

DRAFT REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**PUBLIC ACCESS TO AGENCY
ADJUDICATIVE PROCEEDINGS**

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Jeremy Graboyes & Mark Thomson***

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INTRODUCTION

Open legal proceedings—that is, legal proceedings open to public observation—have, for centuries, been an essential indicator of fair process. Properly implemented, open proceedings have the potential to promote the interests of private parties, the government, and the public. Legislatures, courts, scholars, the organized bar, the press, and others have long fostered a culture, a legal regime, and even an architecture that generally encourages open judicial proceedings.¹

But open proceedings may not be an unmitigated good in all circumstances. Besides imposing administrative costs, openness can result in the public disclosure of sensitive information. It can also allow into the courtroom those who would intimidate parties and witnesses and affect their testimony. There is a long tradition, for example, of closing judicial proceedings involving minors.²

Openness is also not a self-executing norm. Courts routinely consider how they provide access to proceedings that must, as a matter of law, be open to public observation. There is perpetual debate, for example, about whether media professionals should be able to record or broadcast judicial proceedings. The Judicial Conference has debated the issue at least a half-dozen times, and legislative proposals to expand remote access are commonplace. (Several bills are currently pending in Congress.³) Courtroom closures during the COVID-19 pandemic ultimately led many courts to begin broadcasting their own proceedings. Even the Supreme Court began streaming, and allowed media outlets to broadcast, live audio of oral arguments.⁴

Settling on a sound policy for determining which judicial proceedings should be open to the public, and how they are made open, requires a careful balancing of different, and sometimes conflicting, public and private interests.

Despite the different institutional context, similar principles may apply in federal agency adjudication. Courts have sometimes found a First Amendment right of public access to some administrative proceedings, just as they have for judicial proceedings.⁵ Congress has explicitly required “public hearings” in some adjudications, especially those affecting the public interest.⁶ Multi-member agencies, most of which adjudicate at least some cases, are subject to open meeting laws.⁷ And although the formal-hearing provisions of the Administrative Procedure Act (APA) do not establish an explicit presumption of openness, it has been said that the “very

¹ See generally JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011).

² See generally Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE LAW & POLICY REV. 155 (1999).

³ See, e.g., Cameras in the Courtroom Act, S. 807, 117th Cong. (2021); Cameras in the Courtroom Act, H.R. 4257, 117th Cong. (2021); Sunshine in the Courtroom Act, S. 818, 117th Cong. (2021).

⁴ See Robert Barnes, *Supreme Court takes modest but historic step with teleconference hearings*, WASH. POST (May 4, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-teleconference-hearings-bookingcom/2020/05/03/f5902bd6-8d76-11ea-a9c0-73b93422d691_story.html.

⁵ See *infra* Part II.A.1.

⁶ See, e.g., 7 U.S.C. § 136d(d); 15 U.S.C. § 717t-1(b).

⁷ See 5 U.S.C. § 552b.

concept of a hearing comparable to a judicial proceeding,” embedded in the APA’s formal-hearing provisions, “entails norms of openness.”⁸ Agencies have adopted their own rules, policies, and practices in the interstices between constitutional principles and statutory mandates.

Part II of this report addresses in the administrative context what Judith Resnik in the judicial context calls “doctrinal openness”—that is, the judicial doctrines, congressional mandates, agency rules, and policy considerations that determine which adjudicative proceedings should be open to public observation and which should be closed, in whole or in part.⁹

Just as in the courts, openness in administrative adjudication is not a self-executing norm. Agencies must determine, among other things, whether and how to provide advance public notice of adjudicative proceedings, facilitate in-person or remote access, disclose recordings and transcripts, and regulate the conduct of media and other public attendees.

ACUS tackled some of these questions in its earliest years. Recommendation 68-1, *Adequate Hearing Facilities*, recommended that the General Services Administration develop “a set of four hearing room classifications” that could accommodate between 20 and more than 100 attendees, including spectators, according to agencies’ needs.¹⁰ Recommendation 71-6, *Public Participation in Administrative Hearings*, set forth best practices for supplying public notice and defraying the costs of public engagement in on-the-record adjudications and other proceedings.¹¹ And Recommendation 72-1, *Broadcast of Agency Proceedings*, offered principles to help agencies decide whether to encourage or exclude audiovisual coverage of their proceedings, including in adjudications.¹²

Of course, the world looks different now than it did five decades ago. Technological advances have changed administrative processes and the ways in which agencies and the public communicate. Parties, representatives, and witnesses increasingly participate by video or telephone.¹³ As ACUS recently examined, agencies now rely heavily on virtual proceedings, which they may conduct entirely online outside a physical space, such a hearing room, that could accommodate public spectators.¹⁴ The expansion of e-government, and the rapid deployment of remote processes especially during the COVID-19 pandemic, have almost certainly altered public expectations of openness.

⁸ Am. Bar. Ass’n, Sec. of Admin. Law & Reg. Practice, *A Blackletter Statement of Federal Administrative Law* (approved as amended Feb. 5, 2012).

⁹ Cf. Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 109 N.C. L. REV. 605, 606 (2018).

¹⁰ Admin. Conf. of the U.S., Recommendation 68-1, *Adequate Hearing Facilities*, 1 ACUS 9 (1968).

¹¹ Admin. Conf. of the U.S., Recommendation 71-6, *Public Participation in Administrative Hearings*, 38 Fed. Reg. 19789 (July 23, 1973).

¹² Admin. Conf. of the U.S., Recommendation 72-1, *Broadcast of Agency Proceedings*, 38 Fed. Reg. 19791 (July 23, 1973).

¹³ See Admin. Conf. of the U.S., Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, 79 Fed. Reg. 75114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48795 (Aug. 9, 2011).

¹⁴ Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 Fed. Reg. 36083 (July 8, 2021).

Reflecting the sheer diversity of federal programs, agencies have developed an array of practices to facilitate public access to open proceedings. These practices can meaningfully affect the extent to which interested persons can, as a practical matter, observe proceedings that are ostensibly open. Agency practices for facilitating public access can also shape public perceptions about the transparency and fairness of agency decisionmaking. Part III addresses “functional openness”—that is, the specific practices by which agencies operationalize openness.

Before proceeding to discussions of doctrinal and functional openness, we should define what we mean by “public access to agency adjudicative proceedings.”

- **Adjudication.** “Adjudication” under the APA encompasses all agency administrative processes that result in any final action that is not a rule. This is a broad category that includes decisions that directly resolve the rights, interests, or obligations of non-agency parties, as well as “policy implementation” decisions, which do not.¹⁵ (Examples of policy implementation decisions include the siting of a highway, closing a post office, conducting an environmental assessment, managing public facilities, and designating national monuments.¹⁶) This report uses “adjudication” to refer only to processes involving parties beyond the adjudicating agency. Although the recommended best practices in Part IV are limited to proceedings in these adjudications, agencies may also wish to consider their applicability to policy implementation decisions.
- **Proceedings.** Adjudicative processes can involve different “proceedings,” by which we mean processes for the oral exchange of evidence or other information related to an adjudication among agency decisionmakers, their staff, and one or more parties. Proceedings go by many different names: formal hearings, evidentiary hearings, oral hearings, informal hearings, due process hearings, prehearing conferences, scheduling conferences, settlement conferences, informal conferences, fact-finding hearings, investigative or investigatory hearings, oral arguments, etc.¹⁷
- **Public Access.** As used in this report, “public access” refers to the opportunity for individuals to observe proceedings conducted in adjudications in which they are not participants. Public access can be in-person or remote, live or pre-recorded, and available by default or upon request.

This report is based primarily on a review of judicial decisions; federal statutes; rules and policies available in the *Code of Federal Regulations* and *Federal Register*; publicly available notices, orders, and decisions issued in the course of agency adjudication; information that agencies have made publicly available on their websites; news media and blogs; and the relevant legal scholarship. We undertook a comprehensive search for materials relating to public access in federal agencies, searching for key terms in the *U.S. Code*, the *Code of Federal Regulations* and

¹⁵ MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 8–9 (2019).

¹⁶ *Id.* at 9–10.

¹⁷ See Recommendation 2021-4, *supra* note 14; Recommendation 2014-7, *supra* note 13; Recommendation 2011-4, *supra* note 13.

Federal Register, relevant Westlaw databases (including congressional, executive-branch, and judicial materials), the websites of the majority of agencies that adjudicate cases, news aggregator services, and general search engines. We also conducted interviews between August and October 2021 with adjudicators and other attorneys from a targeted sample of federal agencies, as well as representatives from public interest groups. Some practitioner groups were also contacted for interviews.

I. OPENNESS OF AGENCY ADJUDICATIVE PROCEEDINGS

This Part addresses the extent to which agency adjudicative proceedings are open to public observation as a matter of law and policy—the administrative corollary of what Judith Resnik in the judicial context calls “doctrinal openness.”¹⁸ Even as a doctrinal matter, openness to agency adjudicative proceedings is far from uniform. Practices can vary widely according to the type of proceeding, the federal program, and the agency. Some kinds of proceedings are always public; others are only rarely, if ever, open to spectators.

We begin in Subpart A by describing the policies and principles that have traditionally informed the regulation of public access to adjudicative proceedings. In Subpart B, we discuss how various institutional actors—the courts, Congress, and executive-branch officials—have regulated public access through the application of constitutional and common-law principles, federal statutes, and agency rules and policies. As discussed below, we find that when Congress and agencies regulate public access to a specific type of agency adjudicative proceedings, they often establish a general presumption that proceedings of that type are open or closed to public observation along with circumstances in which agency officials may or must depart from that presumption in specific cases.¹⁹ Subpart C analyzes general presumptions governing public access set forth in federal statutes and agency rules and policies. Subpart D analyzes circumstances for departing from general presumptions and processes for doing so.

A. Policy Background

The Star Chamber existed in England from the late fifteenth century until its abolition by Parliament in 1641. Among its many attributes, the Star Chamber conducted secret trials, or is at least remembered as having operated in private.²⁰ Accurately or not,²¹ the Star Chamber came to symbolize a “disregard of basic individual rights”²² and a “menace to liberty.”²³ Open judicial proceedings, especially in criminal trials, became an important tool of justice and democracy.

Similar concerns have shaped administrative processes. Surveying federal agencies’ practices in 1941, the Attorney General’s Committee on Administrative Procedure found that hearings, at least, tended to be public. “This is as it should be,” the Committee concluded. “[T]he practice is an effective guarantee against arbitrary methods in the conduct of hearings. Star

¹⁸ See *supra* note 9.

¹⁹ See *infra* note 101.

²⁰ *In re Oliver*, 333 U.S. 257, 266 (1948).

²¹ See generally Thomas G. Barnes, *Star Chamber Mythology*, 5 AM. J. LEGAL HIST. 1 (1961).

²² *Faretta v. California*, 422 U.S. 806, 821–22 (1975).

²³ *Oliver*, 333 U.S. at 268.

chamber methods cannot thrive where hearings are open to the scrutiny of all.”²⁴ More recently, ACUS has twice recommended, at a high level, that agencies should presumptively open evidentiary hearings to public observation except in limited circumstances.²⁵

Open proceedings are variously recognized as benefitting the interests of private parties and the government, as well as the public interest. Openness is thought to bring all relevant evidence to light and thereby test its truthfulness.²⁶ Open proceedings are also said to prevent the arbitrary exercise of state authority by “keep[ing] the judge himself, while trying, under trial.”²⁷ To quote Justice Brandeis’s famous aphorism, “sunlight is said to be the best of disinfectants.”²⁸

At a personal level, openness permits family, friends, and advocates to accompany parties and provide emotional support. The presence of parties’ support networks may improve their engagement during complex legal processes, potentially leading to more favorable outcomes and better perceptions of procedural and substantive fairness.²⁹

Open proceedings also facilitate public participation, which can be an important part of some processes for agency adjudication. Amicus participation, for example, allows interested persons to weigh in on cases involving the development of important policy or legal principles. A recent ACUS recommendation identified criteria that may favor amicus participation.³⁰ As ACUS has also recognized, public participation can be a best practice in declaratory proceedings involving the application of legal principles to proposed actions.³¹ Intervention similarly invites non-parties to materially participate in cases whose outcomes may affect them. Indeed, one of ACUS’s earlier recommendations—Recommendation 71-6, *Public Participation in Administrative Hearings*—explicitly encouraged to adopt certain best practices for public participation in some on-the-record adjudications.³² And some adjudicative processes include opportunities for members of the public to submit written comments, which can be an important source for information about public utilities, polluters, and other entities whose activities affect the general public. Public participation—through intervention, submission of written comments, and other means—can be an important means of promoting environmental justice and improving access to justice for underserved communities.³³

More broadly, open proceedings can help legitimate government processes, allowing scholars and journalists to gain a better understanding of how public institutions function,

²⁴ FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 68 (1941) [hereinafter FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE].

²⁵ Recommendation 2021-4, *supra* note 14, ¶ 3.; Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, ¶ 18, 81 Fed. Reg. 94314, 94316 (Dec. 23, 2016).

²⁶ *In re Oliver*, 333 U.S. 257, 270 n.24 (1948).

²⁷ 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 522, 523 (1827).

²⁸ LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 92 (1914).

²⁹ Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 N.W. U. L. REV. 933, 997–1000 (2015).

³⁰ Admin Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, ¶ 13, 86 Fed. Reg. 6618 (Jan. 22, 2021).

³¹ Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, ¶ 9, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

³² Recommendation 71-6, *supra* note 11.

³³ See Exec. Order. No. 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 86 Fed. Reg. 7009 (Jan. 25, 2021).

facilitating public oversight of agency operations and performances, and fostering public confidence in government institutions and processes.³⁴ Open proceedings are thought to help democratize justice by forging “important connections between members of the public and the very institutions that make profound judgments about their communities”³⁵ and, in some cases, by offering “significant community therapeutic value.”³⁶

But open proceedings are not costless. Because they result in the disclosure of personal information—medical records in applications for worker’s compensation, financial records in tax disputes, stories of past and potential future abuse and trauma in asylum cases—they can be problematic from a privacy perspective.³⁷ Publicity surrounding investigations can shed light on as-yet unadjudicated allegations of misconduct or noncompliance, resulting in premature and potentially unfair reputational and other harms.³⁸ Just as open proceedings allow parties’ friends and family to attend and support them, they also invite in people whose presence would threaten, intimidate, or distract them.

And although open proceedings can promote truthfulness, they can also make candor and consensus more difficult and result in proceedings that are protracted, more costly, and less satisfying. Alternative dispute resolution (ADR) developed to avoid these qualities through simplified, off-the-record proceedings, closed sessions, and strong guarantees of privacy and confidentiality.³⁹ ACUS has long encouraged the targeted use of ADR in administrative processes⁴⁰ and is currently studying its use in agency adjudication.⁴¹ For many of the same reasons, agencies also have a long history of using informal procedures to make initial decisions and resolve disputes as efficiently as possible, saving trial-like processes for disputes that cannot be resolved by less formal means.⁴² Agencies simply could not function if the public had a right to access every initial meeting with a claims representative, interview, inspection, examination, or informal conference.

³⁴ *In re Oliver*, 333 U.S. 257, 270 n.24 (1948).

³⁵ Eagly, *supra* note 29, at 997; *see generally* RESNIK & CURTIS, *supra* note 1.

³⁶ *Richmond Newspapers v. Va.*, 448 U.S. 555, 570 (1980).

³⁷ JERRY MASHAW, BUREAUCRATIC JUSTICE 92 (1983).

³⁸ *See* Admin. Conf. of the U.S., Recommendation 73-1, *Adverse Agency Publicity*, 38 Fed. Reg. 16839 (June 27, 1973). *See also* Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 B.Y.U. L. REV. 1371 (2011); Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380; *The Distinction Between Informing and Prosecutorial Investigations: A Functional Justification for “Star Chamber” Proceedings*, 72 YALE L.J. 1227 (1963).

³⁹ *See* Admin. Conf. of the U.S., Recommendation 88-11, *Encouraging Settlement by Protecting Mediator Confidentiality*, 54 Fed. Reg. 5212 (Feb. 2, 1989); Admin. Conf. of the U.S., Recommendation 86-3, *Agencies’ Use of Alternative Means of Dispute Resolution*, 51 Fed. Reg. 25643 (July 16, 1986).

⁴⁰ *See, e.g.*, Recommendation 2016-4, *supra* note 25, ¶ 12; Admin. Conf. of the U.S., Recommendation 2014-1, *Resolving FOIA Disputes Through Targeted ADR Strategies*, 79 Fed. Reg. 35988 (June 25, 2014); Admin. Conf. of the U.S., Recommendation 89-2, *Contracting Officers’ Management of Disputes*, 54 Fed. Reg. 28967 (July 10, 1989); Admin. Conf. of the U.S., Recommendation 87-5, *Arbitration in Federal Programs*, 52 Fed. Reg. 23635 (June 24, 1987); Admin. Conf. of the U.S., Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, ¶ 6, 51 Fed. Reg. 46989, 46990 (Dec. 30, 1986); Recommendation 86-3, *supra* note 39.

⁴¹ *Alternative Dispute Resolution in Agency Adjudication*, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/research-projects/alternative-dispute-resolution-agency-adjudication> (last visited Oct. 12, 2021).

⁴² *See* Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. __ (forthcoming 2021) (manuscript at 28–29), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793949.

Like courts, Congress and federal agencies must undertake a complex balancing of individual, governmental, and public interests when they devise policies for determining which agency adjudicative proceedings should be open to public observation and which should not.

B. Legal Background

Congress, agencies, and the courts have all addressed public access to agency adjudicative proceedings at one time or another. This subpart provides an overview of the main sources of law governing which proceedings are open to public observation and which are not: (1) the Constitution, (2) the common law, (3) federal statutes, and (4) executive-branch rules.

1. Constitutional Principles

A long line of cases establishes that the public has a qualified constitutional right to access at least some agency adjudicative proceedings. Early decisions in this vein grounded the right in due process.⁴³ More recently, however, courts have held that the right emanates from the First Amendment.⁴⁴

To determine whether the First Amendment requires public access to a particular type of adjudicative proceeding, courts usually apply what is sometimes called the *Press-Enterprise* framework.⁴⁵ Under that framework, courts first determine whether there is a First Amendment right to access the proceedings in question. Courts make that determination by applying the two-part “experience and logic” test, asking: (1) “whether the place and process have historically been open to the press and general public,” and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.”⁴⁶

⁴³ See, e.g., *Fitzgerald v. Hampton*, 467 F.2d 755, 766 (D.C. Cir. 1972) (holding “that due process requires that [a Civil Service Commission] hearing be open to the press and public”); *Pechter v. Lyons*, 441 F. Supp. 115, 119 (S.D.N.Y. 1977) (“That an open hearing is a fundamental principle of fair play inherent in our judicial process cannot be seriously challenged.”) (parentheses and quotation marks omitted).

⁴⁴ See, e.g., *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 305 (2d Cir. 2012) (finding that agency’s “access policy violate[d] the public’s First Amendment right of access to government proceedings”); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002) (concluding “that there is a First Amendment right of access to deportation proceedings”); *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 181 (3rd Cir. 1999) (holding that “the Planning Commission meetings are precisely the type of public proceeding to which the First Amendment guarantees a public right of access”).

⁴⁵ The *Press-Enterprise* framework emerged from a series of decisions about public access to court proceedings in criminal cases. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 55 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*). When a plaintiff seeks access to an agency proceeding that bears no clear resemblance to such judicial proceedings, courts will sometimes decline to apply the *Press-Enterprise* framework on the ground that the First Amendment right of access does not extend to such proceedings. See, e.g., *Ctr. for Nat. Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 934 (D.C. Cir. 2003) (“The narrow First Amendment right of access to information recognized in *Richmond Newspapers* does not extend to non-judicial documents that are not part of a criminal trial, such as the investigatory documents at issue here.”); *Smith v. Plati*, 258 F.3d 1167, 1178 n.10 (10th Cir. 2001) (“Because Smith’s claims do not involve a claim of denied coverage of a criminal trial in particular, or any trial proceeding in general, we do not find [the *Press-Enterprise* line of] cases particularly relevant.”). *But see* *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012) (applying the *Press-Enterprise* framework to ascertain whether the First Amendment required that the public have access to a Bureau of Land Management horse roundup).

⁴⁶ *Press-Enterprise II*, 478 U.S. at 8–9.

Different courts apply the “experience and logic” test in different ways. For example, some courts require something close to an unbroken history of openness to satisfy the “experience” prong, whereas others deem the prong satisfied so long as there is a general policy of openness—even if it has been subject to occasional exceptions.⁴⁷ Different courts also look to different factors when applying the “logic” prong.⁴⁸ Courts don’t even agree about whether the experience and logic prongs must both be satisfied for the presumptive right of public access to attach, or whether a disjunctive approach is appropriate.⁴⁹ These types of differences in applying the “experience and logic” test can lead to divergent holdings in similar cases. In 2002, for instance, the Third and Sixth Circuits agreed that the *Press-Enterprise* test was the right framework for evaluating challenges to an order restricting the public’s access to deportation hearings but reached opposite conclusions about whether the order at issue violated the First Amendment.⁵⁰

“Even when the experience and logic test is satisfied[,] the public’s First Amendment right of access establishes only a strong presumption of openness,” and so, under the second part of the *Press-Enterprise* test, “the public still can be denied access if closure is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”⁵¹ But that is a high bar,⁵² surmountable only if “specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”⁵³ Among the few “higher values” courts have recognized as potentially justifying closure are the need to preserve the defendant’s right to a fair trial,⁵⁴ protecting minor victims of sex crimes from trauma and embarrassment,⁵⁵ and the “fair administration of justice” generally.⁵⁶ Even

⁴⁷ Compare, e.g., *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 212–13 (3rd Cir. 2002) (suggesting that something comparable to the “unbroken, uncontradicted history” of public access to criminal trials in Anglo American law is required under the “experience” prong), with *Detroit Free Press*, 303 F.3d at 701 (finding the “experience” prong satisfied with respect to deportation proceedings because, “[a]lthough exceptions may have been allowed, the general policy has been one of openness”).

⁴⁸ Compare, e.g., *Whiteland Woods*, 193 F.3d at 181 (identifying “six factors pertinent to the application of the [‘logic’] prong”), with *United States v. Gonzales*, 150 F.3d 1246, 1259–61 (10th Cir. 1998) (looking to a different set of considerations in applying the “logic” prong).

⁴⁹ See *United States v. Cohen*, 366 F. Supp. 3d 612, 633 n.9 (S.D.N.Y. 2019) (collecting and summarizing cases).

⁵⁰ Compare *Detroit Free Press*, 303 F.3d at 711 (holding that the public has a First Amendment right to access deportation proceedings), with *N. Jersey Media Grp.* 308 F.3d at 221 (holding that the public has no First Amendment right to access deportation proceedings).

⁵¹ *Times Mirror Co. v. United States*, 873 F.2d 1210, 1211 n1 (9th Cir. 1989) (quoting *Press-Enterprise I*, 464 U.S. at 509–10).

⁵² See *Press-Enterprise I*, 464 U.S. at 509 (“Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness.”).

⁵³ *Id.* (quotation marks omitted); see also, e.g., *United States v. Doe*, 870 F.3d 991, 998 (9th Cir. 2017) (elaborating on the *Press-Enterprise* framework with a three-part test for determining whether, notwithstanding the existence of a qualified First Amendment right of access, closure is nevertheless appropriate).

⁵⁴ See *Estes v. Texas*, 381 U.S. 532 (1965) (holding that defendant was deprived of his right to due process by the televising of his notorious, heavily publicized, and highly sensational criminal trial).

⁵⁵ *Globe Newspaper*, 457 U.S. at 607.

⁵⁶ *Richmond Newspapers*, 448 U.S. at 581 n.18.

when there exists a compelling interest in closing a proceeding, moreover, closures must be narrowly tailored to serve that interest.⁵⁷

When it applies, the First Amendment right of access requires that the public be able to observe the proceeding at issue. An agency may not satisfy its constitutional obligations by providing the public with a transcript of the proceeding,⁵⁸ unless, “applying the constitutionally mandated balancing test, [it is] found that concurrent access must be denied,” in which case “the provision of a transcript may well be the best available substitute.”⁵⁹

At the same time, the First Amendment right of access does not foreclose agencies from imposing reasonable time-place-and-manner restrictions on public attendance at agency proceedings.⁶⁰ The most common of such restrictions involve limitations on recording proceedings,⁶¹ which have historically been upheld on the ground that they promote the parties’ and tribunal’s interests in a fair hearing.⁶²

2. Common-Law Principles

It’s well established that there’s a common law right to access judicial proceedings and materials.⁶³ It’s also well established that this common-law right extends to accessing *materials* from legislative and executive bodies.⁶⁴ What’s not clear—because courts have not directly

⁵⁷ See *Press-Enterprise II*, 478 U.S. at 13–14. Thus, for instance, the Supreme Court invalidated “a rule of mandatory closure respecting the testimony of minor sex victims” during trials of specified sexual offenses because, even though the State’s asserted interest in “safeguarding the physical and psychological well-being of minors” was “compelling,” it did not “justify a mandatory closure rule,” since it was “clear that the circumstances of the particular case may affect the significance of the interest.” See *Globe Newspaper*, 457 U.S. at 607–08, 611.

⁵⁸ See *ABC, Inc. v. Stewart*, 360 F.3d 90, 99–100 (2d Cir. 2004) (Katzmann, J.); *United States v. Antar*, 38 F.3d 1348, 1360 n.13 (3d Cir. 1994).

⁵⁹ *ABC, Inc.*, 360 F.3d at 100.

⁶⁰ See *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 113 (2nd Cir. 1984) (“[T]he First Amendment right of access is limited to physical presence at trials.”).

⁶¹ See *Rice v. Kempker*, 374 F.3d 675, 679 (8th Cir. 2004) (“[C]ourts have universally found that restrictions on videotaping and cameras do not implicate the First Amendment guarantee of public access.”); *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 184 (3rd Cir. 1999) (public has no right to videotape planning commission meetings where there were “alternative means of compiling a comprehensive record” of the meetings).

⁶² See *United States v. Hastings*, 695 F.2d 1278, 1283 (11th Cir. 1983) (interests supporting media ban in a criminal trial could include defendant’s interests in a fair trial, as well as the court’s interest in ensuring the accuracy of the trial’s truth-seeking function); see generally *Estes*, 381 U.S. at 544–51 (noting how television could impair the truth-finding function of the criminal trial, particularly in its probable adverse impact on jurors, witnesses, and other trial participants). This report takes no position on the continued validity of these longstanding justifications, their applicability to most adjudicative proceedings, or their applicability to the types of virtual hearings that are increasingly common at the agency level.

⁶³ See, e.g., *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001) (recognizing “a common law public right of access to judicial proceedings and records”).

⁶⁴ See, e.g., *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 936 (“[T]he common law right of access extends beyond judicial records to the ‘public records’ of all three branches of government.”); *Wash. Legal Found. v. U.S. Sentencing Comm’n*, 89 F.3d 897, 903–04 (D.C. Cir. 1996) (same holding); see also *Schwartz v. U.S. Dep’t of Justice*, 435 F. Supp. 1203, 1203 (D.D.C. 1977) (“The general rule is that all three branches of government, legislative, executive, and judicial, are subject to the common law right.”)

addressed it⁶⁵—is whether and how far the common-law right to access judicial proceedings extends to accessing proceedings of legislative and executive bodies.

What little commentary there is on the subject assumes that the common-law right of access does not extend to agencies' adjudicative proceedings,⁶⁶ but there are colorable arguments on both sides of that issue. Proponents of a public right of access to adjudicative proceedings might point out, for example, that public policy has long favored public access to administrative proceedings⁶⁷ and that, “in administrative hearings, the rule of the ‘open’ forum is prevailing—if not by statutory mandate, then by regulation or practice.”⁶⁸ Those on the other side might respond that the modern administrative state is “briskly evolving” and still too young to have birthed a new, common-law right.⁶⁹ They might add that a common-law right to attend agency proceedings could interfere with the “basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.”⁷⁰

The common-law right of access to certain government proceedings and records is weaker than its First Amendment counterpart.⁷¹ That is largely because, whereas closures in contravention of the First Amendment right must satisfy strict scrutiny, the common-law right of access is usually subject to a mere ad hoc balancing test, so that the right of access may be

⁶⁵ To be sure, in *Morgan v. United States*, 304 U.S. 1 (1938), the Supreme Court emphasized “that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play,” which “demand ‘a fair and open hearing,’ essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process.” *Id.* at 14–15. Some courts and advocates have read that language as embracing something like a common-law right to access such proceedings, but it’s not clear that’s what the *Morgan* Court meant. Elsewhere in the *Morgan* opinion, for example, the Court characterized “a fair and open hearing” as “embrac[ing] not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.” In other words, it seems that, in extolling the right to a “fair and open hearing,” the *Morgan* Court was not focused on public access so much as on the rights of the parties to fully understand and address the claims made against them. Indeed, the issue of public access to the proceedings themselves seems never to have arisen in *Morgan*.

⁶⁶ See, e.g., Michael Spake, *Public Access to Physician and Attorney Disciplinary Proceedings*, 21 J. NAT’L ASS’N OF ADMIN. L. JUDGES 289, 303 (2001) (“Common law does not recognize the right of the public to attend administrative and licensure disciplinary proceedings.”); see also *Detroit Free Press*, 303 F.3d at 702 (seemingly acknowledging “that there was no common law right of access to administrative proceedings,” but dismissing that fact as largely irrelevant to the “experience and logic” test the court was applying).

⁶⁷ See, e.g., *FCC v. Schreiber*, 381 U.S. 279, 293 (1965) (“The procedural rule, establishing a presumption in favor of public proceedings, accords with the general policy favoring disclosure of administrative agency proceedings.”).

⁶⁸ *Fitzgerald*, 467 F.2d at 764.

⁶⁹ See *Detroit Free Press*, 303 F.3d at 702–03 (acknowledging that argument in the context of a claim for a First-Amendment right of public access to deportation proceedings).

⁷⁰ See *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 544 (1978); see also *Schreiber*, 381 U.S. at 289 (stressing “the established principle that administrative agencies should be free to fashion their own rules of procedure and to pursue method of inquiry capable of permitting them to discharge their multitudinous duties,” and noting that the principle “is an outgrowth of the congressional determination that administrative agencies and administrators . . . will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved”) (quotation marks and citations omitted); see also *United States v. Simone*, 14 F.3d 833, 83

⁷¹ *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1197 n.7 (9th Cir. 2011); see also *United States v. El-Sayegh*, 131 F.3d 158, 160 (D.C. Cir. 1997) (characterizing common-law right of access as “broader but weaker” than its First Amendment counterpart).

overcome simply by showing that a countervailing interest exists that is more compelling than the interest in openness.⁷²

The common-law right of access also applies only to so-called “public” proceedings and records,⁷³ notwithstanding that “[n]onpublic proceedings are common throughout the judiciary”⁷⁴ and, indeed, throughout government and society.⁷⁵ So, for instance, the common-law right of access does not give the public the right to view grand jury proceedings or other government proceedings that depend on privacy to function effectively.⁷⁶ To the extent there is a common-law right of access to agencies’ adjudicative proceedings, it would doubtless be subject to the same limitations.

3. Statutory Requirements

Congress has considerable discretion to regulate public access to agency adjudicative procedures within the rough contours of the constitutional and common-law principles described above. Against this backdrop, Congress has enacted many statutes that bear on public access to agency adjudicative proceedings. Most relate to specific programs and agencies. A number of statutes require that hearings be “public” or “open to the public,”⁷⁷ for example, and at least one statute demands closed hearings.⁷⁸

For most adjudicative proceedings, there are probably no agency- or program-specific statutes regulating public access. Certain generally applicable statutes, however, may bear on public access, including, most notably, the Freedom of Information Act (FOIA),⁷⁹ the

⁷² See *Nixon v. Warner Commc’ns*, 435 U.S. 589, 598 (1978) (balancing of interests “left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of a particular case”). Partly because the balancing standard can make it so easy for tribunals to close proceedings, some courts apply stricter requirements for overcoming the common-law right of access. See Peter G. Blumberg, Comment, *Sunshine and Ill Wind: The Forecast for Public Access to Sealed Search Warrants*, 41 DePaul L. Rev. 431, 446 (1992) (summarizing the case law in this area).

⁷³ See, e.g., *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001); *Wash. Legal Found. v. U.S. Sentencing Comm’n*, 89 F.3d 897, 899 (D.C. Cir. 1996).

⁷⁴ In re *N.Y. Times Co.*, 577 F.3d 40,410 n.4 (2d Cir. 2009) (listing several nonpublic proceedings integral to the judicial process); see, e.g., *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979) (“We have consistently recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.”).

⁷⁵ See *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (“Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations.”).

⁷⁶ See *Douglas Oil Co.*, 441 U.S. at 218.

⁷⁷ See, e.g., 7 U.S.C. § 136d(d) (pesticide control); 8 U.S.C. § 1534(a)(2) (immigration removal); 12 U.S.C. §§ 1786(s)(2), 1818(u)(2), 4522(b), 4586(b), 4639(b), ; 15 U.S.C. § 717t-1(b) (natural gas civil penalty authority); 15 U.S.C. § 77u (SEC); 16 U.S.C. §§ 544m(a)(3) (national forest civil penalty authority), 823b(a) (hydropower license enforcement), 8250o-1 (sanctions for noncompliance with procedural and administrative provisions); 30 U.S.C. §§ 1260(a), 1268(b); 29 U.S.C. § 661(g) (OSHR); 33 U.S.C. §§ 923(b) (Longshore and Harbor Workers’ Compensation Act), 1342(a)(1) (national pollutant discharge elimination system); 42 U.S.C. § 5851(b)(2)(A); 46 U.S.C. § 6302 (marine casualty investigations); 49 C.F.R. § 60117(b)(2) (PHMSA).

⁷⁸ 12 U.S.C. § 2266(a) (Farm Credit Administration enforcement actions). The Crime Control Act of 1990, Pub. L. No. 101-647, eliminated similar provisions applicable to enforcement proceedings before the National Credit Union Administration and Federal Deposit Insurance Corporation.

⁷⁹ 5 U.S.C. § 552.

Government in the Sunshine Act,⁸⁰ and the Privacy Act.⁸¹ The requirements of these statutes are discussed in greater detail below.

a. Freedom of Information Act

By far the best known open-government statute is FOIA, but it has little to say about how agencies conduct their adjudicative proceedings. FOIA is concerned with public access to official records and other documents,⁸² not access to proceedings themselves. So while FOIA does ensure that the public can access an array of materials regarding agencies' adjudicative proceedings,⁸³ it does not regulate the public's ability to access those proceedings.

b. Government in the Sunshine Act

The Sunshine Act requires, in general, that meetings of each federal agency headed by a collegial body, a majority of whose members are appointed by the President with the advice and consent of the Senate, be open to public observation.⁸⁴ But that general requirement is subject to myriad qualifications and exceptions, such that it does not apply to most adjudicative proceedings. For instance, the Act applies only to agencies "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate."⁸⁵ That definition only covers about 50 federal agencies, none of which are among the agencies that conduct the vast majority of administrative adjudicative proceedings in the federal government.⁸⁶ Moreover, the "meetings" covered by the Act are limited to those that involve a quorum of the heads of a given agency and that "determine or result in the joint conduct or disposition of official agency business."⁸⁷ It thus does not apply to decisions of lower-level personnel within covered agencies, including most adjudicators.

Even when the Act does apply, moreover, agencies can invoke any of ten enumerated exemptions that allow portions of meetings to remain closed.⁸⁸ A few of those exemptions are especially relevant to prominent types of adjudicative proceedings. Exemption 4, for example, allows for closing meetings when a party might "disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁸⁹ Exemption 6 allows closure of proceedings whenever a party is likely to "disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy."⁹⁰ And Exemption 10 allows agencies to hold closed deliberations whenever the agency properly

⁸⁰ *Id.* § 552b.

⁸¹ *Id.* § 552a.

⁸² *See* *Pratt v. Webster*, 673 F.2d 408, 413 (D.C. Cir. 1982) (explaining that FOIA provides "a statutory right of public access to documents and records" held by federal agencies).

⁸³ *See* 5 U.S.C. § 552(a)(1)–(2).

⁸⁴ *Id.* § 552b(b).

⁸⁵ *Id.* § 552b(a)(1) (defining "agency" for purposes of the Act).

⁸⁶ *See* Admin. Conf. of the U.S., Federal Administrative Procedure Sourcebook, *Government in the Sunshine Act*, available at https://sourcebook.acus.gov/wiki/Government_in_the_Sunshine_Act/view (last visited Oct. 14, 2021).

⁸⁷ 5 U.S.C. 552b(a)(2) (defining "meeting" for purposes of the Act).

⁸⁸ *Id.* § 552b(c).

⁸⁹ *Id.* § 552b(c)(4).

⁹⁰ *Id.* § 552b(c)(6).

determines that a portion of a meeting is likely to “specifically concern the ... disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 [of the APA] or otherwise involving a determination on the record after opportunity for hearing.”⁹¹ In describing this last exemption, the Second Circuit explained that “[t]he evident sense of Congress was that when a statute required an agency to act as would a court, its deliberations should be protected from disclosure as a court’s would be.”⁹²

On top of all that, even in those rare cases when the Sunshine Act’s public-meeting requirements might apply to particular adjudicative proceedings, the agencies conducting those proceedings often proceed by notational voting, a process whereby an agency’s members “receive written materials, review the same, and then provide their votes in writing.”⁹³ Because notational voting does not involve any interaction of at least a quorum of the agency’s leadership, it does not trigger the Sunshine.⁹⁴

The upshot of all these exceptions and limitations is that the Sunshine Act seldom gives the public a right to access anything other than formal hearings of commissioners, which tend to be somewhat pro forma. It does not play a significant role in granting public access to adjudicative proceedings.

c. Privacy Act

The Privacy Act places limits upon the disclosure of “records” maintained by federal agencies.⁹⁵ The Act defines term “record” broadly, to cover “any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.”⁹⁶ It also includes things like medical or personnel records.⁹⁷

The Privacy Act pertains to public access to adjudications only to the extent those adjudications involve disclosure of agency records covered by the Act. Although the Act does not define “disclose,” most courts have interpreted the term to include any agency process that

⁹¹ *Id.* § 552b(c)(10).

⁹² *Time, Inc. v. U.S. Postal Serv.*, 667 F.2d 329, 334 (1981); *see also* *AMREP Corp. v. Fed. Trade Comm’n*, 768 F.2d 1171, 1179 (10th Cir. 1985) (Sunshine Act did not require Federal Trade Commission, when “act[ing] as a court,” to hold an open proceeding when voting on whether the plaintiff had engaged in unfair and deceptive business practices).

⁹³ Reeve T. Bull, *The Government in the Sunshine Act in the 21st Century* 9–10 (Mar. 10, 2014) (report to the Admin. Conf. of the U.S.).

⁹⁴ *See id.*

⁹⁵ *See* 5 U.S.C. § 552a(b).

⁹⁶ *Id.* § 552a(a)(4).

⁹⁷ *See* *News-Press v. U.S. Dep’t of Homeland Sec.*, 489 F.3d 1173, 1186 (11th Cir. 2007) (combination of Privacy Act and FOIA Exemption 6 “requires agencies to withhold ‘personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy’”)

makes protected information available to people who didn't already know it.⁹⁸ That includes oral communication of the information.⁹⁹ To avoid Privacy Act violations, therefore, agency adjudicators may be forced to at least partially close hearings when an open hearing might result in government disclosure of private information in an agency record.¹⁰⁰

4. Agency Rules and Policies

Within constitutional and common-law principles and applicable statutory requirements, many agencies have adopted their own rules and policies for determining whether adjudicative proceedings should be open to public observation. Our research uncovered more than a hundred relevant rules and policies from dozens of agencies and agency subunits. They appear in the *Code of Federal Regulations*, administrative manuals, adjudicator benchbooks, practitioner guides, and other explanatory materials. Some implement the statutory requirements described in the previous section; many more appear to represent agencies' own policy choices.

Following the model of statutes like the Sunshine Act, agency rules typically establish a general presumption that a certain class of proceedings should be open or closed to public observation but set forth conditions under which an adjudicator or the agency may or must depart from that presumption in specific circumstances.¹⁰¹ This approach is consistent with the recommendation of ACUS with respect to evidentiary hearings, which urges agencies to

adopt the presumption that [evidentiary] hearings are open to the public, while retaining the ability to close the hearings in particular cases including when the public interest in open proceedings is outweighed by the need to protect (a) National security; (b) Law enforcement; (c) Confidentiality of business documents; and (d) Privacy of the parties to the hearing.¹⁰²

C. Establishing a General Presumption

Under federal statutes and agency rules and policies, some proceedings are presumptively open to public observation and others are presumptively closed. There can be significant variation across proceeding types, programs, and agencies. In a few programs, many types of

⁹⁸ See, e.g., *Schmidt v. U.S. Dep't of Veterans Affairs*, 218 F.R.D. 619, 630 (E.D. Wis. 2003) ("The court will define the term 'disclose' to mean the placing into the view of another information which was previously unknown."); see also *Pilon v. U.S. Dep't of Justice*, 73 F.3d 1111 (D.C. Cir. 1996) (concluding that, on the particular facts of that case, "disclose" included the sharing of information with someone who already knew it, while also recognizing "the 'common sense' notion that it is not possible to 'disclose' something to someone who already knows it").

⁹⁹ See, e.g., *Bartel v. Fed. Aviation Admin.*, 223 F.2d 1403 (D.C. Cir. 1984) (finding Privacy Act violation based, in part, on oral disclosure); *Buckles v. Indian Health Serv.*, 310 F. Supp. 2d 1060, 1068 (D.N.D. 2004) ("A disclosure of a record may occur by oral communication—it need not be a written communication.").

¹⁰⁰ E.g., *Abdalla v. United States*, 106 Fed. Cl. 757 (2010) (protective order managing disclosure of Privacy Act-protected information during ongoing litigation).

¹⁰¹ See, e.g., 10 C.F.R. § 2.328 ("Except as may be requested under section 181 of the Act, all hearings will be public unless otherwise ordered by the Commission."); 12 C.F.R. 109.33(a) ("All hearings shall be open to the public, unless the Comptroller, in the Comptroller's discretion, determines that holding an open hearing would be contrary to the public interest.").

¹⁰² Recommendation 2016-4, *supra* note 25, ¶ 18.; see also Recommendation 2021-4, *supra* note 14, ¶ 3.

proceedings are, as a general matter, conducted publicly. In others, proceedings are only rarely, if ever, open to public observation. In the majority of programs, certain especially significant types of proceedings are conducted publicly while others are closed to public observation as a matter of course.

Several factors appear to at least partially explain which proceedings Congress and agencies have decided should be presumptively open to public observation and which should be closed. They are:

- the procedural purpose of a proceeding in an overall process for adjudication;
- the nature of the affected interests and information in typical proceedings;
- the relationship between the parties in typical proceedings;
- the adversarial or non-adversarial features of the overall adjudication process;
- the degree of public interest in typical proceedings; and
- the role of public input in agency decisionmaking.

The following sections address each of these factors in turn.

1. Procedural Purpose of the Proceeding

Agency rules of practice provide for lots of types of proceedings ranging from the truly informal to the trial-like. Agencies use different types of proceedings to manage adjudicative processes and gather the legal and factual inputs necessary to decide cases. Public access appears to be more common in some types of proceeding than in others. Below, we examine five broad categories of agency adjudicative proceedings: (a) evidentiary hearings; (b) investigative proceedings; (3) settlement conferences and ADR proceedings; (4) prehearing, scheduling, and other informal proceedings; and (5) appellate proceedings. These categories are intended to be representative, not exhaustive.

a. Evidentiary Hearings

Evidentiary hearings are often trial-like proceedings at which parties “make evidentiary submissions, have an opportunity to rebut testimony and arguments made by the opposition, and to which the exclusive record principle applies.”¹⁰³ The exclusive record principle means that the decisionmaker is largely “confined to considering inputs from the parties . . . when determining factual issue.”¹⁰⁴ Because the exclusive record principle applies, decisionmakers are ordinarily discouraged or prohibited from engaging in substantive communications outside the hearing. Openness can thus be crucial to the success of evidentiary hearings because it helps ensure both that decisionmakers limit their consideration to the evidentiary record and that all record evidence has been tested through a fair and open process.

ACUS has specifically addressed public access to evidentiary hearings, recommending that agencies adopt the presumption, rebuttable in specific circumstances, that evidentiary

¹⁰³ Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act* 4 (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.).

¹⁰⁴ *Id.*

hearings are open to public observation.¹⁰⁵ Many agencies have published policies stating that evidentiary hearings are presumptively open. Most exceptions can probably be explained by other factors discussed below.

b. Investigative Proceedings

Many agencies have proceedings that, although sometimes similar to evidentiary hearings, do not rely on the exclusive record principle. Such proceedings are generally one part of an information-gathering process that permits, even encourages, decisionmakers to go beyond the inputs provided by the parties and “investigate” the facts. For that reason, we call such proceedings “investigative” for purposes of this report.

It is difficult to generalize about agency policies on public access to investigative proceedings because agencies use investigative proceedings in very different ways. In some programs, the investigative proceeding is the only opportunity for parties to participate in an oral hearing or submit evidence and arguments. In other programs, agencies use investigative proceedings as an efficient way to gather information before initiating a process involving an opportunity for an evidentiary hearing or pursuing litigation in the courts. At some regulatory agencies, for example, formal adjudication takes place after a comparatively informal process, potentially involving an investigative proceeding, results in issuance of a citation or a complaint.

Public access to investigative proceedings could positively or negatively impact the accuracy and efficiency of agency investigative process. Openness may be desirable, say to root out falsehoods, ensure all relevant perspectives are heard, support community engagement, or promote an investigation’s public legitimacy. Confidentiality may be preferable in other situations, say to encourage candor, permit law enforcement to maintain secrecy about an ongoing operation, or prevent unwarranted adverse publicity through premature accusations of wrongdoing.¹⁰⁶ Agencies have taken different approaches depending on context.¹⁰⁷

c. Settlement Conferences and Alternative Dispute Resolution Proceedings

Agencies use settlement conferences and other ADR-related sessions to resolve or ratify the resolution of disputes through processes such as mediation, negotiation, conciliation, facilitation, minitrials, and arbitration. Because these sessions often take place under an agency’s supervision, they can be thought of as adjudicative proceedings for purposes of this report.

Unlike the traditional adversarial model of administrative adjudication, which relies on open proceedings, ADR modalities typically operationalize confidentiality to encourage candor and achieve consensus.¹⁰⁸ ACUS has recognized the importance of confidentiality to ADR in

¹⁰⁵ See Recommendation 2016-4, *supra* note 25, ¶ 18.

¹⁰⁶ Recommendation 73-1, *supra* note 38; *see also* Cortez, *supra* note 38; Gellhorn, *supra* note 38.

¹⁰⁷ Compare 49 C.F.R. § 554.10 (public meeting), with 16 C.F.R. § 1118.5(c) (closed hearing). *See also* Ernest Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113, 117–23 (1968).

¹⁰⁸ *See* Margaret Ward, *Public Fuss in a Private Forum*, 2 HARV. NEGOTIATION L. REV. 217, 220–21 (1997).

several recommendations,¹⁰⁹ and the Alternative Dispute Resolution Act contains specific guarantees of confidentiality.¹¹⁰ Requiring public access to ADR proceedings would, in most situations, eliminate their effectiveness. As a result, nearly all agencies that offer ADR close settlement conferences and ADR proceedings to non-participants.¹¹¹

ADR ultimately represents a balancing of private, government, and public interests that favors certain objectives (e.g., efficiency, consensus, informality, cost-effectiveness) over others like public accessibility. Although ADR has proved a powerful tool for promoting the fair and efficient resolution of disputes in some administrative contexts, the confidentiality that defines it may look a lot like secrecy in contexts in which there is significant public interest and a history of community engagement.¹¹²

d. Prehearing, Scheduling, and Other Informal Conferences

Agencies use prehearing and scheduling conferences for a number of procedural and time-serving purposes, such as clarifying issues, exchanging views, agreeing to stipulations or admissions of fact, agreeing to waive an oral hearing, scheduling deadlines for submitting written materials, managing discovery, setting the time and place for further proceedings, resolving dispositive motions, etc. Some agencies have published policies presumptively closing prehearing, scheduling, or informal conferences.¹¹³ Others may do so as a matter of practice, even in the absence of a specific rule. A few agencies, like the Consumer Financial Protection Bureau,¹¹⁴ Consumer Product Safety Commission,¹¹⁵ and Federal Trade Commission¹¹⁶ have adopted policies that presumptively open prehearing and scheduling conferences to public observation.

e. Appellate Proceedings

Oral arguments and other presentations that take place during appellate review often take place before adjudicators who have limited discretion to reevaluate factual findings or consider new evidence. Their general purpose is to help appellate decisionmakers “address issues that may have been left unresolved in the briefs or about which agency members have questions.”¹¹⁷ There can be considerable public interest in oral arguments because appellate decisions at many agencies can have precedential effect and thereby impact similarly situated non-parties. Some

¹⁰⁹ See Recommendation 88-11, *supra* note 39; Admin. Conf. of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, ¶ 4, 53 Fed. Reg. 26030, 26032 (July 11, 1988); Recommendation 86-3, *supra* note 40.

¹¹⁰ See 5 U.S.C. §§ 571 *et seq.*

¹¹¹ See, e.g., 10 C.F.R. § 851.41(a); 16 C.F.R. § 1012.4(d)(4); 18 C.F.R. § 385.606; 29 C.F.R. § 18.13(g); 29 C.F.R. § 102.45(c)(7); 29 C.F.R. § 1603.108(d); 29 C.F.R. § 2200.120(d), (e); 49 C.F.R. § 1109.3(d).

¹¹² For example, when the EPA proposed a rule that would have mandated ADR between agency lawyers and permit applicants, it was widely seen as a way to silence community voices and obscure decisionmaking processes. See, e.g., Coral Davenport, *E.P.A. Plans to Curtail the Ability of Communities to Oppose Pollution Permits*, N.Y. TIMES (July 12, 2019).

¹¹³ See, e.g., 10 C.F.R. §§ 205.171, 820.22; 42 C.F.R. §§ 422.1032, 423.1032, 498.49(a).

¹¹⁴ 12 C.F.R. §§ 1081.203, 1081.214

¹¹⁵ 16 C.F.R. § 1025.21(d).

¹¹⁶ 16 C.F.R. § 3.21(g).

¹¹⁷ ADMIN. CONF. OF THE U.S., MODEL ADJUDICATION RULES, § 430 (rev. 2018).

agencies, most famously the National Labor Relations Board, develop policy primarily through appellate proceedings.

Some appellate bodies, particularly at independent regulatory agencies, hold appellate proceedings in the context of meetings covered under the Sunshine Act.¹¹⁸ The Act establishes a presumption that meetings at which a quorum of members are present, including oral arguments, are presumptively “open to public observation.”¹¹⁹ The Federal Mine Safety and Health Review Commission (FMSHRC) has adopted a rule that “it is the general policy of the Commission to open to the public meetings that may be subject to closure, including meetings concerning adjudication of cases.”¹²⁰ The Merit Systems Protection Board notes that because “[m]ost regular Board business consists of reviewing initial decisions in cases adjudicated after an opportunity for a hearing has been provided,” the agency could properly close “a majority of its meetings” under the Act.¹²¹ As discussed later, several Sunshine Act agencies

Regardless of whether the Sunshine Act governs appellate review systems, ACUS recommends that agencies consider providing remote access to oral arguments and other appellate proceedings that “present significant legal and policy issues likely to be of interest to regulated parties and other members of the public.”¹²² Some Sunshine Act agencies, like FMSHRC and the Occupational Safety Health Review Commission, do make oral arguments available on their websites.¹²³ And several appellate bodies not subject to the Sunshine Act, including the Environmental Appeals Board¹²⁴ and the Board of Immigration Appeals,¹²⁵ have adopted policies that oral arguments are presumptively open to the public.

2. Nature of Affected Interests and Information Involved

ACUS has acknowledged that the public interest in open evidentiary hearings may be outweighed, in particular cases, by the need to protect national security, law enforcement, confidentiality of business documents, or participants’ privacy.¹²⁶ This approach echoes FOIA, the Privacy Act, and the Sunshine Act, which all stand for the principle that the need to protect certain categories of sensitive information can outweigh, in some situations, the value of transparency.¹²⁷ Many agencies have adopted policies to close specific proceedings, in whole in part, that would implicate certain interests or result in the disclosure of sensitive information.

¹¹⁸ See *supra* Part I.B.3.b.

¹¹⁹ 5 U.S.C. § 552b(b).

¹²⁰ 29 C.F.R. § 2701.7(a). The regulation also notes: “Although the Commission has to date held few meetings, those that have been held concerned the adjudication of cases and could properly have been closed.” *Id.*

¹²¹ 5 C.F.R. § 1206.9(a)(2).

¹²² Recommendation 2020-3, *supra* note 30, ¶ 20.

¹²³ *Oral Arguments*, FMSHRC, <https://fmsihrc.gov/meetings-arguments/arguments> (last visited Oct. 13, 2021); *OSHRC E-FOIA Reading Room*, OSHRC, <https://www.oshrc.gov/foia/oshrc-e-foia-reading-room/>.

¹²⁴ EPA, THE ENVIRONMENTAL APPEALS BOARD PRACTICE MANUAL 10–11 (Aug. 2013) [hereinafter EAB MANUAL].

¹²⁵ DOJ, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW POLICY MANUAL § 8.5 (Dec. 2020) [hereinafter EOIR MANUAL].

¹²⁶ Recommendation 2021-4, *supra* note 14, ¶ 3; Recommendation 2016-4, *supra* note 25, ¶ 18.

¹²⁷ See 5 U.S.C. §§ 552(b), 552a, 552b.

But some agencies administer programs in which most or all cases, by their nature, are likely to involve sensitive information or implicate interests like those that ACUS identified in its previous recommendations. There may be no significant portion of a typical proceeding that does not involve discussion of, say, a party's medical history or financial records. It is difficult to see any value in a presumption of openness if all proceedings under a given program are likely to satisfy a legal standard for closure.

Consider benefits adjudication before SSA administrative law judges (ALJs) and the Board of Veterans Appeals (BVA). Presumptively closed hearings have always been the norm in both programs.¹²⁸ The Attorney General's Committee on Administrative Procedure observed in 1941 that although agency adjudicative hearings "should be, and almost invariably are, public," there were exceptions "where hearings are private are for the benefit of the individual involved." The Committee noted: "Hearings conducted by the Social Security Board are private whenever 'intimate matters of scandalous nature are involved.' Veterans' Administration cases, usually involving medical testimony, are private, unless the veteran waives his right to privacy."¹²⁹

Writing about SSA hearings in *Bureaucratic Justice* (1983), Jerry Mashaw observed that "[t]he usual value of open procedures (that is, procedures open to the public as a guarantee against arbitrariness in a closed authority structure) is, from the perspective of the privacy issue, also problematic."¹³⁰ And the National Organization of Social Security Claimants' Representatives made a similar point in a May 2021 letter to ACUS regarding its project on *Virtual Hearings in Agency Adjudication*,¹³¹ writing:

[R]ather than the presumption . . . that hearings are open to the public unless circumstance dictate otherwise, the recommendation should allow for agencies to determine that none of their hearings should be public if they all involve information that the parties . . . would generally want to be kept private. This would better protect the identities and medical information of claimants for Social Security disability and other benefits.¹³²

All of these perspectives essentially assert that the need to protect claimants' privacy outweighs any public interest in open SSA and BVA hearings.

There are opposing (albeit minority) perspectives. Some ALJs, including a former president of the Association of Administrative Law Judges, Randall Frye, have advocated for importing a suite of adversarial features into SSA hearings, including open hearings, to guard

¹²⁸ See 20 C.F.R. §§ 404.944, 416.1444; cf. 38 C.F.R. § 20.701. It is unclear to what extent individual members of the public, especially sources of emotional support for parties, may be able to attend proceedings with the consent of the party and adjudicator. With respect to SSA hearings, the websites of some individual claimants' representatives provide conflicting accounts. Current rules could be interpreted to permit adjudicators to allow non-parties such as family and friends to attend otherwise closed hearings, but that principle could perhaps be clarified by regulation.

¹²⁹ FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE, *supra* note 24, at 68.

¹³⁰ JERRY MASHAW, BUREAUCRATIC JUSTICE 92 (1983).

¹³¹ Recommendation 2021-4, *supra* note 14.

¹³² Letter from Barbara Silverstone, Exec. Dir., Nat'l Org. of Soc. Sec. Claimants' Representatives, to Jeremy Graboyes, Admin. Conf. of the U.S. (May 4, 2021), <https://www.acus.gov/sites/default/files/documents/comment-nosscr-050421.pdf>.

against fraudulent claims and dishonest testimony.¹³³ Practitioner Jasmine Harris has suggested that greater public access to SSA proceedings might help reduce stigma against persons with disabilities by “produc[ing] a more informed national conversation on the role of social supports in the disability context.”¹³⁴ And in a footnote to a position paper on the public right of access to administrative adjudications, the Committee on Communications and Media Law of the Association of the Bar of the City New York noted that “public policy strongly favors the presumption of openness even in such non-adversarial proceedings” given “concerns over bias and discrimination” against applicants for benefits.¹³⁵ We are aware of no litigation

We have identified a number of agencies, in addition to SSA and BVA, that have adopted policies that always or presumptively close proceedings under certain programs, such as:

- **Chemical and Nuclear Weapons.** Department of Commerce hearings involving alleged violations of chemical and nuclear weapons rules are presumptively closed.¹³⁶
- **Civil Service Proceedings Involving Sensitive Security Information.** Although MSPB hearings are presumptively open to the public, “absent good cause shown, all hearings in which [sensitive security information controlled by the Department of Homeland Security] may be disclosed must be closed to the public.”¹³⁷
- **Equal Employment Opportunity (EEO).** Attendance at Equal Employment Opportunity Commissions hearings regarding federal-sector EEO complaints are “limited to persons determined by the administrative judge to have direct knowledge relating to the complaint.”¹³⁸ The same is true in many agency EEO processes.¹³⁹
- **Government-Managed Health Insurance and Health Care.** HHS rules provide that Medicare enrollees’ appeals of coverage decisions, decided in hearings before the Office of Medicare Hearings and Appeals, are presumptively closed.¹⁴⁰ DOD also presumptively closes similar proceedings involving TRICARE contractor decisions “[b]ecause of the personal nature of the matters to be considered.”¹⁴¹

¹³³ Jeffrey S. Wolfe, Dale Glendening, *Through the Disability Looking Glass: A Considered Response to Professor Pashler’s Wild Social Security Hare*, 44 U. MEM. L. REV. 523, 593–95 (2014); D. Randall Frye, *Fixing Disability Courts*, N.Y. TIMES (Jan. 20, 2014), available at <https://www.nytimes.com/2014/01/20/opinion/fixing-disability-courts.html>; D. Randall Frye, *Statement of the Association of Administrative Law Judges, Committee on Ways and Means, Subcommittee on Social Security*, 33 J. NAT’L ASS’N ADMIN. L. JUDICIARY 35, 47–48 (2013).

¹³⁴ Jasmine E. Harris, *Processing Disability*, 64 AM. U. L. REV. 457, 519–24 (2015).

¹³⁵ Comm. on Comm’n and Media Law of the Ass’n of the Bar of the City of New York, “*If It Walks, Talks and Squawks . . .*” *The First Amendment Right of Access to Administrative Adjudications: A Position Paper*, 23 CARDOZO ARTS & ENT. L.J. 21, 25 n.6 (2005).

¹³⁶ 15 C.F.R. §§ 719.14(b), 785.12(b).

¹³⁷ U.S. MERIT SYSTEMS PROTECTION BOARD JUDGES’ HANDBOOK ch. 10, § 3(b) (Oct. 2019), <https://www.mspb.gov/appeals/files/ALJHandbook.pdf> [hereinafter MSPB HANDBOOK].

¹³⁸ 29 C.F.R. § 1614.109(e).

¹³⁹ See, e.g., 12 C.F.R. § 268.108(e).

¹⁴⁰ See 42 C.F.R. §§ 405.1030(a), 423.2030(a).

¹⁴¹ 32 C.F.R. § 199.10(d)(11)(i).

- **Health Care Provider Status.** Certain HHS hearings to review determinations by the Centers for Medicare and Medicaid Services (CMS) and Office of the Inspector General affecting certain providers' participation in the Medicare and Medicaid programs.¹⁴² Some hearings involve determinations with respect to an incumbent or prospective provider's status as a provider; others involve matters such as the termination of provider agreements, noncompliance with relevant regulatory requirements, denial of reimbursement for services, and the imposition of sanctions.¹⁴³
- **Health Care Provider Reimbursement.** The Provider Reimbursement Board, within CMS, hears appeals by certified Medicare service providers dissatisfied by the final determinations of Medicare contractors and CMS. Board hearings are open only to the parties, CMS representatives, and "such other persons as the Board deems necessary and proper."¹⁴⁴ Michael Asimow notes: "Presumably this provision is justified since the hearings concern private financial information of service providers."¹⁴⁵
- **Immigration.** Although immigration court proceedings are presumptively open,¹⁴⁶ the Executive Office for Immigration Review and Department of Homeland Security have adopted policies that presumptively close proceedings involving exclusion,¹⁴⁷ applications for asylum or withholding of deportation,¹⁴⁸ and credible fear.¹⁴⁹ Proceedings concerning an "abused alien spouse" or "abused alien child" are also presumptively closed.¹⁵⁰
- **March-In Rights.** Proceedings by which agencies exercise rights to require contractors' to grant licenses to patented inventions produced with federal funds are presumptively closed.¹⁵¹
- **Medicare Noncompliance.** Under CMS rules, hearings involving civil money penalties for alleged noncompliance by drug manufacturers and Medicare Advantage organizations are open "to the parties and their representatives and technical advisors, and to any other persons whose presence the ALJ considers necessary and proper."¹⁵²

¹⁴² 42 C.F.R. § 498.60(a).

¹⁴³ 42 C.F.R. § 498.3.

¹⁴⁴ 42 C.F.R. § 405.1851.

¹⁴⁵ ASIMOW, *supra* note 15, at 8–9.

¹⁴⁶ 8 C.F.R. §§ 1003.27, 1240.10(b).

¹⁴⁷ 8 C.F.R. § 1240.32.

¹⁴⁸ 8 C.F.R. § 1240.33(c)(1).

¹⁴⁹ 8 C.F.R. § 1208.30(g)(2)(iii).

¹⁵⁰ 8 C.F.R. § 1003.27(c).

¹⁵¹ 37 C.F.R. § 401.6; 48 C.F.R. § 1227.304-5.

¹⁵² 42 C.F.R. §§ 422.1046(a), 423.1046(a).

- **Parole.** Prisoners’ parole hearings before the United States Parole Commission “shall not be open to the public.”¹⁵³
- **Post-Employment Conflicts of Interest.** Several agencies have also adopted policies that presumptively close hearings involving the disbarment or suspension of previous employees based on a conflict of interest.¹⁵⁴
- **Representative Misconduct.** Although agencies such as the Executive Office for Immigration Review¹⁵⁵ have adopted policies that representative disciplinary hearings are presumptively public, many others have taken the opposite approach.¹⁵⁶
- **Security Clearances.** Hearings before Department of Energy administrative judges to determine eligibility for access to classified and special nuclear material or national security information are presumptively closed to the public.¹⁵⁷
- **Selective Service.** Proceedings before the National Appeal Board of the Selective Service System are “closed to the public.”¹⁵⁸

3. Adversarial or Non-Adversarial Features of Agency Processes

Adjudicative processes are often classified as either adversarial or inquisitorial (called “non-adversarial” in some programs). The distinguishing feature between the two models is the role played by the decisionmaker with respect to the parties. In the adversarial model, the parties investigate the facts, generate the evidentiary record, and raise legal arguments before a passive decisionmaker. In the inquisitorial model, the decisionmaker reaches a decision by actively investigating the case and generating the evidentiary record. Although “no system is purely adversarial or purely inquisitorial,” Michael Asimow has observed that “procedures can be arrayed on this axis and will tend to fall nearer either the adversarial or inquisitorial poles.”¹⁵⁹

It is certainly true that proceedings in several major programs that fall nearer the inquisitorial pole (e.g., SSA, BVA) are presumptively closed to the public, whereas proceedings in many programs that fall nearer the adversarial pole (e.g., ALJ hearings at independent regulatory agencies) are presumptively open. One reference guide has suggested that the “public’s right of access [under the First Amendment] applies to adversarial administrative cases

¹⁵³ 28 C.F.R. § 2.13(e).

¹⁵⁴ 15 C.F.R. § 0.735-46; 31 C.F.R. § 15.737-20(b); 22 C.F.R. § 18.15; 43 C.F.R. § 73b.5.

¹⁵⁵ 8 C.F.R. §§ 292.3(h)(3), 1003.106(a)(2)(v), 1003.108(c). For a discussion of the policy considerations behind one agency’s shift from presumptively closed to presumptively open proceedings in this context, see *Disciplinary Proceedings Involving Professionals Appearing or Practicing Before the Commission*, Securities Act Release No. 33-6783, 41 SEC Docket 388, 1988 WL 1000021 (July 7, 1988).

¹⁵⁶ 12 C.F.R. §§ 19.199, 263.97, § 623.7, 1209.75(f); 37 C.F.R. § 11.44(c).

¹⁵⁷ 10 C.F.R. § 710.26(c).

¹⁵⁸ 32 C.F.R. § 1653.3(t).

¹⁵⁹ Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 3, 6–7 (2015).

akin to judicial proceedings, but possibly not to nonadversarial proceedings such as Social Security cases.”¹⁶⁰

However, it is unclear that the adversarial or inquisitorial features of an adjudicative process should determine whether, as a constitutional or policy matter, proceedings should be open or closed. It is easy to contemplate explicitly inquisitorial proceedings in which there is significant public interest.¹⁶¹ And there have been proposals over the years to introduce adversarial features into hearings before SSA ALJs.¹⁶² That design choice alone is unlikely to substantially alter parties’ privacy interests or the lack of interest by the general public in typical SSA proceedings. When it comes to programs like Social Security disability and veterans benefits, it may simply be that closed proceedings and non-adversarial practices serve similar purposes: helping applicants obtain financial assistance for which they are eligible.

4. Relationship Between the Parties

Nearly all adjudications addressed in this report involve a federal agency and one or more private parties. But agencies and private parties relate to each other in different ways depending on the program involved. Some adjudications involve prosecution of a private party by an agency. Others involve a private party’s application or request for something—a benefit, service, license, permit, etc. Still others situate the agency as a neutral decisionmaker resolving a dispute between two non-agency parties.

a. Agency Actions Against Private Parties

Many proceedings take place in the context of an agency investigation of or action against a private party for alleged noncompliance with the law. Given the specter of the Star Chamber,¹⁶³ it is unsurprising that many enforcement proceedings are subject to statutes that mandate open hearings.¹⁶⁴ Many agency enforcement actions are also governed by the formal-hearing provisions of the APA. The American Bar Association’s Section of Administrative Law and Regulatory Practice has asserted that “the very concept of a hearing comparable to a judicial proceeding,” codified in those provisions, “entails norms of openness.”¹⁶⁵

There are some exceptions. Hearings involving civil money penalties for alleged noncompliance by drug manufacturers and Medicare Advantage organizations are open only “to the parties and their representatives and technical advisors, and to any other persons whose

¹⁶⁰ AM. BAR ASS’N, SECTION OF ADMIN. LAW & REG. PRACTICE, A GUIDE TO FEDERAL AGENCY ADJUDICATION 83 (2d ed. 2012).

¹⁶¹ *See Soc’y of Prof. Journalists v. Sec’y of Labor*, 832 F.2d 1180 (10th Cir. 1987); Comm. on Commc’ns and Media Law of the Ass’n of the Bar of the City of New York, *supra* note 135, at 25 n.6. *But see* Salt Lake Tribune v. Chao, No. 2:07-CV-739, 2007 WL 2973269 (D. Utah Oct. 9, 2007).

¹⁶² *See supra* note 133.

¹⁶³ *See supra* note 24.

¹⁶⁴ 12 C.F.R. § 19.33(a); 12 C.F.R. § 263.33(a); 12 C.F.R. § 308.33(a); 12 C.F.R. § 747.33(a); 12 C.F.R. § 1081.300; 16 C.F.R. § 3.41(a); 17 C.F.R. § 201.301; 29 C.F.R. §§ 2201.2, 2400.2; 30 U.S.C. § 1271(a)(3), (4); 40 C.F.R. §§ 22.3(a), 22.22(a)(2); 49 C.F.R. § 386.56(b).

¹⁶⁵ Am. Bar. Ass’n, Sec. of Admin. Law & Reg. Practice, *supra* note 8.

presence the [adjudicator] considers necessary and proper.”¹⁶⁶ Although a few agencies, like the Executive Office for Immigration Review,¹⁶⁷ have adopted policies that representative disciplinary hearings are presumptively public, several others close such proceedings to public observation.¹⁶⁸ And, as discussed earlier, many agencies have historically claimed the option to conduct initial investigative proceedings in private.¹⁶⁹

There is at least some historical precedent for closing enforcement proceedings in circumstances where publicity before a final disposition could result in reputational damage to private parties, or where public access would negatively affect national security,¹⁷⁰ law enforcement, or some public interest. The Attorney General’s Committee on Administrative Procedure noted, for example that “hearings involving misrepresentation under the Grain Standards Act, where the only sanction is to make findings of misrepresentation public” were presumptively closed to the public. “[I]f the hearing itself were to be public,” the Committee reasoned, “the sanction would be invoked before a finding of guilt.”¹⁷¹ The Committee also noted that “[h]earings conducted by the Federal Reserve Board to forfeit membership in the Reserve System, and by the Federal Deposit Insurance Corporation to terminate the insurance status of a bank, are private, since the mere publicity of a hearing might prove ruinous.”¹⁷²

Congress ultimately required such hearings to be presumptively open to the public through the Crime Control Act of 1990.¹⁷³ And some agencies have explicitly found that, for purposes of the programs they administer, policy considerations favoring public access outweigh any potential reputational damage to parties.¹⁷⁴

b. Agency Decisions on Private Parties’ Applications

Probably the vast majority of federal agency adjudication involves decisions on private parties’ applications and similar requests—for benefits, enrollment in programs, services, licenses, permits, recognition of intellectual property interests, records and information, loans, grants, employment, contracts, security clearances, authorizations, etc. Many involve processes for oral proceedings ranging from full evidentiary hearings to truly informal conferences.

Decisions on private parties’ applications under many programs will have no direct impact on people not associated with the applicant. Examples include decisions on applications for public benefits (e.g., Social Security, veterans’ benefits) and enrollment in health insurance programs. Proceedings in these programs seem likely to garner little or no public interest.

¹⁶⁶ 42 C.F.R. §§ 422.1046(a), 423.1046(a).

¹⁶⁷ 8 C.F.R. §§ 292.3(h)(3), 1003.106(a)(2)(v), 1003.108(c).

¹⁶⁸ 12 C.F.R. § 19.199; 12 C.F.R. § 263.97; 12 C.F.R. § 623.7; 12 C.F.R. § 1209.75(f); 37 C.F.R. § 11.44.

¹⁶⁹ Gellhorn, *supra* note 107, at 117–23.

¹⁷⁰ *See supra* note 136.

¹⁷¹ FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE, *supra* note 24, at 68.

¹⁷² *Id.* Although federal law now requires that Federal Reserve and FDIC hearings be public, Farm Credit Administration enforcement hearings remain presumptively closed. *See* 12 U.S.C. § 2266(a).

¹⁷³ Crime Control Act of 1990, Pub. L. No. 101-647, §§ 2547, 104 Stat. 4789, 4886–87.

¹⁷⁴ *See, e.g.*, Disciplinary Proceedings Involving Professionals Appearing or Practicing Before the Commission, Securities Act Release No. 33-6783, 41 SEC Docket 388, 1988 WL 1000021 (July 7, 1988); H. P. Hood & Sons, Inc., 58 F.T.C. 1184 (1961) (“the deterrent effect of public proceedings upon potential violators is greater by reason of the fact that they are open to all interested persons”).

Other adjudications result in decisions that, although they nominally concern the interests or obligations of the applicant, are more likely to have substantial impacts on non-applicants. Examples include licenses and permits granted to public utilities and service providers and entities that discharge pollutants or otherwise affect the environment. Unsurprisingly, proceedings in these adjudications are more likely to attract significant public interest.

In some programs, decisions on one person’s application will affect the success of other applicants. Examples include contract bids, job applications, applications for exclusive licenses and permits, applications for grant and loan programs with funding or other limitations, and applications for visas, permits, and licenses subject to numerical or physical limitation. Depending on the program, applicants may have a very strong interest in attending proceedings conducted on competitors’ applications.

c. Adjudication Between Private Parties

Several agencies administer programs that involve the resolution of disputes between private parties with competing claims or interests. In these programs, the government adjudicates disputes without becoming a party to them. Examples include proceedings involving patentability (*inter partes* review), commodity broker reparations, some labor and employment matters, and certain agricultural and shipping disputes.¹⁷⁵ Because these processes can look a lot like traditional civil litigation in the courts, it can perhaps be argued that public access should be the norm.¹⁷⁶ In fact, some private-private schemes, such as workers’ compensation programs administered by the Department of Labor (DOL),¹⁷⁷ were explicitly established to supplement or replace judicially administered schemes, in order to “provide relief to private parties facing obstacles to recovery in federal court.”¹⁷⁸ Given a past practice of open proceedings, there is perhaps a clearer case for public access under constitutional principles.

5. Degree of Public Interest

There are any number of reasons members of the public might be interested in attending agency adjudicative proceedings, such as to:

- report on notable participants or newsworthy events involved in an adjudication;¹⁷⁹
- observe, understand, or report on proceedings which may affect people and communities beyond the parties to a proceeding, including regulatory beneficiaries and similarly situated regulated entities; and
- research, gain a better understanding of, or provide public oversight of agency operations and performance.

¹⁷⁵ See generally Michael Sant’Ambrogio, *Private Enforcement in Administrative Courts*, 72 VAND. L. REV. 425 (2019).

¹⁷⁶ Cf. Comm. on Commc’ns and Media Law of the Ass’n of the Bar of the City of New York, *supra* note 135.

¹⁷⁷ See 20 C.F.R. §§ 702.344, 725.46.

¹⁷⁸ Sant’Ambrogio, *supra* note 175, at 446–47.

¹⁷⁹ See, e.g., ‘Real Housewives’ husband Joe Giudice to be deported, YAHOO! NEWS (Oct. 10, 2018); Mike Schneider, *Judge: SeaWorld trying to comply with safety goals*, AP (Aug. 12, 2013).

And, as discussed in the next section, adjudication in programs provides explicit opportunities for public participation beyond observation.

There can be substantial public interest in the outcome of specific cases. Interviewees from a number of agencies shared anecdotes about specific, high-profile cases that attracted inordinate attention, for example, cases involving licenses for controversial infrastructure projects, newsworthy industrial accidents, or labor disputes involving major employers. But interviewees reported that, even in high-profile cases, substantial public interest in a case does not necessarily translate to substantial public attendance at proceedings for that case, especially less formal or substantive proceedings such as prehearing, scheduling, and settlement conferences. Although the lack of significant public interest in attending many adjudicative proceedings may not fully justify existing policies that close certain types of proceedings to public observation, it perhaps explains why they exist and why they have not been challenged.¹⁸⁰

It is worth bearing in mind that the “public” is not some monolithic whole. There are many possible “publics” that may be interested in a proceeding ranging from friends and family to large crowds of concerned citizens. The interested public can vary across proceedings, cases, programs, and agencies. Some proceedings will attract trade press; others are more likely to garner the interest of larger media outlets. Other groups potentially interested in agency adjudicative proceedings can include researchers,¹⁸¹ practitioners, law students, court watchers,¹⁸² trade groups, organized labor groups, public interest groups, colleagues, state and local officials, community members, etc. One interviewee, whose agency conducts hearings in courthouses instead of its own offices, even reported public attendance by curious onlookers who happen to wander into the rooms where agency proceedings take place. In crafting policies on public access, agencies will need to be mindful of the nature of the public interest that their proceedings attract.

6. Role of Public Input in Agency Decisionmaking

The role of public input in agency decisionmaking warrants brief mention. As noted above, some adjudicative programs incorporate opportunities for public participation ranging from fairly proceduralized forms of participation such as intervention and amicus briefing to less formal mechanisms for public input such as comment submission. Open proceedings will be, in probably most cases, foundational to meaningful public participation.

D. Departing from a General Presumption

As noted above,¹⁸³ many agency policies governing public access to adjudicative proceedings take a two-step approach. After establishing a general presumption that proceedings should be either open or closed, they then set forth the conditions for departing from that

¹⁸⁰ Cf. Christopher B. McNeil, *Public Access and Media Rules for Administrative Adjudicators in High-Profile Hearings*, 91 JUDICATURE 298 (2008).

¹⁸¹ See, e.g., *Stevens v. Osuna*, 877 F.3d 1293 (11th Cir. 2017).

¹⁸² See Eagly, *supra* note 29, at 998.

¹⁸³ See *supra* note 101.

presumption in specific circumstances. This Subpart addresses (1) conditions for closing presumptively open proceedings and (2) conditions for opening presumptively closed proceedings before turning to (3) the specific procedures that agencies have devised for departing from general presumptions.

1. Closing Presumptively Open Proceedings

Agency rules reflect several different approaches for closing proceedings, in whole or in part, which would otherwise be open to public observation. Some leave it to individual adjudicators to determine when to close presumptively open proceedings in whole or in part specifying that proceedings are presumptively open “unless otherwise ordered” by the adjudicator,¹⁸⁴ “unless otherwise closed by the adjudicator for good cause shown,”¹⁸⁵ or “subject to restrictions and limitations as may be consistent with orderly procedure.”¹⁸⁶

Some rules allow individual adjudicators, in their discretion, to close proceedings, in whole or in part, in the “public interest” or in the “best interests” of, depending on the agency, one or more of the following: a “party,” a “witness,” the “public,” other “affected persons,” or “national security.”¹⁸⁷ Other policies permit or require partial or total closure for proceedings at which certain categories of information will be considered, including confidential commercial information, classified or national security information,¹⁸⁸ or other information required by law to be protected from disclosure. Indeed, many such rules directly reference or cross-reference FOIA, the Privacy Act, the Sunshine Act, or other sources of law protecting specific records and categories of information from public disclosure.¹⁸⁹

At least one agency has advised adjudicators to be sensitive in cases involving children. EOIR guidance, for example, notes that “[y]oung children may be reluctant to testify about painful or embarrassing incidences, and the reluctance may increase with the number of

¹⁸⁴ See, e.g., 5 C.F.R. §§ 831.1106, 2422.18, 2423.30; 13 C.F.R. § 134.222(c); 16 C.F.R. § 3.21; 20 C.F.R. § 802.308; 22 C.F.R. § 1422.9, 1423.14; 29 C.F.R. §§ 102.64, 458.74; 49 C.F.R. § 386.56(b). ACUS’s *Model Adjudication Rules* specify: “The hearing must be open to the public, unless the Adjudicator orders otherwise.” ADMIN. CONF. OF THE U.S, MODEL ADJUDICATION RULES § 300 (rev. 2018).

¹⁸⁵ See, e.g., 24 C.F.R. § 26.45; 32 C.F.R. § 200.2015(d); 42 C.F.R. §§ 93.517, 160.534. Regulations implementing the Program Fraud Civil Remedies Act also follow this model. See, e.g., 5 C.F.R. § 185.132; 6 C.F.R. § 13.3; 7 C.F.R. § 1.329; 10 C.F.R. § 13.3; 10 C.F.R. § 1013.3; 12 C.F.R. § 308.529; 13 C.F.R. § 142.21; 14 C.F.R. § 1264.129; 15 C.F.R. § 25.3; 20 C.F.R. § 355.3; 20 C.F.R. § 498.215; 22 C.F.R. § 35.3; 22 C.F.R. § 224.3; 22 C.F.R. § 521.3; 28 C.F.R. § 71.3; 29 C.F.R. § 22.3; 31 C.F.R. § 16.30; 34 C.F.R. § 33.30; 38 C.F.R. § 42.30; 40 C.F.R. § 27.30; 41 C.F.R. § 105-70.030; 43 C.F.R. § 35.30; 45 C.F.R. § 79.30; 45 C.F.R. § 1149.47; 45 C.F.R. § 2554.32; 49 C.F.R. § 31.30.

¹⁸⁶ See 27 C.F.R. § 71.78, 771.77.

¹⁸⁷ See, e.g., 4 C.F.R. § 28.57; 5 C.F.R. §§ 1201.52, 2638.504; 8 C.F.R. §§ 1003.106, 1003.27; 10 C.F.R. § 2.328 (NRC); 12 C.F.R. § 10.933, 19.33, 109.33, 263.33, 308.33, 747.33, 1081.300, 1209.12; 24 C.F.R. § 81.84; 28 C.F.R. 68.39; 34 C.F.R. § 32.7; 34 C.F.R. § 32.7(d); 41 C.F.R. § 105-56.007.

¹⁸⁸ See, e.g., Memorandum from Thomas G. Snow, Acting Chief Immig. Judge, EOIR, Operating Policies and Procedures Memorandum 09-01: *Classified Information in Immigration Court Proceedings* (Feb. 5, 2009), <https://www.justice.gov/eoir/eoir-policy-manual/OPPM00901/download> [hereinafter Snow Memorandum]; MSPB HANDBOOK, *supra* note 137, at 51–52.

¹⁸⁹ See, e.g., 10 C.F.R. § 2.1405; 12 C.F.R. §§ 1081.203, 1081.214, 1081.300; 12 C.F.R. §§ 746.111(e), 746.207; 15 C.F.R. §§ 960.19, 766.13(b); 16 C.F.R. § 16.225; 39 C.F.R. § 3010.303; 40 C.F.R. §§ 22.22, 78.14, 179.81; 46 C.F.R. § 4.09-17; 48 C.F.R. § 6101.21; 49 C.F.R. § 604.40.

spectators or other respondents present.” The guidance directs judges to “be sensitive to the concerns of juveniles if there is a motion to close the hearing.”¹⁹⁰

With respect to evidentiary hearings, ACUS recommends that agencies retain the ability to close specific hearings when the public interest in open proceedings is outweighed by the need to national security, law enforcement, confidentiality of business documents, or hearing participants’ privacy.¹⁹¹

2. Opening Presumptively Closed Proceedings

Agency policies reflect several different approaches for opening proceedings, in whole or in part, which would otherwise be closed to public observation. Some permit adjudicators to open presumptively closed proceedings “for good cause shown”¹⁹² or admit specific people that the adjudicator “authorizes”¹⁹³ or “considers necessary and proper.”¹⁹⁴ Others provide for open hearings at the agency’s direction,¹⁹⁵ upon a party’s request,¹⁹⁶ or with the parties’ consent.¹⁹⁷

3. Procedures for Departing from a General Presumption

Some agencies have adopted specific procedural mechanisms for departing from general presumptions, such as:

- a way for a party or parties to request that the adjudicator close or partially close a presumptively open proceeding (e.g., motion to close hearing, motion for protective order¹⁹⁸) or open a presumptively closed proceeding;¹⁹⁹
- a way for parties to consent to opening a presumptively open proceeding or waive the right to a closed proceeding;²⁰⁰
- a way for an adjudicator or other agency official to sua sponte open a presumptively closed proceeding or close a presumptively open proceeding;²⁰¹
- a way for parties or non-parties to object to closing a presumptively open proceeding or opening a presumptively closed proceeding.²⁰²

¹⁹⁰ Memorandum from MaryBeth Keller, Chief Immig. Judge, EOIR, Operating Policies and Procedures Memorandum 17-03: *Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* (Dec. 20, 2017), <https://www.justice.gov/eoir/eoir-policy-manual/OPPM01703/download>.

¹⁹¹ Recommendation 2021-4, *supra* note 14, ¶ 3; Recommendation 2016-4, *supra* note 25, ¶ 18.

¹⁹² 15 C.F.R. §§ 719.14(b), 785.12(b).

¹⁹³ 10 C.F.R. § 710.26(c).

¹⁹⁴ 42 C.F.R. §§ 405.1030(a), 405.1851, 422.1046(a), 423.1046(a), 423.2030(a), 498.60(a).

¹⁹⁵ 12 C.F.R. §§ 19.199; 12 C.F.R. § 263.97; 12 C.F.R. § 623.7; 12 C.F.R. § 1209.75(f).

¹⁹⁶ 8 C.F.R. §§ 1003.27(c), 1208.30(g)(2)(iii), 1240.33(c)(1); 32 C.F.R. § 199.10(d)(11)(i); 12 C.F.R. §§ 19.199; 12 C.F.R. § 263.97; 12 C.F.R. § 623.7; 12 C.F.R. § 1209.75(f); 37 C.F.R. § 11.44.

¹⁹⁷ *See, e.g.*, 8 C.F.R. § 1003.27(c).

¹⁹⁸ *See, e.g.*, Snow Memorandum, *supra* note 188.

¹⁹⁹ *See, e.g.*, EOIR MANUAL, *supra* note 125, §§ 4.9, 8.5.

²⁰⁰ *See, e.g., id.* § 8.5.

²⁰¹ *See, e.g., id.*

²⁰² *See, e.g.*, 12 C.F.R. § 19.33(a).

- a requirement that the adjudicator issue a written decision on the request including the adjudicator’s reasoning and responding to any objections;²⁰³
- a requirement that a general counsel or chief legal officer certify that the proceeding may be closed;²⁰⁴ or
- a way for unsuccessful requestors or objectors to appeal the adjudicator’s decision on public access.²⁰⁵

II. OPERATIONALIZING PUBLIC ACCESS TO OPEN PROCEEDINGS

Public access to adjudicative proceedings is not self-executing—that is, agencies must establish policies or take affirmative steps to facilitate public access to proceedings that, as a legal matter, are said to be open. The openness of a proceeding depends heavily on the means by which the agency conducting it facilitate public access.

Consider an extreme example: an ostensibly open proceeding which takes place deep within a restricted area, without any public notice and with recording or broadcasting strictly prohibited. As a practical matter, is this proceeding open? It probably depends on the context. Adjudicative proceedings can be public for different reasons. Some may be open primarily for the benefit of the private parties involved, so that friends, family, and other sources of moral support can accompany them. In such cases, a lack of public notice and strict limits on recording and broadcasting may have limited practical impact on the functional openness of the proceeding and indeed may balance openness with other policy objectives such as privacy. Other proceedings are open primarily for the benefit of non-parties who will be directly impacted by the adjudication or for the benefit of a broader general public. In such cases, a lack of public notice or an out-of-the-way hearing site may substantially affect functional openness.

We identified several examples that reflect how agency practices can affect functional openness (or at least observers’ perception of openness):

- Practitioners encouraged an agency to maintain a public hearing docket of upcoming proceedings, arguing that “‘open to the public’ requires notice to the public.” They reported limited success with other methods for learning about upcoming hearings, such as contacting the agency’s public affairs office or submitting FOIA requests.²⁰⁶
- A researcher reported barriers she and others experienced when accessing the facilities in which an agency’s adjudicative proceedings take place. Barriers included security requirements, personnel who were unfamiliar with agency policies regarding public access to adjudicative proceedings, hearing rooms that could not accommodate public attendees, and even dress codes. The researcher also reported that public attendees observed proceedings from a separate space (or remotely), positing that

²⁰³ See, e.g., 5 C.F.R. § 2638.504.

²⁰⁴ See, e.g., 5 U.S.C. § 552b(f)(1).

²⁰⁵ See, e.g., 24 C.F.R. § 81.84(h)(1).

²⁰⁶ John A. Gilbert, Jr. & Andrew J. Hull, *DEA Administrative Hearings: “Open to the Public” Requires Notice to the Public*, FDA LAW BLOG (Oct. 26, 2016), <https://www.thefdalawblog.com/2016/10/dea-administrative-hearings-open-to-the-public-requires-notice-to-the-public/>.

separation might affect parties' engagement in their cases and perception of fairness.²⁰⁷

- An adjudicator found that a proceeding held in a prison was sufficiently public under agency rules, even though public attendees had to go through a pre-clearance process that could take several weeks and required them to submit personal information so that prison staff could perform a background check. The adjudicator held that “a hearing is not considered non-public merely because it takes place in a facility that places some conditions on public access” and that although “barriers to public access were high, . . . they were not insurmountable: in principle, members of the public could have attended the hearing had they been especially determined and diligent.”²⁰⁸
- A voluntary bar association alleged, in a policy brief, that one agency’s virtual hearings were functionally non-public, that access was restricted to certain physical facilities where proceedings were conducted, and that “logistical hurdles,” such as prohibitions on notetaking, impeded public attendees’ “ability to accurately observe and document the hearings.”²⁰⁹
- A blogger asked: “Since [an agency’s] hearings are supposed to be public, shouldn’t these video hearings be available for everyone to (at least) hear?”²¹⁰

From these and other anecdotes, we can identify four broad categories of issues that agencies should consider when developing policies to facilitate public access to open proceedings. Described below, they are: (1) public notice of open proceedings, (2) location and form of the proceeding, (3) access to recordings and transcripts of open proceedings, and (4) availability of policies regarding public access to agency adjudicative proceedings.

As a legal matter, case law reveals very little about the practical aspects of public access to agency adjudicative proceedings, and statutes only rarely structure the ways in which agencies operationalize public access to open proceedings. Most notable, of course, is the Government in the Sunshine Act. The Act generally requires agencies to provide public notice of meetings, including adjudicative proceedings, that are subject to the Act and promptly make a transcript, a recording, or minutes publicly available in an easily accessible location.²¹¹ FOIA and the Privacy Act presumably bear on the disclosure of records that document or summarize the conduct of adjudicative proceedings, the vast majority of which are not subject to the Sunshine Act. And some agencies may be subject to program-specific requirements. The Secretary of Transportation, for example, may only issue licenses for the ownership, construction, or operation of a deepwater port after public notice and at least one public hearing held in “each

²⁰⁷ See Eagly, *supra* note 29, at 994–1000.

²⁰⁸ In the Matter of Gary L. McDuff, 115 S.E.C. Docket 4635 (Dec. 16, 2016).

²⁰⁹ Am. Immig. Lawyers Ass’n, AILA Policy Brief: Public Access to Tent Courts Now Allowed, but Meaningful Access Still Absent, AILA Doc. No. 20011061 (Jan. 10, 2020), <https://www.aila.org/advo-media/aila-policy-briefs/public-access-tent-courts-allowed-not-meaningful>.

²¹⁰ John L. Welch, *TTAB Posts August 2021 (Video) Hearing Schedule*, THE TTABLOG (July 30, 2021), <http://thettablog.blogspot.com/2021/07/ttab-post-august-2021-video-hearing.html>.

²¹¹ 5 U.S.C. § 552b(e), (f)(2).

adjacent coastal State.”²¹² Within the requirements of these laws, agencies have adopted their own policies and practices, as described in the following sections.

A. Public Notice of Open Proceedings

Statutes, including the Sunshine Act and some program-specific statutes, require certain agencies to provide advance public notice of certain adjudicative proceedings. Some agencies not subject to statutory requirements have also adopted their own policies requiring public notice of open proceedings.

There are three key components to public notice policies: (1) the location of the notice, (2) the content of the notice, and (3) the timing of the notice. The Sunshine Act, for example, requires agencies to provide public notice of covered meetings at least a week beforehand. The announcement, which is also published in the *Federal Register*, must specify (a) the time, place, and subject matter of the meeting; (b) whether the meeting will be open or closed to the public; and (c) contact information for an agency official responsible for answering questions about the meeting.²¹³

1. Location of the Notice

Although the *Federal Register* is the federal government’s official journal and a predictable location for public notice,²¹⁴ it may not be a publication that people who are particularly interested in or affected by an adjudication are likely to monitor.²¹⁵ ACUS recognized this in Recommendation 71-6, urging agencies, at least for proceedings in which there are opportunities for public participation, to “utilize such methods as may be feasible, in addition to the Federal Register’s official public notice, to inform the public and citizen groups about proceedings (including significant applications and petitions) where their participation is appropriate.” Methods that ACUS identified are:

factual press releases written in lay language, public service announcements on radio and television, direct mailings and advertisements where the affected public is located, and express invitations to groups which are likely to be interested in and able to represent otherwise unrepresented interests and views.²¹⁶

This remains a very good list, although developments in technology and communications since 1971 have added new options and perhaps diminished the importance of others. A contemporary list, based on current agency practices, should include:

- posting in a physical location at an agency facility,²¹⁷

²¹² 33 U.S.C. § 1504(g); *see also* 42 U.S.C. § 9112(g).

²¹³ 5 U.S.C. § 552b(e).

²¹⁴ *See, e.g.*, 33 C.F.R. § 148.230(a); 40 C.F.R. § 78.14(a)(10).

²¹⁵ *See* Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, ¶ 3, 78 Fed. Reg. 76269, 76271 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 68-4, *Consumer Bulletin*, 1 ACUS 12 (1968).

²¹⁶ Recommendation 71-6, *supra* note 11.

²¹⁷ *See, e.g.*, 30 C.F.R. §§ 722.15(d), 843.15(d); 49 C.F.R. § 1113.1(a).

- posting in a physical location that affected non-parties are likely to see (e.g., a bulletin board at a jobsite),²¹⁸
- posting in an appropriate location on an agency website,²¹⁹
- publication in an agency digest,²²⁰
- a press release,²²¹
- social media,²²²
- publication in a media outlet that interested persons are likely to monitor,²²³
- email to persons who have opted to receive notice (e.g. by signing up for a mailing list on an agency website),²²⁴ and
- direct outreach to persons or groups that are likely to be interested in or affected by the proceeding.²²⁵

ACUS also recommended that agencies consider publishing a monthly bulletin that provides notice of upcoming proceedings.²²⁶ Indeed, several agencies and agency adjudication offices now maintain schedules of upcoming proceedings on their websites, either as a separate schedule or as part of general calendar of upcoming events. They include the Environmental Appeals Board (EAB),²²⁷ Federal Energy Regulatory Commission (FERC) Office of ALJs,²²⁸ Patent Trial and Appeal Board (PTAB),²²⁹ Securities and Exchange Commission,²³⁰ and Trademark Trial and Appeal Board.²³¹

The optimal location (or locations) for public notice will, naturally, vary across agencies, programs, and individual cases according to factors such as the level of public interest in a typical proceeding or specific case, the specific audience the agency is trying to reach, and the importance of public input or participation for agency decisionmaking.

2. Content of the Notice

²¹⁸ See, e.g., 29 C.F.R. § 2200.7.

²¹⁹ See, e.g., 49 U.S.C. § 60117(b)(2); 49 C.F.R. § 1113.1(a).

²²⁰ See, e.g., 17 C.F.R. § 201.200(e).

²²¹ OCC News Release 2021-96, OCC to Hold Hearing on Charges Against Former Wells Fargo Bank, N.A. Executives; Agency Seeks Prohibition Order, Orders to Cease and Desist, and Civil Money Penalties (Sep. 10, 2021), <https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-96.html>.

²²² Cf. EPA OFFICE OF WATER, EPA 823-F-19-005, MODERNIZING PUBLIC HEARINGS FOR WATER QUALITY STANDARD DECISIONS CONSISTENT WITH 40 CFR 25.5 13 (June 2019), https://www.epa.gov/sites/default/files/2019-05/documents/modernizing_public_hearings_for_wqs_decisions_consistent_with_40_cfr_25.5_.pdf [hereinafter MODERNIZING PUBLIC HEARINGS].

²²³ See, e.g., 30 C.F.R. § 722.15(d), 843.15(d); 40 C.F.R. § 142.33(a).

²²⁴ See, e.g., 40 C.F.R. § 403.11(b)(1)(i)(A).

²²⁵ See, e.g., *id.*

²²⁶ Recommendation 71-6, *supra* note 11.

²²⁷ *Upcoming Oral Arguments*, EPA, https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Upcoming+Oral+Arguments?OpenView (last visited Oct. 13, 2021).

²²⁸ *Administrative Litigation*, FERC, <https://www.ferc.gov/administrative-litigation-0> (last visited Oct. 13, 2021).

²²⁹ *Hearing Schedules (PTAB)*, USPTO, <https://www.uspto.gov/patents/ptab/hearings/hearing-schedules-ptab> (last visited Oct. 13, 2021).

²³⁰ *Upcoming Events*, SEC, https://www.sec.gov/news/upcoming-events#upcoming_events_public_hearings (last visited Oct. 13, 2021).

²³¹ *TTAB hearings*, USPTO, <https://www.uspto.gov/trademarks/ttab/ttab-hearing-schedules> (last visited Oct. 13, 2021).

Certain types of information are particularly useful for agencies to include when they provide advance notice of open proceedings. As described above, the Sunshine Act requires that notices include the time, place, and subject matter of the meeting and contact information for an agency official who can answer questions about the meeting. (Sunshine Act notices must also indicate whether covered meetings are open or closed to the public.) ACUS provided a similar list in Recommendation 71-6, urging agencies to include the following information about upcoming proceedings in their monthly bulletins:

- (a) The name and docket number or other identification of any scheduled proceeding in which public intervention may be appropriate;
- (b) A brief summary of the purpose of the proceeding;
- (c) The date, time and place of the hearing; and
- (d) The name of the agency, and the name and address of the person to contact if participation or further information is sought.²³²

It may also be useful for agencies to include any instructions for accessing the proceeding. Members of the public who wish to attend proceedings in person may need to coordinate with agency staff to gain access to an agency facility. They may need to budget time, and have documentation in hand, to undergo a security check. Consider the following:

- The website of the Environmental Appeals Board, for example, advises public attendees that, “[f]or security purposes . . . advance notice is required to gain entry into the EPA building where the Courtroom is located.” Public attendees must notify the clerk of the EAB at least a week beforehand.²³³
- CBCA advises attendees to allow time to “go through security.”²³⁴
- PTAB’s guide to oral proceedings informs public attendees that they must bring a valid form of government-issued identification and arrive at least 30 minutes before the scheduled proceeding.²³⁵
- EOIR informs members of the public that they do not notify immigration courts in advance of their visit but encourages them to “contact EOIR’s Office of Communications and Legislative Affairs to coordinate your visit.”²³⁶
- For immigration proceedings that take place in Department of Homeland Security (DHS) detention facilities, EOIR notes on its website that it “does not control entry to the

²³² Recommendation 71-6, *supra* note 11.

²³³ EAB MANUAL, *supra* note 124, at 10.

²³⁴ *Decorum*, CBCA, <https://www.cbca.gov/board/Decorum.html> (last visited Oct. 13, 2021).

²³⁵ USPTO, THE PATENT TRIAL AND APPEAL BOARD: GUIDE TO ADMINISTRATION OF ORAL HEARINGS BEFORE THE PATENT TRIAL AND APPEAL BOARD 8 (Oct. 15, 2021), https://www.uspto.gov/sites/default/files/documents/PTAB_hearings_guide_101520.pdf [hereinafter PTAB GUIDE].

²³⁶ *Observing Immigration Court Hearings*, EOIR (Feb. 2017), <https://www.justice.gov/eoir/observing-immigration-court-hearings>.

detention facilities in which immigration courts are located” and advises public attendees to “contact DHS or the detention facility you plan to visit to learn of any security clearance requirements for entry to the building.”²³⁷ The immigration courts’ practice manual notes that “individuals may be required to obtain advance clearance to enter the facility” and may not be allowed bring electronic devices with them.²³⁸

Similar principles can apply for remote attendance. Is preregistration required? Must public attendees provide a name, an email address, or other personal information to observe the proceeding remotely?

3. Timing of the Notice

Notice policies should be reasonably calculated to provide interested persons sufficient time to make arrangements to attend the proceeding. The Sunshine Act establishes a one-week minimum. For proceedings in which there are opportunities for public participation, ACUS suggested in Recommendation 71-6 that agencies provide initial notice “as far in advance of hearing as possible in order to allow affect groups an opportunity to prepare.”²³⁹

The optimal timing for public notice will depend on factors such as whether typical public attendees would need to travel to the proceeding and whether public participation is permitted or encouraged. For example, a proceeding that the public can only attend in person at an agency’s headquarters in Washington, D.C., probably requires more advance notice than a proceeding that interested persons can attend remotely using a personal electronic device. And a proceeding in which public input is integral to decisionmaking may warrant more advance notice than a proceeding in which public access is peripheral or unrelated to decisionmaking.

B. Location and Form of Public Attendance: In-Person or Remote

Agencies conduct proceedings all over the place—at their Washington headquarters; in their regional and local offices; in courthouses and other federal, state, local, and tribal government facilities; even in hotel ballrooms, convention centers, conference rooms, and theaters across the country depending on the circumstances. The spaces in which in-person proceedings take place vary widely in terms of their public accessibility and capacity to accommodate public observers. As to the location of in-person proceedings, a few statutes and some agency policies dictate the state or area in which proceedings must take place. Higher-volume adjudication programs often have established geographical jurisdictions. And in many cases, an adjudicator sets the location for a proceeding. Under all of these approaches, the location is typically one that is convenient for the agency (e.g., headquarters), convenient for the

²³⁷ *Id.*

²³⁸ EOIR MANUAL, *supra* note 125, § 4.14.

²³⁹ Recommendation 71-6, *supra* note 11.

parties (e.g., within a certain distance of a party’s residence or place of business), or somehow connected to the facts of the case.²⁴⁰

Through the mid-twentieth century, oral proceedings were essentially synonymous with in-person proceedings. Beginning as early as the 1980s, agencies began experimenting with proceedings in which one or more people participated remotely: first by telephone,²⁴¹ then by video conferencing,²⁴² and more recently by web conferencing in so-called “virtual” proceedings.²⁴³ Virtual proceedings have become especially widespread during the COVID-19 pandemic, as ACUS examined in an earlier project.²⁴⁴ The defining characteristic of fully virtual hearings is that they take place in a virtual space without a clear physical nexus, requiring access to a suitable internet connection and personal device. An earlier report to ACUS,²⁴⁵ and interviews conducted for this report, suggest that virtual proceedings will remain commonplace even after the pandemic subsides, at least for informal conferences and less complicated hearings that agencies can effectively administer virtually.

In-person proceedings and proceedings in which one or more people participate remotely can both pose challenges for public access. But for purposes of this report, we will speak of *in-person public access*, in which the agency provides a location for public observation (which may or may not be the same location as the adjudicator or parties), and *remote public access*, in which interested persons can observe a proceeding live from a location of their choosing online or by telephone.

Agencies can facilitate live in-person and remote public access in a number of ways:

In-Person Public Access	Remote Public Access
<ul style="list-style-type: none"> • Attendees observe the proceeding in the space from which the adjudicator conducts it. • Attendees observe the proceeding in the space from which a party remotely participates. 	<ul style="list-style-type: none"> • Attendees observe a live video or audio stream of the proceeding through a commercial platform such as YouTube. • Attendees observe a live video or audio stream of the proceeding through a private hosting platform.

²⁴⁰ See *supra* note 212; see also 8 U.S.C. § 1324a(e)(3)(B), 1324c(d)(2)(B); 30 C.F.R. § 843.15 (“[t]he hearing shall be held at or reasonably close to the mine site . . . or at any other location acceptable to the Office and the person to whom the notice or order was issued”).

²⁴¹ See Recommendation 86-7, *supra* note 40, ¶ 10.

²⁴² See Recommendation 2014-7, *supra* note 13; Recommendation 2011-4, *supra* note 13.

²⁴³ See Recommendation 2021-4, *supra* note 14.

²⁴⁴ *Id.*

²⁴⁵ Fredric I. Lederer & the Ctr. for Legal & Ct. Tech., Analysis of Administrative Agency Adjudicatory Hearings Use of Remote Appearances and Virtual Hearings 15 (June 3, 2021) (report to the Admin. Conf. of the U.S.).

<ul style="list-style-type: none"> Attendees observe a live video or audio stream of the proceeding in a space provided by the agency.²⁴⁶ 	<ul style="list-style-type: none"> Attendees use a dial-in number to listen to the proceeding.²⁴⁷ Attendees observe the proceeding by directly joining the videoconference or teleconference in which it takes places.
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Agencies can also manage public access in different ways. In some contexts, members of the public who wish to observe a proceeding, in person or remotely, will need to make arrangements with the agency beforehand. In other contexts, members of the public can simply show up.

All of these arrangements have their benefits and costs for public access, which agencies must consider as they develop a policy that makes sense for the programs they administer and the cases they adjudicate. In addition to administrative costs and available resources, factors to consider include: (1) accessibility for public attendees, (2) scalability, (3) the balance between transparency and privacy, (4) impact on participants' behavior, (5) impact on the ability to share sensitive materials, and (6) impact on adjudicators' ability to regulate proceedings. We discuss these factors in detail below. Of course, public access is far from the only factor agencies must consider when they determine best practices for conducting proceedings, and they will need to weigh openness against the other applicable legal requirements and policy objectives specific to their programs.

1. Accessibility for Public Attendees

One obvious benefit of remote public access is that people interested in attending a proceeding can do so from a location of their choosing without incurring the costs and time associated with travel to and from a physical location. Members of the public who wish to attend a proceeding in person may need to make special arrangements for transportation, time off work, or childcare. As ACUS has noted, these costs can disproportionately affect members of traditionally underserved communities.²⁴⁸

On the other hand, remote public access requires that observers have a telecommunications connection to reliably access the proceeding and an electronic device from which to observe it; in-person public access only requires that observers show up. This may or may not be a practical issue, depending on the nature of the proceeding and the resources available to would-be public attendees.

Agencies that conduct adjudicative proceedings in which there are opportunities for public participation may wish to consult best practices for public events in other contexts. Particularly helpful is an EPA guide to *Modernizing Public Hearings for Water Quality Standard Decisions*.²⁴⁹ For both in-person and remote public access, agencies may need to take steps under

²⁴⁶ See, e.g., MSPB HANDBOOK, *supra* note 137, at 28.

²⁴⁷ See, e.g., FERC OFFICE OF ADMINISTRATIVE LAW JUDGES, REMOTE HEARING GUIDANCE FOR PARTICIPANTS 9 (July 13, 2020), <https://www.ferc.gov/sites/default/files/2020-07/Remote%20Hearing%20Guidance%20for%20Participants.pdf>.

²⁴⁸ Recommendation 2021-4, *supra* note 14.

²⁴⁹ MODERNIZING PUBLIC HEARINGS, *supra* note 222.

the Rehabilitation Act²⁵⁰ and other laws and policies to ensure people with disabilities can effectively observe open proceedings.

2. Scalability

As ACUS recognized in its very first recommendation, the spaces in which proceedings take place can come in all shapes and sizes.²⁵¹ This is as it should be. Many proceedings will involve no more than an agency official and a single party, or an official conducting a proceeding virtually or by telephone, and attract no public interest. It would be wasteful and unnecessary, in such cases, to require that the proceeding take place in a hearing room accommodating hundreds of observers and could negatively affect case processing. On the other hand, agencies would impose a functional limit on public access were they to conduct proceedings in which there is a great deal of public interest in small offices without an option for remote public attendance.

Some agencies make provisions in their policies for expanding in-person public access in high-profile cases or cases that ultimately attract more public attention than expected. The MSPB *Judges' Handbook*, for example, advises adjudicators who are “aware of substantial interest in a particular case” to “make arrangements for a hearing room that will accommodate a reasonable number of persons.”²⁵² And the PTAB states in its guide to oral hearings that the agency can usually arrange for “overflow rooms,” from which “the public will have the ability to see and hear the oral hearing in its entirety.”²⁵³

A potential benefit of remote public access is that it is easily scalable. Agencies can easily, securely, and now inexpensively use remote means of public access to accommodate hundreds or thousands of public attendees as needed.

3. Cameras in the Courtroom: Effects on Transparency, Privacy, and Participants' Behavior

Open proceedings are all, as a legal matter, open to public observation. As a practical matter, however, the ways in which agencies facilitate public access to open proceedings can affect the number of people who ultimately attend them.

Consider the experience of the courts, especially state courts, during the COVID-19 pandemic. To provide public access to proceedings conducted virtually or in courthouses that were closed to the public, some courts began livestreaming their proceedings online, often using commercial platforms such as YouTube. Few people had previously attended many of these proceedings in person because of the costs associated with in-person access. Although these proceedings had always been doctrinally open, as a practical matter, they were fairly obscure.²⁵⁴ Remote public access significantly decreased the costs associated with public observation. Public

²⁵⁰ 29 U.S.C. § 701 *et seq.*

²⁵¹ See Recommendation 68-1, *supra* note 10.

²⁵² MSPB HANDBOOK, *supra* note 137, at 53.

²⁵³ PTAB GUIDE, *supra* note 235, at 8.

²⁵⁴ Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875, 1900 (2021); Cf. DOJ v. Reporters Comm. for Free Press, 489 U.S. 749 (1989).

proceedings which had been only sparingly attended in person suddenly had hundreds or thousands—occasionally millions—of spectators.²⁵⁵

On the one hand, livestreaming judicial proceedings in this way has been a boon for transparency. Testifying before a House subcommittee on the federal courts’ experiences during the pandemic, Melissa Wasser, Policy Analyst for the Reporters Committee for Freedom of the Press, urged Congress to “[p]rovide support and guidance to allow courts at all levels to broadcast or stream live proceedings in future crises and during normal operation” and “[e]nsure uniform and effective public notice of remote court proceedings during COVID-19 and beyond.”²⁵⁶

On the other hand, some have accused courts of essentially televising people’s “darkest hours.”²⁵⁷ What previously required prior awareness of a proceeding and enough interest to warrant a trip to the courthouse is now immediate and fairly costless to access from anywhere. This has resulted in a new form of online entertainment built on viral videos of odd moments in virtual court proceedings.²⁵⁸ There is an entire subreddit, r/ZoomCourt, dedicated to “Videos of Crazy Zoom Court videos.”²⁵⁹ (Its logo is a screenshot of the lawyer who, in a virtual state-court proceeding that went viral, famously insisted he was “not a cat.”²⁶⁰) It is unclear that this is the type of transparency that open proceedings are intended to effect.

This is partly a new iteration of an old debate about cameras in the courtroom, which has been a deeply contested issue for nearly a century.²⁶¹ The American Bar Association passed Judicial Canon 35 in 1937, declaring:

The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings

²⁵⁵ “[T]he people sitting on the stiff wooden benches in physical courtrooms usually have a significant interest in a case (a big enough interest to travel to the courtroom and pay for transportation and potentially child care, for instance). When justice is livestreamed, that calculation is different, which puts courts in the complex position of guaranteeing public access in the vast majority of cases, while also protecting privacy as appropriate.” Mia Armstrong, *Justice, Livestreamed*, SLATE (Aug. 14, 2020), <https://slate.com/technology/2020/08/zoom-courts-livestream-youtube.html>

²⁵⁶ Testimony of Melissa Wasser, Policy Analyst, The Reporters Committee for Freedom of the Press, Before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet, *Federal Courts During the COVID-19 Pandemic: Best Practices, Opportunities for Innovation, and Lessons for the Future* (June 25, 2020) <https://www.rcfp.org/wp-content/uploads/2020/06/6-24-20-Reporters-Committee-House-testimony-about-pandemic-court-access.pdf>.

²⁵⁷ See, e.g., Gita Jackson, *Zoom Court Videos Are Making People’s Darkest Hours Go Viral*, VICE (Mar. 18, 2021), <https://www.vice.com/en/article/z3va9x/zoom-court-videos-are-making-peoples-darkest-hours-go-viral>.

²⁵⁸ See Armstrong, *supra* note 255; Shelly Banjo, *Digital Courtrooms Put Justice on YouTube, Zoom*, BLOOMBERG (Apr. 7, 2020), <https://www.bloomberg.com/news/newsletters/2020-04-07/digital-courtrooms-put-justice-on-youtube-zoom>; Jackson, *supra* note 257; Eric Scigliano, *Zoom Court Is Changing How Justice Is Served*, THE ATLANTIC (Apr. 13, 2021), <https://www.theatlantic.com/magazine/archive/2021/05/can-justice-be-served-on-zoom/618392/>.

²⁵⁹ *Videos of Crazy Zoom Court videos*, REDDIT, <https://www.reddit.com/r/ZoomCourt/> (last visited Oct. 13, 2021).

²⁶⁰ Aaron Feis, *Zoom filter transforms lawyer into cat during court hearing*, N.Y. POST (Feb. 9, 2021), <https://nypost.com/2021/02/09/zoom-filter-transforms-lawyer-into-cat-during-court-hearing/>

²⁶¹ Frank Lomonte, *Cameras Might Alter Courtroom Behavior: Maybe That’s the Point*, LITIGATION 22 (Spring 2021).

are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.²⁶²

Eighteen years later, the Supreme Court found that televising a state-court criminal proceeding violated a defendant's right to due process.²⁶³ But in a bit of foreshadowing, the Court also noted that the constitutional calculus could change if the day came "when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process."²⁶⁴ A quarter-century later, the Court allowed greater experimentation with broadcast coverage of trials.²⁶⁵ The Judicial Conference has considered the question of cameras in the courtrooms at least a half dozen times.²⁶⁶ (The current policy allows judges to authorize broadcasting, televising, recording, or taking photographs only in limited circumstances.²⁶⁷) Congress has repeatedly considered the issue too.²⁶⁸ Several bills currently pending would, if passed, expand the media's ability to cover federal court proceedings.²⁶⁹

Traditionally, one concern has been that the presence of cameras and the potential for broadcasting to expand the potential viewership may affect participants' behavior. Attorneys may grandstand. Witnesses may hear other participants' testimony, or they may be less forthcoming in front of an audience. Parties may perform for the camera. Parties may be intimidated, and adjudicators may misinterpret their nervousness as untruthfulness. Heightened awareness of public scrutiny may affect decisionmaking. Another concern has been that sound bites and video clips may be taken out of context or misused. A third concern has been that media professionals, in particular, would take up physical space and disrupt proceedings with the cameras, microphones, and lighting needed to record or broadcast proceedings. This has become less of a concern as recording and broadcasting technologies have become less obtrusive.²⁷⁰

Some of these concerns are reflected in current agency policies. The MSPB *Judges' Handbook*, for example, encourages adjudicators, before granting permission to outside entities to broadcast agency proceedings, to consider whether broadcasting proceedings could lead participants to "grandstand" or "posture" for the camera.²⁷¹ Model Instructions for Broadcast Coverage in the MSPB *Judges' Handbook* contain extensive guidance on equipment, personnel, sound, light, location, and movement.²⁷²

²⁶² Albert E. Blashfield, *The Case of the Controversial Canon*, ABA J., May 1962, at 429.

²⁶³ *Estes v. Texas*, 381 U.S. 532, 595–96 (1965).

²⁶⁴ *Id.*

²⁶⁵ *Chandler v. Florida*, 449 U.S. 560 (1981).

²⁶⁶ *History of Cameras in Courts*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-courts> (last visited Oct. 13, 2021).

²⁶⁷ *Id.*

²⁶⁸ SARAH J. ECKMAN, CONG. RESCH. SERV., R44514, VIDEO BROADCASTING FROM THE FEDERAL COURTS: ISSUES FOR CONGRESS 24–27 (updated Oct. 28, 2019).

²⁶⁹ *See supra* note 3.

²⁷⁰ ECKMAN, *supra* note 268, at 19–24.

²⁷¹ MSPB HANDBOOK, *supra* note 137, at 52–53.

²⁷² *Id.* at 122–24.

ACUS considered these issues almost 50 years ago, concluding in Recommendation 72-1, *Broadcast of Agency Proceedings*, that:

- Audiovisual coverage should be encouraged in “adjudications in which a public interest standard is applied to authorize service or determine its level or quality,” which “normally involve issues of broad public interest.”
- Audiovisual coverage should be excluded in “adjudicatory proceedings involving the rights or status of individuals (including those of small corporations likely to be indistinguishable in the public mind from one or a few individuals) in which individual past culpable conduct or other aspect of personal life is a primary subject of adjudication and the person in question objects to coverage.”
- In other adjudicatory proceedings, agencies “should determine whether the drawbacks of audiovisual coverage outweigh the advantages of informing the public. When audiovisual coverage is excluded or restricted, the agency should state the reasons for such exclusion or restriction on the record of the proceeding.”

ACUS also recommended that “[i]n any public proceedings a witness should have the right, prior to or during his testimony, to exclude audiovisual coverage of his testimony.”²⁷³ At least one agency, DOL, implemented these recommendations in its regulations.²⁷⁴

But ACUS issued Recommendation 72-1 in a very different time, and the nature and scale of broadcasting and media consumption have changed dramatically. Five decades ago, “broadcast of agency proceedings” meant media professionals setting up lighting and cameras in a hearing room and filming proceedings in which there was significant public interest for playback on the nightly news. Today, agencies themselves are almost certainly the most frequent broadcasters (or webcasters) of their own proceedings. As agencies increasingly rely on virtual proceedings, some form of broadcasting is practically inevitable. Excluding audiovisual coverage of virtual proceedings functionally closes them to public observation, no matter whether they are doctrinally open.

The question is increasingly *how* and *where* proceedings should be broadcast, and *who* should broadcast them, not *whether* they can be broadcast in the first place. Many courts have turned to commercial video sharing platforms, especially YouTube, to livestream proceedings during the COVID-19 pandemic.²⁷⁵ There are obvious benefits to using YouTube; it is inexpensive, familiar, and easy to use. But YouTube is also a commercial enterprise designed to publicize content for monetary gain without clear regard for agencies’ ethical concerns.²⁷⁶ It is a website that many people visit for entertainment rather than civic purposes, and one that defaults

²⁷³ Recommendation 72-1, *supra* note 12.

²⁷⁴ 29 C.F.R. § 2.10 *et seq.*

²⁷⁵ Several states, notably Michigan and Florida, have launched “Virtual Courtroom Directories,” which allow observers to see which courts statewide are currently in session and click a button to watch proceedings live. *See MiCOURT Virtual Courtroom Directory*, MICHIGAN COURTS, <https://micourt.courts.michigan.gov/virtualcourtroomdirectory/> (last visited Oct. 13, 2021); *Florida Virtual Courtroom Directory*, FLORIDA COURTS, <https://courtrooms.flcourts.org> (last visited Oct. 13, 2021).

²⁷⁶ *See* Jackson, *supra* note 257; Scigliano, *supra* note 258.

to allowing people to engage with the videos they watch and other observers through public commenting—a form of public participation which is probably not especially valuable in the context of agency adjudication.²⁷⁷

It is also difficult to control what people do with proceedings that are webcast. Many federal agencies have policies on the books requiring participants and public attendees to seek authorization before recording or using recordings of proceedings. It is fairly simple to enforce these rules for in-person attendees, but it is easy for remote observers to surreptitiously record, repurpose, and share webcasted content.²⁷⁸ Interviewees for this report tended to agree that it would be impossible, in most cases, to enforce current rules banning the unauthorized recording of agency proceedings.

There are certainly concerns in the federal and state courts over the possible effects of expanded viewership and unauthorized and misused recordings.²⁷⁹ To gauge the level of concern in federal agencies, we asked interviewees about their experiences with remote public access, particularly during the uptick in virtual hearings in response to public health measures during the COVID-19 pandemic. Although some interviewees voiced concerns, few reported seeing any significant increase in the number of public attendees as a result of the shift to virtual hearings. (This stands in contrast with the experience of some state courts, as referenced earlier, which did see increased viewership.²⁸⁰) No interviewees had any knowledge of instances in which someone used an unauthorized recording for an inappropriate purpose. Still, it remains possible that these sorts of concerns, even if they have not yet been substantiated in the federal administrative context, could still impact the behavior of individual participants in agency proceedings.

Ultimately, agencies will need to tailor how they provide remote public access to open proceedings to account for the unique circumstances of the programs they administer, including the nature of the cases they decide, public interest in individual proceedings, and the people and interests they serve. It may be appropriate, even beneficial, to use platforms like YouTube to broadcast proceedings that “involve issues of broad public interest,” to quote Recommendation 72-1, or appellate presentations on important points of law. It may be less appropriate, even unfair, to require applicants for public benefits to state their claims on what amounts to international television. Other options may be more appropriate in these cases: use private hosting platforms (which are widely available), provide a secure location where virtual proceedings can be observed in person, require interested persons to pre-register and use a unique passcode to observe proceedings online, or provide a telephone call-in number instead of livestreaming video. To choose an appropriate approach, agencies will need to carefully balance legitimate interests in privacy and transparency along with other legal requirements and policy objectives specific to the programs they administer.

²⁷⁷ While public participation can be important in certain adjudicative programs, there are probably better ways than a YouTube comments section to encourage and facilitate it.

²⁷⁸ Scigliano, *supra* note 258.

²⁷⁹ See Christopher L. Dodson, Scott Dodson & Lee H. Rosenthal, *The Zooming of Federal Civil Litigation*, JUDICATURE 12, 17 (Fall 2020–Winter 2021).

²⁸⁰ See *supra* notes 255.

Regardless of the approach they adopt, agencies may wish to take steps to ensure that public attendees are aware of restrictions on recording and broadcasting. When agencies do use public hosting services, they should consider the benefits and drawbacks of enabling public commenting. Above all, agencies should carefully consider what they do after livestreaming proceedings. Are they recorded (and, relatedly, are they records for purposes of federal records management laws)? Do they remain freely accessible online, or is access limited after the proceeding has ended?

4. Impact on Adjudicators' Ability to Regulate Proceedings

In the most common form of in-person public access, public attendees observe a proceeding in the same physical space where the proceeding takes place. As in any public proceeding, there are concerns that some attendees may take actions that are, intentionally or unintentionally, disruptive. Although interviewees for this report reported only isolated incidents, disruption remains a possibility.

Several agencies, including some at which proceedings attract comparatively greater public interest, have published instructions on decorum for in-person attendees. They address matters such as:

- the role of observers and participation by public attendees;²⁸¹
- processes for obtaining or reserving seats in a hearing room;²⁸²
- hearing room security;²⁸³
- talking, gesturing, and making facial expressions;²⁸⁴
- possession and use of cell phones and other electronic devices generally;²⁸⁵
- use of cell phones and other electronic devices to record or transmit open proceedings;²⁸⁶
- setup and use of audiovisual equipment;²⁸⁷
- possession of weapons;²⁸⁸
- presence of food or drink in hearing rooms;²⁸⁹
- on-time arrival;²⁹⁰

²⁸¹ See, e.g., 5 C.F.R. § 1206.12; 40 C.F.R. § 72.67(c).

²⁸² See, e.g., EOIR MANUAL, *supra* note 125, § 8.5.

²⁸³ See, e.g., Memorandum from William R. Robie, Chief Immig. Judge, EOIR, Operating Policies and Procedures Memorandum 88-9: *Courtroom Security* (Nov. 29, 1988), <https://www.justice.gov/eoir/eoir-policy-manual/OPPM08809/download>.

²⁸⁴ See, e.g., PTAB GUIDE, *supra* note 235, at 8; CBCA, *supra* note 234.

²⁸⁵ See, e.g., 5 C.F.R. § 1201.52(b); PTAB GUIDE, *supra* note 235, at 8; EOIR MANUAL, *supra* note 125, § 4.13; CBCA, *supra* note 234.

²⁸⁶ See, e.g., 5 C.F.R. § 1201.52(b); PTAB GUIDE, *supra* note 235, at 8; EOIR MANUAL, *supra* note 125, §§ 4.13, 8.5; CBCA, *supra* note 234.

²⁸⁷ See, e.g., 29 C.F.R. § 2.16.

²⁸⁸ See, e.g., PTAB GUIDE, *supra* note 235, at 8; EOIR MANUAL, *supra* note 125, § 4.14; *Observing Immigration Court Hearings*, *supra* note 236; EAB Manual, *supra* note 124, at 10; CBCA, *supra* note 234.

²⁸⁹ See, e.g., PTAB GUIDE, *supra* note 235, at 8; CBCA, *supra* note 234.

²⁹⁰ See, e.g., CBCA, *supra* note 234.

- entry and exit from hearing rooms during proceedings;²⁹¹
- appropriate attire;²⁹² and
- consequences for improper behavior.²⁹³

A few agencies have developed policies to account for high-profile cases, which may be the exception rather than the norm.²⁹⁴ The MSPB *Judges' Handbook* notes, for example: “If a hearing is open but the appeal has attracted the public’s attention, the [administrative judge] may be able to avoid the possibility of disruption by having the public attendees view the hearing on video from another room at the [office], if one is available.”²⁹⁵

Several agencies have also published specific rules or instructions specific to media professionals, including DOL (whose regulations implement ACUS Recommendation 72-1),²⁹⁶ EOIR,²⁹⁷ Food and Drug Administration,²⁹⁸ FERC,²⁹⁹ and MSPB.³⁰⁰ These materials typically include policies on recording and broadcasting open proceedings, capturing and using still images of open proceedings, reserving seats for media professionals, and coordinating with agency communications offices. Other agencies grant adjudicators significant discretion to regulate media coverage.³⁰¹

Interviews conducted for this report suggest that agencies, like courts, continue to consider how remote public attendance, especially by video, affects expectations for public attendees. It can be easier in some ways to regulate the behavior and conduct of remote attendees. After all, there is no mute button for in-person attendees.

In other ways, it may be harder for agencies to regulate the behavior and conduct of remote attendees. We heard some concerns that virtual proceedings could be vulnerable to incidents of Zoombombing, in which individuals disrupt videoconferencing sessions by sharing lewd or offensive comment. But no one interviewed for this study reported any instances of it occurring. Besides, the threat of Zoombombing can be easily managed by directing public attendees to a webcast instead of inviting them into the videoconferencing session in which a proceeding takes place, or by requiring public attendees to register and provide contact information before joining the session.

Furthermore, it is almost certainly harder for agencies to enforce rules prohibiting the unauthorized recording of proceedings against remote attendees. If such rules are intended to guard against the misuse of recordings of agency proceedings, it is unclear that they are truly

²⁹¹ See, e.g., PTAB GUIDE, *supra* note 235, at 8; CBCA, *supra* note 234.

²⁹² See, e.g., PTAB GUIDE, *supra* note 235, at 8; CBCA, *supra* note 234.

²⁹³ See, e.g., PTAB GUIDE, *supra* note 235, at 8.

²⁹⁴ See McNeil, *supra* note 180; Christopher B. McNeil, *Public Access and Media Rules for Administrative Adjudicators in High-Profile Hearings*, 91 JUDICATURE 298 (2008).

²⁹⁵ MSPB HANDBOOK, *supra* note 137, at 28.

²⁹⁶ 29 C.F.R. § 2.10 *et seq.*

²⁹⁷ EOIR MANUAL, *supra* note 125, § 4.9, 8.5.

²⁹⁸ 21 C.F.R. § 10.200 *et seq.*

²⁹⁹ 18 C.F.R. § 388.105.

³⁰⁰ MSPB HANDBOOK, *supra* note 137, at 122–25.

³⁰¹ See, e.g., 15 C.F.R. § 904.204(d); 43 C.F.R. § 4.807(c); 49 C.F.R. § 1113.3(d).

necessary. No one interviewed for this study reported any instances in which unauthorized recordings of proceedings were posted online, misleadingly doctored, used to intimidate or harass, or otherwise exploited.

C. Access to Recordings and Transcripts of Open Proceedings

Closely related to the question of public access to agency adjudicative proceedings is public access to recordings and transcripts of those proceedings. In some sense, public access to recordings and transcripts could be an effective alternative to in-person or remote public access. But several interviewees, including some agency officials, felt that simultaneity is an important aspect of public access and that post-proceeding disclosure of recordings or transcripts may not be an adequate substitute for live observation.

As discussed above, the Sunshine Act mandates the public availability of recordings, transcripts, or minutes for covered meetings. Agencies subject to the Sunshine Act typically make recordings or transcripts of open, covered meetings available on their websites.³⁰² Outside the Sunshine Act context, many agencies make recordings or transcripts available to nonparties on request (often for a cost),³⁰³ as they probably must under FOIA.³⁰⁴ (FOIA's and the Privacy Act's limitations on disclosure would also apply.) Many agency rules specify that transcripts are available for a fee from the independent court reporter who provided transcription services.³⁰⁵ And some agencies provide in their rules that transcripts and/or recordings will be made freely available for public inspection, often in a physical location or online (e.g., a docket system).³⁰⁶

To some extent, ACUS also addressed this issue more broadly in Recommendation 2017-1, *Adjudication Materials on Agency Websites*.³⁰⁷ That Recommendation encouraged agencies to “consider providing access on their websites to decisions and supporting materials . . . issued and filed in adjudicative proceedings in excess of the affirmative disclosure requirements of [FOIA].” In determining which materials to post online, the Recommendation advised agencies to “implement[] appropriate safeguards to protect relevant privacy interests” and consider the following factors:

- a. the interests of the public in gaining insight into the agency's adjudicative processes;
- b. the costs to the agency in disclosing adjudication materials in excess of FOIA's requirements;

³⁰² *Oral Arguments*, *supra* note 123.

³⁰³ *See, e.g.*, 5 C.F.R. § 1201.53(c); 46 C.F.R. § 502.213.

³⁰⁴ *Cf.* 12 U.S.C. § 1818(u)(3) (“A transcript of public hearings shall be made available to the public pursuant to section 552 of title 5.”).

³⁰⁵ *See, e.g.*, 12 C.F.R. § 1016 C.F.R. § 1025.47(a); 16 C.F.R. § 3.44(a); 17 C.F.R. § 10.65(a); 24 C.F.R. § 26.23(c); 34 C.F.R. § 101.91; 28 C.F.R. § 68.48; 36 C.F.R. § 1150.92; 45 C.F.R. § 81.91.

³⁰⁶ *See, e.g.*, 5 C.F.R. §§ 2422.18(d), 2423.30(f); 10 C.F.R. §§ 2.1405(b), 2.327(b); 22 C.F.R. §§ 1422.9(a), 1423.14(b); 40 C.F.R. § 209.28(a); 40 C.F.R. § 124.12(d).

³⁰⁷ Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31039 (July 5, 2017). The Recommendation was limited to “proceedings in which a statute, executive order, or regulation mandates an evidentiary hearing.” *Id.*

- c. any offsetting benefits the agency may realize in disclosing these materials; and
- d. any other relevant considerations, such as agency-specific adjudicative practices.³⁰⁸

These factors may be useful for agencies to consider in shaping policies on public access to recordings and transcripts of open proceedings. With respect to appellate proceedings specifically, ACUS has recommended:

Regardless of whether the Government in the Sunshine Act (5 U.S.C. § 552b) governs their appellate review system, agencies should consider announcing, livestreaming, and maintaining video recordings on their websites of appellate proceedings (including oral argument) that present significant legal and policy issues likely to be of interest to regulated parties and other members of the public.³⁰⁹

As discussed before, however, agencies should be mindful of the ways in which affirmative online disclosure may affect parties' privacy. Affirmative online disclosure may be more appropriate in some contexts than in others.

D. Availability of Agency Policies on Public Access to Adjudicative Proceedings

Policies on public access to agency adjudicative proceedings are intended to regulate an important way in which agencies, the media, and general public interact with each other. The substance of such policies is important. But their effectiveness also depends, in large part, on their availability to the adjudicators, agency staff, media professionals, parties, representatives, and others who rely on them. Clear policies on public access can help improve public understanding of agency processes, including which proceedings are open and which are not; ensure members of the public, including media professionals, know how to attend open proceedings and understand what is expected of them; ensure consistent implementation by agency adjudicators and staff; flag instances of noncompliance with established policies; and identify areas for improvement.

Agencies should carefully consider the types of information on public access that different audiences will need access to. Topics that agencies may wish to include in published rules or policies may include:

- presumptions favoring open or closed proceedings and conditions for departing from those presumptions in specific circumstances, including any procedures for doing so;
- requirements for advance notice of open proceedings, including the location, content, and timing of such notice;
- policies on and instructions for in-person and/or remote public access;
- decorum expectations and standards of conduct for public attendees;

³⁰⁸ *Id.*, ¶ 1.

³⁰⁹ Recommendation 2020-3, *supra* note 30, ¶ 20.

- special rules for the media;
- special rules for managing high-profile proceedings; and
- policies on and instructions for accessing recordings and transcripts.

The specific topics that agencies ultimately address in published rules or policies may depend on their intended audience (e.g., media professionals³¹⁰) and will vary across programs and agencies according to their unique circumstances.

Agencies should also carefully consider which publications will most effectively communicate rules and policies on public access to the internal and external audiences that participate in or attend adjudicative proceedings. Some principles, such as presumptions favoring open or closed proceedings, will be appropriate for codification in the *Code of Federal Regulations*. Others, such as specific instructions for observing proceedings online or accessing government facilities, may not. Agencies can clarify or supplement codified rules through other materials including benchbooks, practitioner guides, descriptive text on agency websites, online events calendars and specialized dockets, *Federal Register* notices, notices issued in individual cases and made publicly available in online docket systems, and press releases.

³¹⁰ See McNeil, *supra* note 180; McNeil, *supra* note 294.