]

I. Quality Assurance Systems

An agency that performs informal adjudication should consider adoption of a quality assurance system.[285] Such systems are internal mechanisms designed to collect data and to detect and remedy problems in individual adjudications as well as systemic problems in adjudicative programs. Such systems 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, and inefficient procedures. They examine the entire adjudicative process, including investigation, initial decisionmaking, and internal appellate 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."[286]

[284] APA § 552(a)(1)(C). As discussed above, in Part III G., 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.
[285] *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).
[286] See Ho, Marcus & Ray, *supra* note 222.

Obviously, the informal adjudication systems discussed in this report vary enormously and no single type of quality assurance system would be appropriate for all of them.[287] 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.

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, informal adjudication systems should be periodically evaluated to assure their procedures strike the optimal balance of accuracy, efficiency, and perceived fairness.

VI. CONCLUSION

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[287] USDA's 15d program includes a quality assurance system in which an auditor reviews a sample of cases. *See* Part II. A. 3.

Type C adjudication is everywhere. The federal government could not function without conducting massive amounts of it. Type C adjudication is difficult to study and describe because of its vast scale and diversity, and it resists regulation by trans-substantive procedural statutes.

This Report 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 wise exercise of discretion. These procedures should be efficient and be 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 decisionmaking.

This Report suggests a modestly demanding set of best practices for conducting Type C adjudication. These practices are grounded in existing sources of law and practice. For the most part, agencies engaged in Type C adjudication already observe these practices. These best practices 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 who have disputes with the government. They deserve attention from administrative and public administration scholars and from every agency that engages in informal adjudication.