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November 23, 2021

VIA COMMENT PORTAL

Administrative Conference of the United States  
1120 20th St NW, Suite 706 South  
Washington, DC 20036  
Attn: Jeremy Graboyes

Re: Public Access to Agency Adjudicatory Proceedings

Greetings:

Practices regarding public access to agency adjudicatory proceedings has long been due for attention, and I am gratified that the Administrative Conference of the United States ("ACUS") has devoted attention to the subject once again. The draft report ACUS staff has prepared on the subject *Public Access to Agency Adjudicative Proceedings* (October 15, 2021), is both excellent and comprehensive. I submit this comment to raise an issue that may merit greater consideration as a part of ACUS' public access project.

Often, in federal and state court judicial proceedings, media entities will seek appellate review closure orders entered by trial judges, seeking to have them vacated or overturned. Frequently, such litigation must be conducted on an expedited basis. The challenge to the closure order may be by petition for writ of *mandamus* or some other method. Some of the varied law in the federal circuits (and in state courts) on launching such challenges is reported by "Open Courts Compendium" maintained by the Reporters Committee on the Freedom of the Press, accessible at <https://www.rcfp.org/open-courts-compedium/>. In discussing "Procedures for Asserting A Right of Access to Proceedings and Records," the compendium discusses media standing to challenge closure orders, procedures for requesting access in criminal and civil matters, as well as the means for obtaining review of initial court decisions. For example, the law in the Third Circuit regarding review of initial closure decision is summarized at <https://www.rcfp.org/open-courts-compedium/3rd-circuit/#d-obtaining-review-of-initial-court-decisions>.

While such challenges to closure orders in the context of agency adjudications may have rare to date, considering whether creating an internal agency review process for closure orders, and what the contours of a model process might look like may nevertheless merit attention.

The draft report does touch on the subject very briefly, in describing the procedures for a departure from a general presumption of openness or closure, mentioning regulations that require "the adjudicator issue a written decision on the [closure] request including the

adjudicator’s reasoning and responding to any objections,”<sup>1</sup> and, more importantly, regulations specifying the manner in which “unsuccessful requestors or objectors to appeal the adjudicator’s decision on public access.”<sup>2</sup> But the draft report in general, and more particularly the section on “Operationalizing Public Access to Open Proceedings” does not appear to further address the process for seeking vacatur or reversal of reversal of closure decisions by way of internal agency review.

Indeed, the two provisions cited above focus on requests *by parties* or other participants protesting orders to *close* proceedings, not requests from the *news media or members of the general public to open* them.

**There should be some form of internal agency mechanism for expedited review of decisions to close (or open) proceedings in whole or in part. Ideally, the decision to close a proceeding should be made, and publicly announced, well before any hearing. Such a practice would allow any media or other objectors to the closure order to seek internal agency review of the decision before, rather than during, the hearing. Such a practice might reduce the necessity to delay the hearing, or avoid interruption of the hearing for an appeal of a closure order.**

It is not clear whether closure decisions could be the subject to immediate judicial review under the Administrative Procedure Act’s (“APA”) judicial review provisions. The APA provides for judicial review of agency action when no other route of judicial review is available. 5 U.S.C. §704. And such orders might well be reversible if found to violate the Constitution rights or procedurally deficient. 5 U.S.C. §706(2)(B) & (D). However, section 704’s “finality” requirement may pose a barrier to judicial review. A closure order would presumably not be considered a “final” order – even though final with regard to access, closure orders do not resolve the issues that are the subject of the agency proceedings.

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<sup>1</sup> *Public Access to Agency Adjudicative Proceedings* 32 & n.203 (October 15, 2021). The draft reports cites as an example, 24 CFR § 81.84, which reads:

All hearings shall be open to the public, unless the ALJ determines that an open hearing would be contrary to the public interest. *Where a party makes a timely motion to close a hearing and the ALJ denies the motion, such party may file with the Secretary within 5 working days a request for a closed hearing, and any party may file a reply to such a request within 5 working days of service of such a motion.*

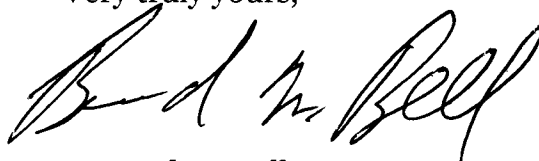
<sup>2</sup> *Id.* at 203 & n.205. The draft reports cites as an example, 5 C.F.R. § 2638.504(g)(6), which reads, in relevant part:

If the administrative law judge denies a request *by a party or an affected person to close the hearing, in whole or in part, that denial will be immediately appealable by the requester. The requester must file a notice of appeal with the Director within 3 working days. In the event that such a notice is filed, the hearing will be held in abeyance pending resolution of the appeal. . .*

In short, the procedures for non-parties objecting to closure of specific adjudicatory proceedings, either presumptively or despite a presumption of openness, should be considered in addressing the question of public access to agency adjudicatory proceedings.

I would be happy to discuss the issues above with you, so please do not hesitate to contact me at [bbell@law.rutgers.edu](mailto:bbell@law.rutgers.edu).

Very truly yours,

A handwritten signature in black ink, appearing to read "Bernard W. Bell". The signature is fluid and cursive, with the first name "Bernard" and last name "Bell" being the most prominent parts.

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