

DRAFT REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

FAIR PROCEDURE IN INFORMAL ADJUDICATION

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Michael Asimow*

Table of Contents

I. INTRODUCTION	3
A. Three Types of Administrative Adjudication	4
B. Definitions	9
1. Adjudication	9
2. Evidentiary hearing	13
II. THE WORLD OF TYPE C ADJUDICATION	15
A. Grants, Benefits, Loans and Subsidies	15
1. National Science Foundation grant applications	15
2. Insurer decisions under the Affordable Care Act (ACA)	17
3. Department of Agriculture Anti-Discrimination	18
4. Department of Energy Loan Guarantees	22
5. Community Development Financial Institutions Program	22
B. Licensing and permitting	23
1. Licensing of National Banks	23
2. Food and Drug Administration (FDA) Licensing of Tobacco Products	24
3. Portability Administrator (FCC)	25
4. U. S. Forest Service (USFS) Licensing of Private Use of National Forests	26
5. Fish and Wildlife Service (FWS) Protection of Wild Animals	26
C. Immigration	27
1. Expedited Removal of Undocumented Aliens By Department of Homeland Security	27
2. U.S. Citizen and Immigration Services (USCIS) Review of Visa Applications	28
3. USCIS Naturalization Decisions	29
4. State Department Review of Voluntary Expatriation	30
D. Land Use Approvals—Federal Energy Regulatory	

Commission (FERC) approval of hydropower licenses	30
E. Foreign policy and National Security	
Determinations	36
1. Petitions to OFAC to Delist Persons	
Subject to Economic Sanctions	36
2. Prevention of Takeovers by CFIUS	38
3. Transportation Security Administration (TSA)	
No-fly List	39
F. Inspections, Grading, and Testing	39
1. Bank supervision	39
2. Fish inspections	41
3. Federal Aviation Administration (FAA)	
Medical Approvals for Pilots	42
4. Adulterated Food	42
5. TSA Aircraft Security	43
G. Orders subject to De Novo Judicial Review	43
1. Retailer Disqualification	43
2. FOIA Requests	44
H. Orders relating to tariffs, tax, and debt collection	45
1. Tariff Classification Rulings	45
2. IRS Collection due process (CDP)	46
3. Denial or Revocation of Passports for Seriously	
Delinquent Tax Debts	50
I. Other Discretionary actions	51
1. USPC Decisions to Deny Parole	51
2. SEC Whistleblower Awards	53
III. LEGAL PROTECTIONS FOR PRIVATE PARTIES	
ENGAGED IN TYPE C ADJUDICATION	54
A. Consultative Due Process	55
B. Government Ethics	59
C. Right to Counsel under Administrative Practice Act & APA	60
D. APA § 555	63
1. Right to Appear	63
2. Reasons for Denial of Applications	65
E. APA Section 558(c)--Licensing Disputes	68
F. Ombuds	69
G. Freedom of Information Act Pro-Active Disclosure	71
H. Judicial Review	72
IV. THE BEST PRACTICES APPROACH TO PROVIDING	

PROCEDURAL PROTECTION IN INFORMAL ADJUDICATION	76
A. Public Administration and Best Practices	76
1. Infeasibility of Statutory Solutions	76
2. Public Administration and Internal Administrative Law	79
B. Best Practice Methodology	82
1. Best Practices as Raw Material	82
2. Factors that Agencies Must Balance	84
a. Stakes	84
b. Accuracy	85
c. Efficiency	85
d. Fairness and Acceptability	86
3. Criticisms of Best Practice Methodology	88
C. Sources for Best Practices in Type C adjudication	89
V. PROPOSALS FOR BEST PRACTICES IN INFORMAL ADJUDICATION	90
A. Notice	90
B. Opportunity to Submit Evidence and Argument	93
C. Representation	95
D. Decisionmaker Neutrality	97
E. Statement of Reasons	100
F. Administrative Review	101
G. Ombuds	103
H. Procedural Regulations	105
I. Quality Assurance	107
VI. CONCLUSION	109

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

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¹ The Type A-B-C typology was introduced in an ACUS Report. Michael Asimow, “Adjudication Outside the Administrative Procedure Act” (March 24, 2016) (hereinafter 2016 ACUS Report), <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>. That report was implemented ACUS Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94314 (Dec. 23, 2016). The 2016 Report was expanded and published as a book. MICHAEL ASIMOW, *FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT* 89-103 (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 (Dec. 6, 2022) (hereinafter Walker et al.).

² 5 U.S.C. §§ 554, 556-57.

³ 5 U.S.C. § 554(a).

Administrative Law Judge (ALJ) and subjected to a variety of procedural 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

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) 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” (ACUS Report 2020); ACUS Recommendation 2020-3; 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 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 hearings. These procedures may include document exchanges and submission of

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 Congressional Research Service, *Informal Administrative Adjudication: An Overview*, <https://crsreports.congress.gov> (search for R46930) (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).

research studies, as well as oral arguments, public hearings, conferences with staff, interviews, negotiations, examinations, or inspections. Of course, agencies engaged in Type A or B adjudication also make use of these informal dispute resolution techniques as preliminaries to a formal evidentiary hearing and in attempting to settle cases.⁷ In contrast, agencies conducting Type C adjudication employ informal procedures to generate a legally binding decision 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 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 of an employee to 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, new drug marketing approvals, and issuance of bank charters. 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

⁷ See Bremer, *supra* note 4, 99 WASH U. L. REV. at 402-12, pointing out that most Types A and B adjudications include both informal and formal stages.

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, and statutes specific to particular regulatory schemes. The judicial review process generates certain procedural constraints on agency decisionmaking.¹⁰ Agencies conducting Type C adjudication are often constrained by due process requirements.¹¹ Finally, and perhaps most importantly, agencies are bound by their own voluntarily-adopted procedural regulations.

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

⁸ See Part III. C. and D.

⁹ See Part III. B and C.

¹⁰ See Part III F.

¹¹ See Part III A.

circumstances of one informal activity and is applied without reexamination to another.¹²

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.¹³ This is emphatically not an area where one size fits all.

B. Definitions

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

1. Adjudication

¹² Gardner, *supra* note 7 at 157.

¹³ See text at note 16 and 61, *infra*.

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 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.

¹⁴ This definition does not track the definitions of adjudication and rulemaking contained in the APA which 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 (it is of particular applicability and future effect), but everyone treats it as adjudication. See ACUS Sourcebook 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 “(the only responsible attitude toward the central APA definition is one of benign disregard”).

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," yet they entail environmental, public health, and economic impacts that fall on the general public.¹⁵ 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).

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

¹⁵ See Part II. D.

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.¹⁶ 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.¹⁷

The report includes administrative proceedings that can be followed by de novo judicial trials if the private party is dissatisfied with the administrative decision.¹⁸ Typically, such proceedings involve Type C adjudication since there may be less need for an evidentiary administrative hearing when a de novo judicial trial is available. However, fair informal adjudication procedures are important in such 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.¹⁹

¹⁶ 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).

¹⁷ 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 (ACUS Report, 2018) (treating patent applications as a Type C adjudicatory process).

¹⁸ See Part II. C. 1 and G. 3 .

¹⁹ See Part III. G. The author's previous work on Type B adjudication excluded matters subject to de novo judicial review. See ACUS Sourcebook 9. This Report does include such schemes because of the practical importance of fair informal administrative procedures and the likelihood that judicial review will be infeasible.

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).²⁰ 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 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 the hearing is adversarial or inquisitorial, the decisionmakers must be neutral and unbiased. They must not play conflicting roles

²⁰ See Asimow, ACUS study, *supra* note 1 at 4; Bremer, *supra* note 4, 99 Wash U L R 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 ACUS Rec. 2019-6; Jeremy S. Graboyes, “Independent Research by Agency Adjudicators in the Internet Age,” https://www.acus.gov/sites/default/files/documents/2019-10-31%20Internet%20Evidence%20-%20Final%20Report_0.pdf

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 precision. The Report does not call for enactment of a statute that would have to contain precise and judicially manageable definitions. 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 practices this Report recommends for Type C.²¹ However, both this Report and ACUS Recommendation 2016-4 suggest that proposed best practices be adapted to the particular circumstances of each adjudicatory system 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

²¹ ACUS Recommendation 2016-4.

discussed below represent only a small fraction of the total number of such schemes.²² 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 Type C adjudication schemes roughly grouped into nine somewhat overlapping categories. Some but not all of the descriptions include interview data. The Report protects the anonymity of interviewees.

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.²³

One Type C scheme applies to proposals declined for financial or administrative reasons. The proposer has an opportunity to obtain clarification by

²⁰ Most agencies also entertain requests for waivers from the requirements of a statute or regulation and resolve these requests through Type C adjudication. This Report does not discuss waiver proceedings, but they are extremely common. See ACUS Rec. 2017-7; Aaron L. Nielson, Regulatory Waivers and Exemptions Final Report, <https://www.acus.gov/contacts/aaron-l-nielson>.

²³ 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* (ACUS Report, May 1993); *Disputes Under Federal Grant Programs*, ACUS Rec. 88-2 and 71-4.

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.

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.²⁴

2. Insurer Decisions under the Affordable Care Act (ACA). The ACA regulations provide for a “review of adverse benefit determinations by health insurers or group health plans” based on medical judgments.²⁵ 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.²⁶ The IRO must provide written notice of its decision within 45 days including “a discussion of the

²⁴ See PAPPG, *supra* note 20, chap. XII B.

²⁵ 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).

²⁶ 42 C.F.R. § 147.136(d)(5).

principal reason or reasons for its decision, including the rationale for its decision and any evidence-based standards that were relied on in making its decision.”²⁷

3. U. S. Department of Agriculture (USDA) Anti-Discrimination.²⁸ USDA maintains a system of informal adjudication (known as the “15d procedure”) to remedy prohibited discrimination in USDA programs.²⁹ 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 prohibited discrimination as well.³⁰ Persons who believe they were the victims of illegal discrimination in a loan program can bring suit under the Equal Credit Opportunity Act (ECOA).³¹ 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

²⁷ 45 C.F.R. § 147.136(d)(7)(iv).

²⁸ Interview with USDA 1 provided data about USDA’s anti-discrimination procedure.

²⁹ 7 C.F.R. Pt. 15d.5.

³⁰ See, e.g., *Pigford v. Glickman*, 206 F.3d 1212 (D. C. Cir. 2000).

³¹ 15 U.S.C. §§1691-1691f.

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 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.³²

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

³² 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."³² Johnson v. Vilsack, 833 F.3d 948, 953-58 (8th Cir. 2016) (internal quotation marks and citation eliminated).

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. 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.³³ 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 application and provide a list of items that may be corrected or amended to satisfy the requirements that would create an eligible application.³⁴

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.³⁵ 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

³³ See Energy Policy Act of 2005, 42 U.S.C. § 16511 et seq.

³⁴ 10 C.F.R. § 609.5(d).

³⁵ 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*, forthcoming Duke L.J. (2023), ms. p. 48.

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 any formal or informal hearing or comparable proceeding not otherwise required by law.³⁶

B. Licensing and Permitting

The term “license” refers to any “form of permission” by a federal agency.³⁷ Agencies engaged in licensing and other permitting programs frequently resolve disputes through Type C adjudication.³⁸

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

³⁶ 12 C.F.R. § 1805.801(g).

³⁷ 5 U.S.C. § 551(8).

³⁸ 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).

community.³⁹ 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 with interested parties.⁴⁰ The process ends with a concise order including a cursory explanation of the decision granting or denying the charter.⁴¹

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.⁴² 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

³⁹ 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.

⁴⁰ 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).

⁴¹ Zaring, *supra* note 33 at 1433.

⁴² See Adam I. Muchmore, *Marketing Authorization at the FDA: Paradigms and Alternatives*, 74 ADMIN. L. REV. 539 (2022); Daniel G. Aaron, *The Fall of FDA Review*, -- YALE J. OF HEALTH POLICY, LAW, AND ETHICS -- (2023).

parties and extensive scrutiny by expert committees of experimental data of safety and efficacy.⁴³

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 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.⁴⁴

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).⁴⁵ The FCC selected Telcordia to replace Neustar as an LNPA after utilizing an informal adjudication process that resembled notice-and-comment rulemaking. A

⁴³ FDA, Development and Approval Process/Drugs, <https://www.fda.gov/drugs/development-approval-process-drugs>.

⁴⁴ 21 U.S.C. § 387j(c)(4); 21 C.F.R. §§ 1114.25 to 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).

⁴⁵ 47 U.S.C. § 251(e)(1).

court described it as an “interactive public process.”⁴⁶ 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. U.S. Forest Service (USFS) Permits for private use of National Forests.

This is a placeholder because we may delete this procedure as it may be classified as Type B adjudication rather than Type C—pending further interviews]

5. Fish and Wildlife Service (FWS) Protection of Wild Animals. FWS

operates various permitting systems relating to the protection of wild birds and animals, including permits for the import of wild animal trophies.⁴⁷ 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.⁴⁸

Decisional officials are instructed to use any relevant available information, so that there is no exclusive record.⁴⁹ The regulations provide for an appeal to the

⁴⁶ *Neustar, Inc. v. FCC*, 857 F.3d 886, 895 (D.C. Cir. 2017).

⁴⁷ *See* 50 C.F.R. §§ 13.11 and .12 for a list of the various conservation programs requiring permits; *Marcum v. Salazar*, 694 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).

⁴⁸ 50 C.F.R. §§ 13.15 to .28.

⁴⁹ 50 C.F.R. § 13.21(d).

Regional Director. That official can permit oral argument if necessary to clarify the record.⁵⁰

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.⁵¹ 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.

Expedited removal proceedings arise when undocumented aliens are captured near the border.⁵² 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

⁵⁰ 50 C.F.R. §13.29(f).

⁵¹ See 8 C.F.R. § 235.3.

⁵² 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).

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.⁵³

2. U.S. Citizen and Immigration Services (USCIS) Review of Visa

Applications. Visa applications give rise to millions of Type C adjudications each year.⁵⁴ 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

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

⁵⁴ 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, note 4, Appendix D; <https://www.uscis.gov/about-us/organization/directorates-and-program-offices/the-administrative-appeals-office-aa0>.

visa. If the reviewing officer disagrees with the decision, that officer can assume responsibility and re-adjudicate the case. No hearing is provided.⁵⁵

3. USCIS Naturalization Decisions.⁵⁶ 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.”⁵⁷ A USCIS officer conducts a personal interview with the applicant that includes a language and history test.⁵⁸ 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.⁵⁹ Denial of the petition is subject to de novo judicial review in federal district court.⁶⁰

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

⁵⁶ See Emily Ryo & Reed Humphrey, *Citizenship Disparities*, SSRN 4052979, -- Minn. L. Rev. – (2023), pp. 13-21 (criticizing disparities in naturalization decisions between different USCIS offices).

⁵⁷ 8 U.S.C. §§ 1423, 1424, 1427.

⁵⁸ 8 C.F.R. § 1447; <https://www.uscis.gov/policy-manual/volume-12-part-b-chapter-3>;
<https://www.uscis.gov/policy-manual/volume-12-part-b-chapter-4>

⁵⁹ <https://www.uscis.gov/policy-manual/volume-12-part-b-chapter-6>

⁶⁰ 8 U.S.C. § 1421(c); 8 C.F.R. § 336.9.

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.⁶¹ 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 to fill out various forms.⁶² There is no provision for any procedural protections other than this interview.⁶³

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

Federal government approval is required for numerous 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.”⁶⁴

⁶¹ 8 U.S.C. § 1401(a)(1).

⁶² Foreign Affairs Manual, §1227(a)(4).

⁶³ 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.

⁶⁴ 5 U.S.C. § 551(6), (8).

Using the more functional definitions discussed earlier,⁶⁵ 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. 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.⁶⁶ 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

⁶⁵ See text at *supra* notes 15-16.

⁶⁶ 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) .

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.⁶⁷ Numerous federal adjudicatory schemes involve agency consideration and approval of applications for development projects. The approval process resembles rulemaking more 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.⁶⁸ 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.⁶⁹

⁶⁷ Details of the FERC hydropower process were provided by interviews with FERC-1 and FERC-2.

⁶⁸ See Jody D. Lowenstein & Samuel J. Panarella, *Troubled Water: Building a Bridge to Clean Energy Through Small Hydropower Regulatory Reform*, 36 UCLA J. OF ENVIR. LAW & POLICY 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 LAW 37, 100-102 (2022).

⁶⁹ FERC, HYDROPOWER PRIMER 29, <https://www.ferc.gov/media/hydropower-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

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.⁷⁰ The application provides detailed information about the project and the studies to be performed. A preliminary permit authorizes the applicant to study a project site for a four-year period (which could be extended 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.⁷¹ 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

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.

⁷⁰ See 18 C.F.R. §§ 4.80 to 4.84.

⁷¹ See Primer, note 66 at 30-32.

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 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 3⁷² 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, 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.

⁷² Primer 31.

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.⁷³

[This is a placeholder while this case study is finalized.]

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

⁷³ Interview with OFAC 1 provided data about delisting procedure.

unclassified evidence on which CFIUS and the President relied. In addition, the parties must be given an opportunity to rebut that evidence.⁷⁴

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.⁷⁵ A number of cases apply due process analysis to no-fly determinations. These decisions require the agency to provide access to unclassified information that would enable the listed person to rebut the listing decision.⁷⁶

F. Inspections, Grading, and Testing

A large number of disputes between private parties and government agencies are resolved by inspections or tests.⁷⁷

1. Bank Supervision. Banks and bank holding companies are closely supervised by several federal agencies, depending on the size of the bank and

⁷⁴ *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. Department of State*, 251 F.3d 192, 208-09 (D.C. Cir. 2001), concerning procedures for designation of a Foreign Terrorist Organization.

⁷⁵ 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.

⁷⁶ *Chachko*, *supra* note 66 at 1105-09.

⁷⁷ See Final Report, *supra* note 7 at 35-38. The APA exempts from its Type A requirements "proceedings in which decisions rest solely on inspections, tests, or elections." 5 U.S.C. § 554(a)(3).

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.

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.⁷⁸ The appeal must be heard and decided expeditiously.⁷⁹ 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

⁷⁸ See 12 U.S.C. § 4806(a), (b), (f)(1) and (2).

⁷⁹ 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.

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.⁸⁰

The banking regulatory agencies also engage in stress testing to determine the adequacy of a bank's capital.⁸¹ 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 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.⁸²

2. Fish inspections. A voluntary fish inspection program by the Department of Commerce depends entirely on inspections. A manufacturer that disagrees with

⁸⁰ Notice, Internal Appeal Process, 60 Fed. Reg. 16470 (1995).

⁸¹ See Daniel K. Tarullo, *Bank Supervision and Administrative Law*, 2022 COLUM. BUS. L. REV. 279.

⁸² 12 C.F.R. § 225.8(h), (i), (j); see Tarullo, *supra* note 76, at 322-25. See also *Metlife, Inc. v. Financial 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.

the report of the original inspector is entitled to an appeal in the form of a re-inspection conducted by different inspectors.⁸³

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.⁸⁴

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.⁸⁵ 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.⁸⁶ However, there must be proper notice so that the opportunity to appear and introduce testimony will be meaningful.⁸⁷

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

⁸⁴ *See* 14 C.F.R. §§ 67.401, .407, .409.

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

⁸⁶ *Sugarman v. Forbragt*, 267 F. Supp. 817 (N.D. Cal.1967), *aff'd*, 405 F.2d 1189, 1190 n.3 (9th Cir. 1968).

⁸⁷ *L&M Industries v Kenter*, 458 F.2d 968, 970 (2d Cir. 1972).

5. TSA Aircraft Security.⁸⁸ 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

When an agency order is subject to de novo judicial review, agencies typically do not conduct evidentiary hearings prior to rendering adjudicatory decisions.⁸⁹

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

⁸⁸ See 49 C.F.R. § 1544.105; *Amerijet International, Inc. v. Pistole*, 753 F3d 1343 (D.C. Cir. 2014).

⁸⁹ 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.” 5 U.S.C. § 554(a)(1). For additional examples of Type C adjudication subject to de novo judicial review, see discussion of discrimination in administration of agricultural loans, Part II A.3, naturalization disputes, Part II C. 2, and revocation of taxpayer’s passport Part II. H. 3.

regulations providing for administrative review.⁹⁰ 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.⁹¹ Decisions disqualifying vendors are subject to de novo judicial review.⁹²

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.⁹³ 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

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

⁹¹ 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).

⁹² 7 U.S.C. § 2023(a)(14). See *Broad St. Food Market v. U.S.*, 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).

⁹³ 10 C.F.R. § 1004.5, .7

will not be disclosed. A rejected FOIA request is subject to de novo judicial review in the federal district court.⁹⁴

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).⁹⁵ Most TCRs are issued by local CBP field offices, but either the staff or the importer can request a TCR from CBP headquarters.⁹⁶ 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.⁹⁷ 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."⁹⁸ 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

⁹⁴ 5 U.S.C. §552(a)(4)(B).

⁹⁵ See 19 C.F.R. §§ 177.0 to 177.13.

⁹⁶ 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).

⁹⁷ 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) to (e).

⁹⁸ 19 C.F.R. § 177.4(a).

reconsidered by CBP headquarters. Local offices issue about 10,000 TCRs each year.

2. Internal Revenue Service (IRS) Collection Due Process (CDP).⁹⁹

[This is a placeholder while this case study is finalized.]

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.”¹⁰⁰ 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.

⁹⁹ IRS-1 furnished interview data on the CDP process. *See* Andy Kelso, “A Closer Look at the IRS Independent Office of Appeals,” <https://www.irs.gov/about-irs/a-closer-look-at-the-irs-independent-office-of-appeals>.

¹⁰⁰ INT. REV. C. § 7345; IRS 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>. *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. 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.

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 erroneous certification issues.¹⁰¹ 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.¹⁰² It is unsettled whether the scope of review in such actions is de novo or arbitrary and capricious.¹⁰³

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,¹⁰⁴ USPC set the

¹⁰¹ “Revocation or Denial of Passport in Cases of Certain Unpaid Taxes,” *supra*.

¹⁰² Int. Rev. Code § 7345(e).

¹⁰³ *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.

¹⁰⁴ *See* 18 U.S.C. §§ 4201-18. Prior to 1976, the agency was called the U.S. Board of Parole. For discussion of its procedures as of 1972, see ACUS Rec. 1972-3, <https://www.acus.gov/sites/default/files/documents/72-3.pdf>

dates for parole release of federal prisoners. The regulations described an informal hearing procedure in which a hearing examiner (or a panel of examiners) considered the prisoner's offense severity rating and salient factor score and the prisoner's institutional conduct along with any other matter the examiner deemed relevant. Examiners conducted a brief personal interview with the prisoner and the prison counselor. Prisoners did not have access to their file but were usually given some indication of 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.¹⁰⁵ 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.¹⁰⁶ The prisoner could appeal the decision to the National Appeals Board.¹⁰⁷ The prisoner could seek review of the

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

¹⁰⁶ 28 C.F.R. § 2.24.

¹⁰⁷ 28 C.F.R. § 2.26.

parole decision by bringing a writ of habeas corpus, but the courts upheld the decision if it had a rational basis.¹⁰⁸

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.¹⁰⁹ Payment of such awards is “at the discretion of the Commission.”¹¹⁰ Under the SEC’s regulations,¹¹¹ 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.¹¹² 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

¹⁰⁸ *Furnari v. Warden*, 218 F.3d 250, 254 (3d Cir. 2000).

¹⁰⁹ 15 U.S.C. § 78u-6. The whistleblower award shall be between 10% and 30% of the amount collected.

¹¹⁰ 15 U.S.C. § 78u-6(f).

¹¹¹ 17 C.F.R. § 240.21F-10.

¹¹² 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.

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.¹¹³

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.¹¹⁴ Fact findings are reviewed based on substantial evidence and the ultimate decision is reviewed for abuse of discretion.¹¹⁵

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

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

¹¹⁴ 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.*

¹¹⁵ *Kilgour v. SEC*, 942 F.3d 113, 120 (2d Cir. 2019).

because informal adjudication lacks many of the statutory and regulatory constraints and private-party protections that apply to Types A and B adjudication.

A. Consultative Due Process

Under the Fifth Amendment (applicable to the federal government) and the Fourteenth Amendment (applicable to state and local government), no person shall be deprived of life, liberty, or property without due process of law. Procedural due process is the subject of a vast body of case law and scholarly literature.¹¹⁶ For present purposes, it is sufficient to note that the definitions of “liberty” and “property” are both capacious and controversial.¹¹⁷ 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.¹¹⁸ “Liberty” means freedom from physical confinement or abuse by government agencies as well as benefits provided by other constitutional

¹¹⁶ 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 3d edition].

¹¹⁷ 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.

¹¹⁸ *Board of Regents v. Roth*, 408 U.S. 564, 575-78 (1972).

provisions (such as freedom of speech). It also covers freedom from governmentally-imposed stigma as well as various traditional freedoms such as the right to marry, engage in various occupations, and enjoy “those privileges long recognized...as essential to the orderly pursuit of happiness by free men.”¹¹⁹

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.¹²⁰ 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.¹²¹ The same idea is conveyed by the requirement that due process requires a hearing that is “granted at a meaningful time and in a

¹¹⁹ *Id.* at 572-75.

¹²⁰ *Goldberg v. Kelly*, 397 U.S. 254, 268-71 (1970).

¹²¹ *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); see Friendly, *supra* note 7 at 1294-1304.

meaningful manner.”¹²² Courts determine the required elements of due process on 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.¹²³

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*,¹²⁴ 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

¹²² *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

¹²³ *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

¹²⁴ 419 U.S. 565 (1975).

witnesses to verify his version of the incident.”¹²⁵ In other words, the school 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,¹²⁶ prison disciplinary proceedings,¹²⁷ and pre-termination employment discharges.¹²⁸ Although the specifics differ, the common core of the consultative due process cases is notice sufficient to permit the private

¹²⁵ *Id.* at 581-83. Some cases hold that even this bare-bones procedure can be dispensed with if a de novo judicial hearing is available. *Ingraham v. Wright*, 430 U.S. 651 (1977).

¹²⁶ *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.”

¹²⁷ *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).

¹²⁸ *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.

party to challenge the decision,¹²⁹ an opportunity to confer or submit documents to the decisionmaker, and a statement of reasons for the decision.

B. Government Ethics

All federal government employees are bound by a statutory and regulatory code of ethical conduct. The code identifies financial conflicts of interest that require the employee to be disqualified from participating in a particular matter.¹³⁰ 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.”¹³¹

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

¹²⁹ 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 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).

¹³⁰ 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, <https://www.acus.gov/sites/default/files/documents/Recusal-Rules-for-Administrative-Adjudicators-Final-Report-11.30.2018.pdf>

¹³¹ 5 C.F.R. § 2635.101(b)(8).

effect on that interest.”¹³² The definition of “particular matter” makes clear that the disqualification rule apply to employees engaged in resolving adjudicatory disputes.¹³³ The regulations permit agencies to adopt a conflict of interest code that supplements the across-the-board ethics provisions.¹³⁴

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.”¹³⁵ This provision insures a

¹³² 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 in the matter, the employee should not participate in the matter” [without having received authorization to do so]. *Id.*

¹³³ 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.” 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. 5 C.F.R. § 2635.402(b)(3). 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).

¹³⁴ 5 C.F.R. § 2635.105.

¹³⁵ 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).

right of representation by counsel in all agency proceedings, including Type C adjudication.

The Administrative Practice Act supplements the requirements of APA § 555(b) which provides: “A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.”¹³⁶ 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.¹³⁷ 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.¹³⁸

¹³⁶ 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).

¹³⁷ See *Professional Reactor Operator Soc. 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.” The court held that counsel of the witness’ choice cannot be excluded absent “concrete evidence that his presence would obstruct and impede the investigation.”

¹³⁸ *Laccetti v. SEC*, 885 F.3d 724 (D.C. Cir. 2018); *Whitman v. SEC*, 613 F. Supp. 48 (D.D.C. 1985).

The Administrative Practice Act and § 555(b) neither grant nor deny a private party the right to be represented by a non-lawyer.¹³⁹ The *Attorney General's Manual* states that it is up to agencies whether to allow non-lawyers to practice before them or to set reasonable time limits during which former employees may not practice before them.¹⁴⁰

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.¹⁴¹ 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.¹⁴² 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.¹⁴³

¹³⁹ The Administrative Practice Act provides: "This section does not—(1) grant or deny to an individual who is not qualified as provided by subsection (b)...the right to appear for or represent a person before an agency or in an agency proceeding." 5 U.S.C. § 500(d)(1). Similarly, § 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."

¹⁴⁰ ATTORNEY GENERAL'S MANUAL, *supra* note 133, at 65–66; *see also* Herman v. Dulles, 205 F.2d 715, 717 (D.C. Cir. 1953).

¹⁴¹ See Brittany Benjamin, *Accredited Representatives and the Non-Citizen Access to Justice Crisis*, 30 STAN. L. & POL. REV. 263 (2019).

¹⁴² *See* ACUS Sourcebook, *supra* note 1 at 181-82.

¹⁴³ Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985).

D. APA § 555

Section 555 of the APA provides a set of modest protections for private parties involved in adjudicatory disputes with federal government agencies. In addition to the right to counsel discussed in the preceding subsection, the most important parts of § 555 provide a right to “appear” and a requirement that agencies provide reasons for denying applications. In addition, § 555 provides that matters must be concluded within a reasonable time, that parties have a right to transcripts, and that subpoenas can only issue as provided by law.¹⁴⁴ Obviously, the scatter-shot provisions of § 555 do not set forth a code of procedure for Type C adjudication,¹⁴⁵ 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.”¹⁴⁶ This provision allows an interested person to make a

¹⁴⁴ 5 U.S.C. §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?)

¹⁴⁵ Bremer, 2019 WISC. L. REV. at 1400-01, *supra* note 1.

¹⁴⁶ Section 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

submission to agency heads or to relatively high-level staff members¹⁴⁷ in informal adjudication (as well as in other agency functions).¹⁴⁸

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.”¹⁴⁹ Thus, the right to “appear” in § 555(b) might extend consultative due process rights¹⁵⁰ to informal adjudication contexts even though due process does not apply.¹⁵¹ The right to appear in the APA is limited by the

with counsel or other duly qualified representative in an agency proceeding.” This provision is not subject to the “orderly conduct of public business” provision that conditions the right to appear by interested persons.

¹⁴⁷ 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 133 at 63.

¹⁴⁸ 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).

¹⁴⁹ ATTORNEY GENERAL’S MANUAL, *supra* note 133 at 63.

¹⁵⁰ See Part III. A.

¹⁵¹ 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

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.”¹⁵² 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 section 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.”¹⁵³ This reason-giving requirement has broad application and may be the most significant portion of §

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. The equation of the right to appear in § 555(b) and consultative due process is questionable, however. The *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).

¹⁵² ATTORNEY GENERAL’S MANUAL, *supra* note 133 at 63.

¹⁵³ *Id.* at 70.

555. It seems similar to the requirement of reason-giving imposed by due process¹⁵⁴ but is less demanding than the reason-giving requirements imposed by the APA in Type A adjudication.¹⁵⁵

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

¹⁵⁴ “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).

¹⁵⁵ In Type A adjudication, an ALJ’s decision must include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record.” 5 U.S.C. § 557(c)(A); *see George Transfer & Rigging Co. v. United States*, 380 F. Supp. 179, 186 (D. Md. 1974).

prejudice.”¹⁵⁶ Numerous additional cases have applied the reason-giving requirements of section 555(e).¹⁵⁷

The reason-giving requirement of § 555(e) overlaps with the reason-giving requirement for judicial review which is discussed below.¹⁵⁸ An unexplained agency action violates both § 555(e) and the APA’s arbitrary and capricious test. Several cases equate the two reason-giving requirements.¹⁵⁹ 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.¹⁶⁰

¹⁵⁶ *Roelofs v. Sec’y of the Air Force*, 628 F.2d 594, 599-600 (D.C. Cir. 1980); *see 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).

¹⁵⁷ *King v. United States*, 492 F.2d 1337, 1343 (7th Cir. 1974) (parole board must state reasons for denial of parole); *Washington v. OCC*, 856 F.2d 1507, 1513 (11th Cir. 1988) (Comptroller of Currency must state reasons for rejecting a public hearing on bank merger); *Butte County v. Hogen*, 613 F.3d 190, 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. Transportation Security Admn.*, 20 F.4th 57, 63-65 (D.C. Cir. 2021) (TSA must explain why it rejected airline’s request for refund of fees paid by mistake); *Amerijet Int’l, Inc. v. Pistole*, 753 F.3d 1343, 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).

¹⁵⁸ See Part III. G.

¹⁵⁹ *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).

¹⁶⁰ *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

E. APA § 558(c)--Licensing Disputes

Section 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.”¹⁶¹

Section 558(c) does not provide a right to a hearing (formal or informal) in the case of a license withdrawal.¹⁶² 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.”¹⁶³ In addition, § 558(c) requires that the licensee have an opportunity to demonstrate or achieve

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.

¹⁶¹ 5 U.S.C. § 551(8). See discussion of USFS permission to use national forest land discussed in Part II B.4.

¹⁶² *See Empresa Cubana Exportadora de Alimentos y Productos Varios v. Dep’t of Treasury*, 638 F.3d 794, 802 (D.C. Cir.2011).

¹⁶³ *Anchustegui v. USDA*, 257 F.3d 1124, 1129 (9th Cir. 2001); *Blackwell Coll. of Business v. Attorney General*, 454 F.2d 928, 936 (D.C. Cir. 1971); *Lawrence v. CFTC*, 759 F.2d 767, 773 n.13 (9th Cir. 1985).”

compliance with the defects identified in the warning letter.¹⁶⁴ But the second chance provision does not apply in cases of “willfulness”¹⁶⁵ or when public health, interest, or safety requires otherwise.¹⁶⁶

F. Ombuds

Ombuds are officials situated within an agency who enjoy significant independence. So-called external ombuds have legal power to investigate complaints by persons outside the agency, engage in mediation, and advocate in favor of complainants, but they lack power to compel the agency to do anything.¹⁶⁷ Nevertheless, ombuds have “soft power,” because agency officials wish to avoid criticism by ombuds. Consequently, ombuds can play a significant role in achieving fair informal adjudication. ACUS Recommendations strongly endorse the use of external ombuds.¹⁶⁸ Countless ombuds exist within federal, state and

¹⁶⁴ 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).

¹⁶⁵ 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).

¹⁶⁶ ATTORNEY GENERAL’S MANUAL, *supra* note 133 at 91 (citing withdrawal of a pilot’s license after an accident); *Tucson Rod and Gun Club v. McGee*, 25 F. Supp. 1025, 1030 (D. Ariz. 1998).

¹⁶⁷ 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).

¹⁶⁸ ACUS Recommendations 90-2 and 2016-5. 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 I: Executive Summary* (ACUS 2016) (hereinafter Houk, Executive Summary) and *A Reappraisal—The Nature and Value of Ombudsmen in Federal Agencies Part II: Research Report* (ACUS

local government, academic and other non-profit institutions, and elsewhere. An ACUS study identified about 150 of them in the federal government alone.¹⁶⁹ Some are authorized by legislation and others were established by administrative decisions.

An example of a successful federal external ombuds is the Internal Revenue Service (IRS) National Taxpayer Advocate (NTA).¹⁷⁰ 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).¹⁷¹ When an NTA

2016) (hereinafter Houk Part II). There is a substantial literature on ombuds. See e.g. Carole S. Houk et al., *A Reappraisal—The Nature and Value of Ombudsmen in Federal Agencies: Part I: Executive Summary* (ACUS 2016) (hereinafter Houk, Executive Summary) and *A Reappraisal—The Nature and Value of Ombudsmen in Federal Agencies Part II: Research Report* (ACUS 2016) (hereinafter Houk Part II); Amy Widman, *Inclusive Agency Design*, 74 ADMIN. L. R. 23, 54-58 (2022); BRYAN GILLING, *THE OMBUDSMAN IN NEW ZEALAND* (1998).

¹⁶⁹ Houk, Executive Summary, note 178 at 6.

¹⁷⁰ See INTERNAL REVENUE CODE § 7803(c). See Houk, Part II, note 176 at 141-163; www.taxpayeradvocate.irs.gov/can-tas-help-me-with-my-tax-issue/. See also discussion of the NTA at text accompanying notes xx, supra. .

¹⁷¹ Houk, *supra* at 153. Lubbers reported similar results in 2001. Lubbers, "Independent Advocacy Agencies Within Agencies: A Survey of Federal Agency External Ombudsmen" (Report to National Taxpayer Advocate 2022) p. 8. (83% were very satisfied or satisfied with the

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.

G. Freedom of Information Act Pro-Active Disclosure

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..."¹⁷² 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."¹⁷³ A requirement of pro-active

taxpayer advocate; 58% said their opinion of the IRS was more positive as the result of their experience with the advocate).

¹⁷² 5 U.S.C. § 552(a)(2)(A) and (i).

¹⁷³ 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); *National 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").

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.¹⁷⁴ A recent ACUS draft Report favors a more expansive interpretation of the disclosure requirement for informal adjudication decisions.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷

¹⁷⁴ See DEPARTMENT OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURE (2019); Daniel J. Sheffner, “Adjudication Materials on Agency Websites” (ACUS Final Report, April 10, 2017), at pp 5-6; Gardner, *supra* note 7 at 161-62; American Immigr. Lawyers Ass’n v. Exec. Office for Immigr. Review, 830 F.3d 667, 679-80 (D.C. Cir. 2016) (pro-active disclosure of non-precedential decisions resolving complaints against immigration judges would serve no useful purpose). June 2, 2023, pp. 96-102

¹⁷⁵ Bernard Bell et al., “Disclosure of Agency Legal Materials,” ACUS Rep. June 2, 2023, pp. 96-102; -- MICH. J. OF ENVIR. & ADMIN LAW. --, SSRN 4382229, pp. 96-105.

¹⁷⁶ Some Type C decisions fall within judicial review exceptions such as statutory preclusion or commitment to agency discretion. 5 U.S.C. § 701(a)(1) and (2). Discussion of the reviewability of Type C decisions is beyond the scope of this Report.

¹⁷⁷ “Section 706(2)(A) requires a finding that the actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

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,¹⁷⁸ although the decisions vary 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.¹⁷⁹ 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

¹⁷⁸ 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 those facts are assessed...It is therefore permissible...for common sense and predictive judgements to be attributed to the expertise of an agency in an informal proceeding, even if not explicitly backed by information in the record...But formal adjudications (which more typically involve historical facts) require substantial evidence to be found based on the closed record before the agency.” *Phoenix Herpetological Society, Inc. v. US Fish and Wildlife Serv.*, 998 F.3d 999, 1005-06 (D.C. Cir. 2021), citing *Ass’n of Data Proc. Serv. Orgs. v. Federal Res. Sys.*, 745 F.2d 677, 683-85 (D.C. Cir. 1984).

¹⁷⁹ 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.”

opposed to post hoc rationalizations raised on judicial review or reasons that the court might supply for itself.¹⁸⁰

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.¹⁸¹ As a result, 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.¹⁸² 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.¹⁸³ Most importantly, the

¹⁸⁰Calcutt v. Federal 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).

¹⁸¹ 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 (Report for Administrative Conference of the U.S., May 14, 2013); Aram A. Gavor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1 (2018); Peter Constable Alter, *A Record of What: The Proper Scope of an Administrative Record for Informal Agency Action*, 10 U. C. IRVINE L. REV. 1045, 1061-66 (2020); Young, *supra* note xx at 208-09.

¹⁸² See Jonah H. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. R. 1097 (2018).

¹⁸³ 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).

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 situations, the private party and the government have a continuing relationship that could be jeopardized by an attempt to secure judicial relief.¹⁸⁴

In addition to these practical constraint, 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.¹⁸⁵ Courts are prohibited from mandating procedures that are not otherwise legally required.¹⁸⁶ 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

¹⁸⁴ See Asimow et. al. note 178 at 359; Tarullo, note 76 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).

¹⁸⁵ See Part III. G.

¹⁸⁶ *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.* 435 U.S. 519, 544; *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).

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.

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.¹⁸⁷

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.¹⁸⁸ It might even be feasible to extend the APA adjudication provisions to some Type B adjudication.¹⁸⁹ Type C adjudication, in contrast, has no such commonality.

¹⁸⁷ 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).

¹⁸⁸ ACUS Rec. 2016-4, *supra* note 1, p. 3.

¹⁸⁹ Bremer, 69 Duke L. J. *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).

Because ex post judicial review of Type C adjudication is usually infeasible and useless,¹⁹⁰ 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 courts cannot impose procedural requirements on agencies conducting Type C adjudication beyond those provided by statutes, regulations, or due process.¹⁹¹

Several authors have suggested statutory solutions to the problem of prescribing procedures for informal adjudication, but these proposals have gained no traction.¹⁹² 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

¹⁹⁰ See Part III. G.

¹⁹¹ See text at note 180.

¹⁹² Krotozynski, *supra* note 7 at 1069-75; Gardner, *supra* note 7 at 158-66 (tentatively proposing an “Informal Procedure Act of 1980” based on required rulemaking to achieve statutory goals).

modification of such schemes through statutory amendments would confront obvious legislative difficulties.

Statutory procedures for informal adjudication would necessarily employ vague terms and thus would invite frequent judicial challenges by losing parties. Even a system of required procedural rulemaking to achieve vaguely stated procedural goals¹⁹³ 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.¹⁹⁴

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

¹⁹³ As recommended by Gardner, *supra* note 7.

¹⁹⁴ See Bremer, *supra* note 1, 69 DUKE L.J. at 1786-90 (2020). Bremer generally favors trans-substantive procedural norms, but she observes 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, *supra* note 1, 2019 WISC. L. REV. at 1409-1416; David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191 (2013).

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 and practices previously developed within the agency.¹⁹⁵ 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.¹⁹⁶ Shapiro refers to these as “inside-out” rather than “outside-in” administrative practices.¹⁹⁷

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

¹⁹⁵ 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).

¹⁹⁶ See CAROL HARLOW AND RICHARD RAWLINGS, *LAW AND ADMINISTRATION* (2004).

¹⁹⁷ Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L. REV. 1 (2013).

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.¹⁹⁸

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.¹⁹⁹ Agency managers often self-regulate for reasons rooted in a positive public-interest seeking institutional culture. Many of the procedural constraints on

¹⁹⁸ 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 190 (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. MASHAW*, ed. Nicholas R. Parrillo (2017) (discussing Mashaw's emphasis on agency-generated law rather than externally imposed law); Tarullo, *supra* note 76 at 379-98 (proposing judicial review of adequacy of agency's adoption of internal controls on bank supervision) .

¹⁹⁹ See Magill, *supra* note 193 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 193, 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).

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 binding on the agency until the regulations are changed.²⁰⁰ 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

²⁰⁰ See Magill, *supra* note 193 at 872-82. Further discussion of the circumstances in which courts require agencies to follow voluntarily adopted procedures is beyond the scope of this Report.

function as expected, it can be quickly modified or scrapped.²⁰¹ 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,²⁰² agencies should utilize notice and comment rulemaking for 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.²⁰³

Agencies must balance a group of incommensurate factors in order to determine how to implement a menu of best practices. These factors include the

²⁰¹ 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 Administrative Conference Recommendation 2017-6 on regulatory experimentation and learning from experience.

²⁰² See Part V. H.

²⁰³ See Vermeule, *supra* note 193 (2016); Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 692-94 (2015).

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.²⁰⁴ 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 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

²⁰⁴ 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); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIG. L. . REV. 595, 633-34 (2009).

particular procedures for these management-type 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.²⁰⁵

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

²⁰⁵ See ACUS Rec. 2021-10; Daniel E. Ho, David Marcus, & Gerald K. Ray, “Quality Assurance Systems in Agency Adjudication: Emerging Practices and Insights,” pp. 4-8 (Dec. 1, 2021), <https://www.acus.gov/report/quality-assurance-systems-agency-adjudication-final-report>

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.²⁰⁶

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-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.²⁰⁷ 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

²⁰⁶ Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 361-64 (2019) (sketching increased agency costs from adoption of additional procedural requirements).

²⁰⁷ TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 115-57 (2d ed. 2006). Tyler summarizes the findings of numerous earlier researchers on the the factors contributing to a sense of procedural justice.

procedures are likely to influence the outcome of the dispute or depend on the actual outcome.²⁰⁸

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. The factor in second place 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.²⁰⁹

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.

²⁰⁸ Tyler takes exception to earlier instrumental theories of procedural justice. Under these theories, the satisfaction of participants depends on whether they think the procedures will actually influence the outcome of the dispute. *See, e.g.*, JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

²⁰⁹ Tyler, *supra* note 203 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).

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.²¹⁰ This suggests that the methodology of informal adjudication (such as the use of consultation, document exchange, public hearings, and negotiation) can generate as much 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.²¹¹ 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 basis elements of acceptable and efficient adjudication procedure. They do not set forth precise templates for procedural regulations for the sprawling universe of Type C

²¹⁰ *Id.* at 154-56.

²¹¹ 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).

adjudication, a result that would be neither possible nor desirable. Instead, the best practice approach advanced by this Report invites agencies to consider the basic and generally accepted norms for informal adjudication and to tailor them by crafting procedures appropriate to their unique situations.

C. Sources for Best Practices in Type C Adjudication

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.²¹² 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.

V. PROPOSALS FOR BEST PRACTICES IN TYPE C ADJUDICATION

This section spells out nine proposed best practices for Type C adjudication. Each best practice, of course, must be tailored to individual adjudicatory schemes.

A. Notice

Appropriate notice is the foundation of every scheme of administrative procedure.²¹³ 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

²¹² 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 [221]

²¹³ *See Gardner, supra* note 7 at 163-64; *Friendly, supra* note 7 at 1279-81.

circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”²¹⁴ Consultative due process cases stress the importance of timely notice in relatively low-stakes disputes.²¹⁵ The 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.”²¹⁶

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

²¹⁴ See Part III. A.

²¹⁵ Before a high school imposes a brief school suspension, a student must receive “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 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).

²¹⁶ The notice in § 558(c) does not apply to “cases of willfulness or those in which public health, interest, or safety requires otherwise.”

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 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.²¹⁷ 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.”²¹⁸ 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.²¹⁹

²¹⁷ See Part III. A; *Goss v. Lopez*, discussed in text at note 121, involving 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 581-82.

²¹⁸ See Part III. D. 1.

²¹⁹ APA §553(c).

Finally, Executive Order 13892 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 legal and factual determinations.”²²⁰ Executive Order 13892 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.²²¹

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 broad legislative facts or an exercise of discretion. It will also vary depending on the stakes involved as well as

²²⁰ “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication,” Exec. Order 13,892, § 6(a) 84 Fed. Reg. 55239 (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).

²²¹ “Revocation of Certain Executive Orders Concerning Federal Regulation,” Exec. Order 13992, § 2, 86 Fed. Reg. 7049 (January 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.”

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 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.”²²² Due process authorities mandate a right to counsel,²²³ although not in cases involving small stakes.²²⁴ The Administrative Practice Act provides a right of representation in Type C adjudication and prevents agencies from creating a specialized bar.²²⁵

²²² See Part III. D. 1.

²²³ 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).

²²⁴ *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975).

²²⁵ See Part III. C.

The Administrative Practice Act and § 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.²²⁶ Best practices, however, should include a right to be assisted by a friend or family member or by a 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.²²⁷ ACUS Recommendation 86-1 urged agencies to permit lay representation in mass justice adjudication.²²⁸ For parties who cannot afford or cannot obtain a lawyer, having the assistance of a knowledgeable lay representative is far superior to self-representation.²²⁹ Regulations that recognize a

²²⁶ See Part III. C.

²²⁷ See ACUS Rec. 2016-4, ¶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.”

²²⁸ 51 Fed. Reg. 25641 (1986).

²²⁹ 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.

right to lay representation preempt state unauthorized practice laws that prohibit lay representation in civil and criminal cases.²³⁰

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.²³¹

D. Decisionmaker Neutrality

Best practices for C adjudication should include provisions relating to decisionmaker neutrality.²³² Tyler found that an important element of participant satisfaction with adjudicatory process is the perceived neutrality of the decisionmaker.²³³ However, the neutrality standards applicable to Types A and B adjudication must be relaxed in many Type C situations.²³⁴ The requirement of neutrality must be appropriately tailored to a system of adjudication that is

²³⁰ 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).

²³¹ ACUS Recommendation 2016-4, ¶16; ACUS Recommendation 2016-6. Another option to facilitate self-representation is to institutionalize it through an office like FERC's Office of Public Participation. See text at note xx

²³² Friendly ranks an unbiased decisionmaker as the most important procedural safeguard for Type B adjudication. Friendly, *supra* note 7 at 1279.

²³³ See *supra* text at note 203-06.

²³⁴ See ACUS Recommendation 2018-4, "Recusal Rules for Administrative Adjudicators" which applies only to Types A and B adjudication. Recommendation 2018-4 carefully distinguishes recusal rules from the ethical rules administered by the Office of Government Ethics that apply to Type C adjudication. See discussion in the consultant's report. Louis J. Virelli, "Recusal Rules for Administrative Adjudicators," p. 6, <https://www.acus.gov/sites/default/files/documents/Recusal-Rules-for-Administrative-Adjudicators-Final-Report-11.30.2018.pdf>

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,²³⁵ 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.²³⁶ In addition, due process authorities require decisionmaker neutrality.²³⁷

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 conflict of interest in particular matters they are investigating or deciding. Under ethics law, agencies can supplement the federal standards by tailoring their

²³⁵ See Part III. B.

²³⁶ See Part III. B.

²³⁷ 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 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 xx, at 7-8.

regulations to the specific ethics issues they confront, but such supplemental regulations must be approved by the Office of Government Ethics.²³⁸

In addition, in accordance with the aspirational standard of federal ethics law, agency regulations should seek to assure decisionmaker impartiality that extends beyond conflicts 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.

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 adjudication²³⁹ and by regulations in most Type B cases.²⁴⁰ However, it would not be realistic or efficient to require separation of functions in most Type C cases. The same is true of rules prohibiting ex parte communications to decisionmakers in Types A and B adjudication.²⁴¹ An ex parte rule of this kind would not work in the sort of inquisitorial decisionmaking common in Type C cases. However, where Type C adjudication is accusatory in

²³⁸ 5 C.F.R. § 2635.105.

²³⁹ 5 U.S.C. § 554(d).

²⁴⁰ ACUS Report, *supra* note 1 at 20. ACUS Rec. 2016-4 calls for adoption of separation of functions in Type B adjudication. ¶3.

²⁴¹ 5 U.S.C. § 557(d); ACUS Report, *supra* note 1 at 18-19; ACUS Recommendation 2016-4, ¶2.

nature and could involve serious sanctions, agencies should consider adoption of internal separation of functions and limitation on outside ex parte communications.

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.²⁴² Obviously, as in the case of the other best practice recommendations, the detail and formality required of an agency's reasons statement depends on the context, such as the stakes involved in the decision, the complexity of issues, and the agency's caseload.

Requiring the decisionmaker to furnish a statement of reasons is likely to improve the quality of discretionary decisions and is important in enhancing stakeholder satisfaction with the process.²⁴³ Having a statement of reasons is also necessary if the private party 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

²⁴² See Verkuil, *supra* note 4 at 790-92; Friendly, *supra* note 4 at 1292.

²⁴³ See *supra*, text at note 205.

reasons are not obvious.²⁴⁴ Under § 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.”²⁴⁵ 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.²⁴⁶ Similarly, the broadly accepted rulemaking process requires that final rules contain a “concise general statement of their basis and purpose.”²⁴⁷ FOIA requires agencies to make available and index its adjudicatory decisions.²⁴⁸ Finally, Executive Order 13892, mentioned earlier,²⁴⁹ required that “[t]he agency must respond in writing and articulate the basis for its action.”²⁵⁰

F. Administrative Review

²⁴⁴ “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).

²⁴⁵ See Part III. D. 2.

²⁴⁶ See Part III. G.

²⁴⁷ 5 U.S.C. § 553(c).

²⁴⁸ See discussion in text at notes xx.

²⁴⁹ See *supra* text at note 215.

²⁵⁰ Executive Order 13892, §6(a), revoked by Executive Order 13992, § 2, notes 215-16, *supra*.

Most adjudicatory schemes provide for a second look at decisions by a different decisionmaker.²⁵¹ In Type C adjudication, the second look is often provided by a staff member superior to the initial decisionmaker in the agency hierarchy. Best practices for Type C adjudication includes administrative review of initial decisions where it is practicable to provide it.

The purpose of adjudicative review is to make sure proper procedures were followed at the initial decision level as well as error-correction and promotion of consistent initial decisions. A review process invokes the so-called sentinel effect, which holds that decisions may be better when the decisionmaker knows it will be scrutinized.²⁵² A system of internal review facilitates quality assurance mechanisms by creating a database of potentially problematic situations, as discussed in Recommendation I. Finally, the ability to get someone to take a second look at a negative decision enhances user satisfaction with the administrative process.²⁵³

²⁵¹ See Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. OF COMP. L. 3, 6 (2015); Administrative Conference Recommendation 83-3. There are hundreds of appellate review schemes in federal agencies. These schemes are diverse and many do not conform to the appeal scheme set forth by the APA for Type A adjudication. § 5 U.S.C. § 557(b). See Walker & Weiner, *supra* note 4. Walker & Wiener's report primarily discusses review schemes in Type B adjudication. *Id.* at p. 7, note 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.

²⁵² Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1464 (2011).

²⁵³ Tyler, text at *supra* note 203.

Of course, there are many situations in which an opportunity for reconsideration 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,²⁵⁴ an ombuds is empowered to receive and investigate complaints from persons outside the agency, mediate disputes, and advocate in favor of complainants, but not the power to compel the agency to do anything. Consequently, an ombuds can play a significant role in achieving fair and acceptable informal adjudication procedure as well as in suggesting reforms of the adjudication process. Ombuds in numerous federal agencies are empowered to consider complaints arising in the informal adjudication process.²⁵⁵

As previously discussed,²⁵⁶ judicial review is not a feasible or affordable remedy for most Type C disputants. Many instances of abuse of discretion or

²⁵⁴ Part III. F.

²⁵⁵ In addition to the National Taxpayer Advocate, discussed in text at notes xx, Lubbers identifies numerous other federal ombuds whose powers include investigation of informal adjudication, such as the Department of Education Student Loan Ombudsman. Lubbers, note 181 at 17-19.

²⁵⁶ Part III. G.

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 by the likelihood that reviewers may be reluctant to criticize or second-guess the work of initial Type C decisionmakers.²⁵⁷ 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.²⁵⁸ Yet in the minds of private disputants, the decisionmaker's perceived respect and civility is the second most important element of procedural justice behind decisionmaker neutrality.²⁵⁹

Best practice is for the agency 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, lack of neutrality, or disrespect or

²⁵⁷ Ames et al., *supra* note 197 at 61-62.

²⁵⁸ Hauk, Part I, 26-27, *supra* note 166.

²⁵⁹ See text at *supra* note 204.

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.²⁶⁰ 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.

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.²⁶¹ Although the APA does not require agencies to use the usual notice-and-comment process for adopting procedural

²⁶⁰ Independence, confidentiality, and impartiality are the three core standards of ombudsman practice. *Id.* at 7.

²⁶¹ Gardner's proposed "Informal Procedure Act of 1980" relied primarily on provisions that required agencies to adopt procedural regulations. *Supra* note 7 at 158-66.

regulations,²⁶² agencies should nevertheless use that process for the adoption of significant procedural regulations in order to give affected stakeholders a chance to weigh in on the tradeoffs necessarily inherent in adopting adjudicatory procedures.²⁶³

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 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.²⁶⁴ 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

²⁶² 5 U.S.C. § 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. 5 U.S.C. § 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. 5 U.S.C. § 553(b)(A).

²⁶³ See ACUS Recommendation 92-1, encouraging agencies to voluntarily use notice-and-comment procedures in promulgating procedural rules except in situations in which the costs of such procedures outweighs the benefits of receiving public input.

²⁶⁴ 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.

regulations, even if the regulations provide protections that the agency was not legally required to adopt.²⁶⁵

This recommendation is founded 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.”²⁶⁶ In addition, the APA requires that the agency publish “rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations.”²⁶⁷

I. Quality Assurance Systems

An agency that performs informal adjudication should consider adoption of a quality assurance system.²⁶⁸ 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

²⁶⁵ *Service v. Dulles*, 354 U.S. 363, 388 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

²⁶⁶ 5 U.S.C. § 552(a)(1)(B).

²⁶⁷ 5 U.S.C. § 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.

²⁶⁸ 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); Ho, Marcus & Ray, *supra* note 201.

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 look at 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.”²⁶⁹

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.²⁷⁰ 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.

²⁶⁹ See Daniel E. Ho, David Marcus & Gerald K. Ray, “Quality Assurance Systems in Agency Adjudication: Emerging Practices and insights,” (Nov. 20, 2021) (Report to Admin. Conf. of the U.S.).

²⁷⁰ USDA’s 15d program has a quality assurance system in which an auditor reviews a sample of cases. See Part II. A. 3.

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

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 the private parties who have disputes with the government. They should preserve informality while furnishing the basic 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.