



Administrative Conference of the United States

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**EVIDENTIARY HEARINGS OUTSIDE THE  
ADMINISTRATIVE PROCEDURE ACT**

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*This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views, and recommendations expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.*

# EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT

By Michael Asimow<sup>1</sup>

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## INTRODUCTION

This study concerns federal administrative adjudication that consists of individualized decisionmaking through legally required evidentiary hearings that is *not* regulated by the adjudication provisions of the Administrative Procedure Act (APA). I refer to this as Type B adjudication. Type A adjudication is regulated by the APA, whereas Type C adjudication does not utilize legally required evidentiary hearings to make adjudicatory decisions. This study proposes best practices that agencies engaged in Type B adjudication could adopt in procedural regulations.

This study proceeds as follows: Part I contains definitions and discusses the scope of the study and the Administrative Conference of the United States (ACUS) federal adjudication database. Part II discusses the problem of differentiating Types A, B, and C adjudication. Part III furnishes statistical data about the world of Type B adjudication. Part IV proposes an ACUS recommendation for best practices in Type B adjudication. The Appendix consists of ten “deep dive” memoranda that represent a fair sample of Type B adjudicating schemes.

The agencies and schemes (with abbreviations used throughout this study) are:

- Department of Agriculture--Perishable Agricultural Commodities Act (Appendix A-1) (USDA, PACA)
- General Services Administration--Civilian Board of Contract Appeals (Appendix A-2) (GSA, CBCA)
- Department of Energy--Personnel Security and Whistleblowing (Appendix A-3) (DOE)
- Equal Employment Opportunity Commission (Appendix A-4) (EEOC)
- Environmental Protection Agency--Environmental Appeals Board (Appendix A-5) (EPA, EAB)
- Department of Justice--Executive Office for Immigration Review (Appendix A-6) (DOJ, EOIR)
- Merit Systems Protection Board (Appendix A-7) (MSPB)
- Department of Commerce--US Patent and Trademark Office (Patent Trial & Appeal Board; Trademark Trial & Appeal Board) (Appendix A-8) (DOC, USPTO, PTAB, TTAB)
- Department of Health & Human Services--Provider Reimbursement Review Board (Appendix A-9) (HHS, PRRB)
- Department of Veterans Affairs--Board of Veterans' Appeals Appendix A-10) (DVA, BVA)

## I. DEFINITIONS, DATABASE, AND SCOPE OF REPORT

### A. TYPE A, B, AND C ADJUDICATION

This report concerns evidentiary hearings by federal administrative agencies that are *not* governed by the adjudication sections of the Administrative Procedure Act (APA). It proposes a set of best practices for adjudication outside the APA.

For purposes of this report, the term “Type A adjudication” refers to adjudicatory systems governed by the adjudication sections of the APA.<sup>2</sup> With a few exceptions, Type A hearings are presided over by administrative law judges (ALJs).<sup>3</sup>

The term “Type B adjudication” refers to systems of adjudication administered by federal agencies through evidentiary hearings required by statute, regulation, or executive orders, that are *not* governed by the adjudication provisions of the APA.<sup>4</sup> The evidentiary hearings in Type B adjudication are presided over the agency head or by administrative judges (AJs), although AJs are known by many other titles. Because Type A adjudication is relatively uniform and well-studied, this report focuses on Type B adjudication which is vastly more diverse and less well studied.

The term “Type C adjudication” means adjudication by federal administrative agencies that does not occur through legally required evidentiary hearings. This report does not cover the vast array of Type C adjudicatory schemes.

### B. DATABASE

This study began with the construction of a database that was jointly funded by the Administrative Conference of the United States (ACUS) and Stanford Law School. The database contains information about all of the schemes of Type A and Type B federal agency adjudication (with the exceptions of military and foreign affairs adjudication, which were omitted because of resource constraints).

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<sup>2</sup> 5 U.S.C. §§ 554, 556, 557. The APA is referred to herein without the prefatory 5 U.S.C.

<sup>3</sup> APA § 556(b)(3).

<sup>4</sup> This description is imprecise, since some sections of the APA do apply to evidentiary hearings outside the APA. See APA §§ 555 (providing minimal protections for all adjudication), 558 (providing protections in licensing), and 701-706 (providing judicial review rules for all agency action). However, APA §§554, 556, and 557, which provide the elaborate procedural protections for APA adjudication, are not applicable to Type B adjudication.

ACUS staff did enormous amounts of work gathering, inputting, and verifying<sup>5</sup> information in the database, which I gratefully acknowledge here.<sup>6</sup> The database information was my starting point in doing this report. The database is now open to the public and can be accessed at <https://acus.law.stanford.edu>. The deep dive memoranda (located in the appendices to this report) contain the database identifying numbers that enable the reader to quickly access the relevant portions of the database.

### C. FORMAL AND INFORMAL ADJUDICATION

This report does *not* refer to Type B adjudication as “informal.” The word “informal” is commonly used in practice and in scholarship to cover both Types B and C adjudication, but it creates a false picture of Type B adjudication. The hearings in many schemes of Type B adjudication often contain most of the same formal elements and protections for private parties as Type A adjudication.<sup>7</sup> Indeed, in some cases, Type B adjudication is even *more* formal than the familiar trial-type adjudication procedure prescribed by the APA. In contrast, some Type A adjudication (such as the inquisitorial Social Security disability program) is *less* formal than many Type B schemes. However, some Type B adjudication is relatively informal. The term “informal adjudication” should be reserved for Type C adjudication in which decisions are not required to be based on evidentiary hearings.

Type B adjudication should be recognized as a distinct category, different from both Types A and C. Because Type B adjudication is characterized by legally required evidentiary hearings, it is feasible to prescribe a set of best practices for such hearings. In contrast, Type C adjudication, which is vastly more numerous than Type B, lacks any unifying procedural element, which makes prescription of best practices infeasible. Although the term “informal adjudication” is often used to cover both Type B and Type C adjudication, it blurs the important distinction between them. As a result, the term “informal adjudication” is used in this report only to describe Type C adjudication.

### D. DEFINITIONS

For purposes of this report, the term “adjudication” (or “administrative adjudication”) means:

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<sup>5</sup> The database was constructed from publicly available information; ACUS attempted to obtain verification from agency officials of the information in the database but was not always successful in obtaining it. The database indicates what information has been verified.

<sup>6</sup> I also express my gratitude to Stanford Law School Dean Elizabeth Magill for helping to fund the database and to professional database builders Irina Zachs and Alex Shor for their tremendous technical efforts in organizing it.

<sup>7</sup> See *United States v. Mead Corp.* 533 U.S. 218, 230 (2001). The *Mead* decision states: It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a *relatively formal administrative procedure* tending to foster the fairness and deliberation that should underlie a pronouncement of such force. Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or *formal adjudication*.” In context, it is clear that the term “formal adjudication” includes adjudicatory proceedings both inside and outside the APA.

- a decision by federal officials made through an administrative process
- to resolve a claim or dispute between a private party and the government or between two private parties
- arising out of a federal program.

In Type A and Type B adjudications, the decision follows a legally required oral or written evidentiary hearing. In the case of Type C adjudication, however, no evidentiary hearing is legally required, and usually no such hearing occurs.

The definition of adjudication excludes adjudication by state or local officials even in cases where the adjudication arises under a federal program and is governed by federal regulations. It also excludes decisions by non-governmental federal contractors. As stated above, because of resource constraints, the report does not include adjudication relating to military or foreign affairs functions.

The term “decision” means an agency action of specific applicability, as distinguished from action of general applicability such as rulemaking.

The term “evidentiary hearing” means a proceeding at which the parties make evidentiary submissions, have an opportunity to rebut testimony and arguments made by the opposition, and to which the *exclusive record principle* applies. The exclusive record principle means that the decisionmaker is confined to considering inputs from the parties (as well as matters officially noticed) when determining factual issues. As discussed in Part II, the word “evidentiary hearing” excludes a variety of agency adjudicatory proceedings that might be described as hearings but that lack the attributes of a determination at which the parties have an opportunity to make evidentiary submissions and to which the exclusive record principle applies. The definition of “evidentiary hearing” is discussed further in Part II below.

## E. SCOPE OF THE REPORT

As most readers of this report are aware, the world of Type B adjudication is vast and formless. How to study and map it presents a methodological puzzle. My approach has been to write (and include as appendices) ten deep dive memoranda giving a detailed analysis of many of the most important schemes of Type B adjudication. These memos include several of the most important Type B adjudicatory schemes (measured by caseload volume and by importance of the stakes being adjudicated). The adjudicatory schemes described in these memoranda are representative of the tremendous diversity of the Type B world. The ultimate objective of this report is to formulate recommendations for best practices for Type B adjudication that should be embodied in agency procedural regulations.



## F. PRIOR RESEARCH

The epic 1992 ACUS study, “The Federal Administrative Judiciary,”<sup>8</sup> described and analyzed both Type A and Type B adjudication and did extensive research into the status of the AJs who conduct Type B adjudication. The 1992 ACUS report questioned the statutory allocation of adjudicatory schemes between Type A and Type B.<sup>9</sup>

Former ACUS Chair Paul Verkuil<sup>10</sup> analyzed a number of schemes involving Type B and type C adjudication.<sup>11</sup> Verkuil assessed the degree to which these schemes complied with the due process elements sketched by *Goldberg v. Kelly*, the leading procedural due process case at that time.<sup>12</sup> He discussed the appropriateness of various forms of procedural protection in the context of the particular adjudicatory scheme.

Two earlier studies by John Frye and Ray Limon sought to map the world of Type B adjudication. These studies gathered statistical data on the caseload of the various Type B schemes and the judges who decided them. The studies take snapshots of Type B adjudication in 1992 and again in 2002.<sup>13</sup>

The American Bar Association’s (ABA’s) Section of Administrative Law and Regulatory Practice published a guide to APA adjudication.<sup>14</sup> The Section also sponsored a resolution adopted by the ABA’s House of Delegates that urged Congress to amend the APA to extend some (but not all) of the APA’s Type A adjudication provisions to Type B adjudication.<sup>15</sup> I published an article supporting this resolution.<sup>16</sup>

Several works attempted to identify best practices for Type C adjudication<sup>17</sup> or considered the criteria for the study of decisionmaking in Type C adjudicatory schemes.<sup>18</sup>

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<sup>8</sup> Paul R. Verkuil, Daniel J. Gifford, Charles H. Koch, Jr., Richard J. Pierce, Jr., & Jeffrey S. Lubbers, *The Federal Administrative Judiciary*, 1992 ACUS 779 (hereinafter “1992 ACUS Study”).

<sup>9</sup> *Id.* at 843-873.

<sup>10</sup> Former Chair Verkuil was then president of the American Automobile Association and former Dean of Tulane University Law School, former President of the College of William and Mary, and former Dean of Cardozo School of Law.

<sup>11</sup> Paul R. Verkuil, *A Study of Informal Adjudication Procedure*, 43 U. CHI. L. REV. 739 (1976) (hereinafter “Verkuil”).

<sup>12</sup> 397 U.S. 254 (1970).

<sup>13</sup> John H. Frye, III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261 (1992) (hereinafter “Frye”); Ray Limon, *The Federal Administrative Judiciary Then and Now: A Decade of Change 1992-2002* (Office of Personnel Management, Office of Administrative Law Judges) (hereinafter “Limon”).

<sup>14</sup> Jeffrey B. Litwak, ed., *A GUIDE TO FEDERAL AGENCY ADJUDICATION* (2d ed. 2012) (hereinafter “ABA Guide”).

<sup>15</sup> Resolution 114, Feb. 2005.

<sup>16</sup> Michael Asimow, *The Spreading Umbrella: Extending the APA’s Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003 (2004).

<sup>17</sup> Warner W. Gardner, *The Procedures by Which Informal Action is Taken*, 24 ADMIN. L. REV. 155 (1972).

<sup>18</sup> William J. Lockhart, *The Origin and Use of “Guidelines” for the Study of Informal Action in Federal Agencies*, 24 ADMIN. L. REV. 167 (1972).

Another paper produced a comparative analysis of high-volume adjudicatory systems (both Types A and B).<sup>19</sup>

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<sup>19</sup> Daniel L. Skoler, *The Many Faces of High-Volume Administrative Adjudication: Structure, Organization, and Management*, 15 J. OF NAT. ASS'N OF ADMIN. LAW JUDGES 43 (1996).

## II. THE LEGAL STRUCTURE OF TYPES A, B, AND C ADJUDICATION

This section discusses the problem of distinguishing Type B adjudication from Types A and C adjudication. As mentioned above, Type A is adjudication governed by the APA. In type B adjudication the decision follows a legally required evidentiary hearing, but the APA adjudication provisions do not apply. In Type C adjudication, no evidentiary hearing is legally required.

### A. THE BORDER BETWEEN TYPE A AND TYPE B ADJUDICATION

The “gateway provision” of the APA defines the type of adjudication that it regulates—what this report calls Type A adjudication.<sup>20</sup> According to the gateway, the APA adjudication provisions cover “every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.”<sup>21</sup> In many cases, statutes that establish administrative adjudicatory schemes are not explicit about whether the APA applies to them. The prevailing view is that the APA applies only if the statute says it applies or the statute explicitly calls for a hearing “on the record.” However, this “magic words” approach is defective. The decisionmaker at most evidentiary hearings maintains a “record” of the proceedings in the sense that what is said is written down or recorded; and the normal assumption is that this record is “exclusive.” This means that the adjudicator is limited to that “record” (including material that is the subject of official notice) in deciding factual issues in the case. Thus the term “on the record” fails to distinguish Type A and Type B hearings.

Consequently, there is a gray area in application of statutes that call for evidentiary hearings but do not explicitly resolve the issue of whether the APA applies. One approach states that the issue of interpreting such statutes should be resolved through *Chevron* methodology. A statute calling for a “hearing” is “ambiguous,” so that a reviewing court must defer to the agency’s reasonable interpretation that the APA does not apply.<sup>22</sup> As numerous authors have pointed out,<sup>23</sup> this approach is questionable. *Chevron* presumes a congressional decision to delegate interpretive authority to an agency whenever Congress passes an ambiguous statute; it seems unlikely that Congress would have intended agencies to make the final call on whether a fundamental and quasi-constitutional trans-substantive statute like the APA should apply to their adjudicatory activity.

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<sup>20</sup> As has often been pointed out, the APA’s definitions of “adjudication” and “rulemaking” are flawed and do not reflect actual practice. See Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of “Rule,”* 56 ADMIN. L. REV. 1077 (2004). I ignore them here also, defining adjudication as agency action of individualized impact. See Part I.D. for a more detailed definition of adjudication.

<sup>21</sup> APA § 554(a). This section contains 6 exceptions.

<sup>22</sup> *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006); *Chemical Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989).

<sup>23</sup> See e.g. Cooley Howarth, *Restoring the Applicability of the APA’s Adjudicatory Procedures*, 56 ADMIN. L. REV. 1043 (2004)

Another approach to the question is that courts assume that Congress wanted the APA to apply to adjudicatory hearings involving serious issues of public policy. However, the leading authority to that effect has been overruled.<sup>24</sup>

Still another approach assumes that Congress does not want the APA to apply unless it explicitly says that it does or explicitly uses the magic words “on the record.”<sup>25</sup>

Finally, a fourth approach to the problem has recently emerged. Under this approach, the APA applies to statutes that call for evidentiary hearings that appear to assume record exclusivity but do not use the magic words “hearing on the record.” These cases all involve the question of whether the Equal Access to Justice Act (EAJA)<sup>26</sup> applies to decisions by the National Appeals Division (NAD) of the Department of Agriculture (USDA). The Supreme Court has made it clear that EAJA is applicable only to hearings governed by the APA adjudicatory provisions.<sup>27</sup> NAD handles disputes arising under USDA’s numerous statutory provisions relating to agricultural grants, loans, or insurance. The statute calls for evidentiary hearings that are conducted by AJs appointed by the Secretary of Agriculture but does not use the magic words “on the record.” Several decisions hold that the APA applies to NAD hearings because the statutory provisions contain most of the elements of Type A adjudication and therefore that NAD AJs are limited to the record in deciding factual issues.<sup>28</sup> After losing in three circuits, USDA conceded the issue and now applies the APA and EAJA to NAD hearings.<sup>29</sup>

Still another unresolved issue concerning APA applicability arises when an evidentiary hearing is required by due process but not by a statute. In the famous *Wong Yang Sung* decision,<sup>30</sup> the Supreme Court ruled that the APA applies to a hearing required by due process unless Congress specifically says that it does not. The *Wong Yang Sung* decision has been studiously ignored in later cases, because of the development of due process balancing under *Mathews v. Eldridge*.<sup>31</sup> Under *Mathews*, the degree of procedural protections in a hearing required by due process depends on the specific context. The more formal provisions of the rigid

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<sup>24</sup> *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978), overruled by *Dominion Energy*, note 22. Arguably, *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977), stands for the same proposition as *Seacoast*, and it has not been overruled.

<sup>25</sup> *City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983).

<sup>26</sup> EAJA requires agencies to pay private party attorney fees (up to a rather low limit) when the government’s position was not “substantially justified.” 5 U.S.C. §504, 28 U.S.C. § 2412(d).

<sup>27</sup> *Ardestani v. INS*, 502 U.S. 129 (1991). There are some statutory exceptions allowing EAJA fees in a few type B adjudications.

<sup>28</sup> *Lane v. USDA*, 120 F.3d 106, 108-110 (8th Cir. 1997); *Ageson Grain & Cattle v. USDA*, 500 F.3d 1038, 1043-46 (9th Cir. 2007); *Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1125-29 (7th Cir. 2008).

<sup>29</sup> 7 C.F.R. §11.4(a). These decisions do not require that ALJs preside in NAD hearings because the statute explicitly allows USDA to employ its own presiding officers. The APA requires that ALJs preside in Type A hearings, but it permits statutes to designate other types of presiding officers. APA § 556(b).

<sup>30</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

<sup>31</sup> 424 U.S. 319 (1976).

APA adjudicatory procedures (including the requirement that ALJs preside) might be inappropriate in many cases of hearings required by due process.

There is a pressing need for Congress or the Supreme Court to resolve the question of whether the APA applies to gray area cases. This report takes no position on the issue of how to distinguish Type A and Type B adjudication. If the agency conducts legally required evidentiary hearings but does not presently apply the APA, this report assumes that its evidentiary hearings are Type B proceedings.

The question of whether Congress should transfer Type B adjudicatory schemes to Type A is beyond the scope of this study.<sup>32</sup> The 1992 ACUS study recommended that some existing schemes of Type B adjudication that involve serious sanctions (such as deportation) be converted to Type A, because the use of ALJs instead of AJs would enhance the acceptability of the process.<sup>33</sup> However, Congress took no action in response to this recommendation. The ABA recommended that future statutes calling for a “hearing” should be governed by the APA unless Congress explicitly provides to the contrary.<sup>34</sup> Again, this study does not take a position on that issue. Nor does this study consider whether an agency conducting Type B adjudication should adopt regulations that convert its hearings into Type A rather than Type B. Such a decision (which would involve among other things turning AJs into self-created ALJs) would involve complex legal and practical issues that I have not considered.<sup>35</sup>

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<sup>32</sup> See Kent Barnett, *Against Administrative Judges*, 49 UC DAVIS L. REV. 1643 (2016) (urging conversion of AJs to ALJs). But see Gary J. Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on “Ossifying” the Adjudication Process*, 55 ADMIN. L. REV. 787 (2003) (opposing conversion of Type B hearings to Type A but favoring the adoption of procedural standards for Type B).

<sup>33</sup> 1992 ACUS Study, *supra* note 8, at 779, 1046-1050. See also Admin. Conf. of the U.S., Recommendation 92-7, *The Federal Administrative Judiciary*, 57 Fed. Reg. 61,760 (Dec. 29, 1992), available at <https://www.acus.gov/recommendation/federal-administrative-judiciary>.

<sup>34</sup> ABA Rec. 113 (June, 2000). For criticism of this recommendation, see Edles, note 32.

<sup>35</sup> An ACUS study relating to the EEOC gave detailed consideration to whether EEOC could place its federal discrimination adjudicatory scheme under the APA, including the conversion of its AJs to become ALJs, without first securing implementing legislation. The study indicates that the EEOC probably has power to place itself under the APA. However, the Office of Personnel Management, which recruits and hires ALJs, would likely refuse to cooperate, particularly with respect to the conversion of AJs to ALJs. ACUS, *Equal Employment Opportunity Commission: Evaluating the Status and Placement of Adjudicators in the Federal Sector Hearing Program* 27-32 (2014). The budgetary cost to the EEOC of such a conversion would be quite substantial (several million dollars per year, depending on various assumptions). *Id.* at 42-48.

## B. THE BORDER BETWEEN TYPE B AND TYPE C ADJUDICATION

A Type B adjudicatory proceeding arises when a source of law (a statute, regulation,<sup>36</sup> or executive order<sup>37</sup>) requires an adjudicatory decision made after an evidentiary hearing.<sup>38</sup> In contrast, a Type C proceeding is one in which an evidentiary hearing is not legally required even though the agency is empowered to render a legally binding adjudicatory decision. The definition of “evidentiary hearing” thus becomes critical, but it is not an easy term to define and the definition is not always easy to apply.

The term evidentiary hearing means one in which both parties have the opportunity to offer testimony and rebut the testimony and arguments made by the opposition and to which the *exclusive record principle applies*. This means that the decisionmaker receives written or oral submissions of information from the parties *and* the decisionmaker is confined to those inputs (as well as matters officially noticed) when making its decision.<sup>39</sup>

The term “evidentiary hearing” does not require orality; in some Type B hearings, the decisionmaker considers only written documents (with or without an oral argument). Nor does it require that a particular case involve a dispute about adjudicative or legislative facts. Quite a few cases turn on questions of legal interpretation or the exercise of discretion.

The term evidentiary hearing does *not* include:

- a “public hearing” at which the members of the public are invited to make statements (for example in response to an application for development) but such statements do not furnish the exclusive record for decision;<sup>40</sup>

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<sup>36</sup> The Appendices present several examples of evidentiary hearings required by procedural regulations but not by a statute. See DOE Whistleblowers (App. A-3), EEOC (App. A-4); EPA EAB (App. A-5), MSPB (App. A-7).

<sup>37</sup> DOE Personnel Security hearings are required by an executive order. (See App. A-3)

<sup>38</sup> Evidentiary hearings may also be required by due process. However, this report does not include constitutionally required evidentiary hearings in its definition of Type B adjudication. The elements of a due process hearing are determined based on context, and often would not include all of the best practices discussed in this report. See *Mathews v. Eldridge*, 424 U.S. 319 (1976). The *Mathews* balance may well call for a procedure that does not rise to the level of an evidentiary hearing based on an exclusive record, which is the criterion for identifying Type B adjudication. See discussion of *Goss v. Lopez*, text at note 41, *infra*.

<sup>39</sup> For further discussion of the exclusive record principle, text starting at note 64, *infra*.

<sup>40</sup> For example, before issuing a permit for discharge of material into navigable waters, the Army Corps of Engineers must give public notice and conduct a public hearing. 33 U.S.C. § 1344(a). Similarly, the term “evidentiary hearing” does not include hearings held by EPA when it finds a significant degree of public interest in a draft permit. See EPA (App.-A5).

- a legally required conference between a private party and the decisionmaker that is not intended to be the exclusive source of the information considered by the decisionmaker;<sup>41</sup>
- a “front-line” decision by agency staff that constitutes the initial agency decision about whether to deny a benefit or issue a complaint or impose a regulatory sanction, when that or an initial decision is followed by an evidentiary hearing before an agency or before a court.
- a “review” that does not include an opportunity for submission of new evidence.<sup>42</sup>

In the end, a certain degree of judgment is called for in deciding whether a legally-required adjudicatory procedure is an evidentiary hearing. Examples of borderline situations:

- Collection due process (CDP) Hearings. The IRS is required by statute to provide a hearing to taxpayers at the time it imposes a tax lien or initiates a tax collection action. The hearing is provided by an IRS Appeals Officer (AO) who has no previous involvement in the dispute. A statute limits ex parte communications from other IRS officials to the AO to the extent such communications “appear to compromise the independence” of the AO.<sup>43</sup> CDP hearings are informal and inquisitorial; they often consist of one or more phone calls. There is no provision for cross-examination of adverse witnesses and no subpoena power. The hearing requirement seems to entail a conference, little different from the normal function of AOs in settling disputes about the amount of tax due. The AO’s decision is reviewed by a team manager who makes the final IRS decision. The regulations at least suggest that the decision in a CDP case is not limited to information that the AO receives at the CDP hearing.<sup>44</sup> I originally included IRS CDP hearings as Type B adjudication, but have now decided that they are not “evidentiary hearings.” Instead, they should be treated as Type C adjudication.
- Affordable Care Act (ACA) Hearings. Under the ACA, the regulations provide for a “review of adverse benefit determinations by health insurers or group health

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<sup>41</sup> An example is the conference required by due process when a school administrator suspends a student for disciplinary reasons for ten days or less. The administrator is not limited to considering information provided at the conference. *Goss v. Lopez*, 419 U.S. 565 (1975).

<sup>42</sup> Most agencies provide for reconsideration of their initial adjudicatory decisions. See Best Practice Recommendation t., text following note 125. The reconsideration is primarily a review of the record made at the initial decision phase, not a de novo consideration of the case. The reconsideration function is not treated as a separate Type B proceeding.

<sup>43</sup> Internal Revenue Service Restructuring and Reform Act of 1998, § 1001(a)(4), 112 Stat. at 689. This section was not codified in the Internal Revenue Code.

<sup>44</sup> The IRS’ determination in a CDP case can be appealed to the Tax Court. The record before the Tax Court includes “any other documents or materials relied on by the Appeals officer ... in making the determination...” *Treas. Reg. § 301.6320-1, A F-4.*

plans.<sup>45</sup> There is first an internal review at the insurer or group plan level. Then there is an external review at the state level. If there is no state external review procedure that meets the requirements of the regulation, a federal review procedure is provided for. I have not included the federal review procedure as Type B adjudication. First, it is supplied by a private “independent review organization” (IRO) rather than by federal officials. Second, the IRO is permitted to consider non-record evidence such as the report of its own clinical reviewer as well as practice guidelines developed by the federal government or by professional medical societies as well as clinical review criteria used by the plan.<sup>46</sup>

- Supplemental Nutrition Assistance Program (SNAP) adjudication. Food and Nutrition Service (FNS) of the Department of Agriculture (USDA) operates a series of federal-state programs that supply food to the poor, including SNAP (formerly known as food stamps). FNS adjudicates cases involving local vendors authorized to sell food to SNAP recipients. Vendors can be disqualified from the program for various offenses. The statute does not call for hearings but authorizes USDA to adopt regulations providing for administrative review.<sup>47</sup> The vendor may file a written request to submit information in support of its position to a reviewer (who considers the submitted information along with other available information and makes a final determination. The sanctions are subject to de novo judicial review. The reviewers are Administrative Review Officers in the Administrative Review Branch of FNS. The review proceedings are entirely in writing. I believe USDA’s SNAP adjudicatory scheme is Type C adjudication because the exclusive record requirement does not appear to apply to the review procedure.<sup>48</sup>

Fortunately, this study is not intended to lead to recommendations for congressional action, because in a statute the muddiness of the borderline between Type B and Type C adjudication would be problematic. Instead, the study is intended to lead to recommendations for a set of best practices for Type B adjudication. As a result, agencies would be encouraged to make common sense determinations as to whether their legally-required procedures are Type B

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<sup>45</sup> 45 C.F.R. § 147.136, implementing 42 U.S.C. §300gg-19 (calling for “effective external review” at the federal level if no effective state external review program exists).

<sup>46</sup> 42 C.F.R. §147.136(d)(5). A different appeals process, relating to rejection of applicants to health insurance companies regulated by state exchanges, provides for evidentiary hearings by a state appeal entity with a backup provision for an HHS appeal entity. 42 C.F.R. 155.500 et seq. This backup provision might well call for Type B adjudication.

<sup>47</sup> 7 U.S.C. § 2023(a); 7 C.F.R. § 279.1 et seq.

<sup>48</sup> 7 C.F.R. § 279.5(a). In FY 2013, there were 1239 reviews requests relating to SNAP. SNAP hearings involving claims by recipients are processed at the state level in accordance with USDA regulations which mandate great solicitude for self-represented parties. 7 C.F.R. § 273.15.



rather than Type C. If Type C agencies decide to adopt some of the recommended best practices, so much the better.

The study does not recommend that agencies convert their Type C adjudication to Type B by adopting regulations that would require evidentiary hearings. This might well be a good idea, but the study does not attempt to evaluate the circumstances in which it should occur.<sup>49</sup>

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<sup>49</sup> See Verkuil, *supra* note 11, at 779-92 for tentative recommendations relating to Type C adjudication.

### III. THE WORLD OF TYPE B ADJUDICATION

This section of the report supplies statistical data about the world of Type B adjudication. Table 1 concerns the workload of Type B agencies (as contrasted with their workload in 1992 and 2002, where that information is available). The final column supplies data on pending cases but this information is incomplete.

For those schemes for which we have current data and also comparable 1992 or 2002 data, the table shows a significant increase in workload. For example, EOIR's caseload increased from 152,372 (1992) and 254,000 (2002) to about 335,000, if Immigration Court (IC) and Board of Immigration Appeals (BIA) cases are combined. BVA cases increased from 31,000 (2002) to 47,000. DOE security clearance cases doubled from 65 to 121. EEOC federal employee cases rose from 6,227 (1992) to 8,086. Thus the workload of Type B adjudicating agencies is growing steadily.

In the following chart, a blank cell means information is not available because the current Type B scheme did not exist in comparable form during 1992 or 2002. A question mark means that I am still seeking the information.

TABLE 1: WORKLOAD OF TYPE B ADJUDICATING AGENCIES

Agency/Scheme	Caseload Frey Study (1992) <sup>50</sup>	Caseload Limon Study (2002) <sup>51</sup>	Caseload (Current)	Pending cases
USDA PACA	255		?	?
CBCA			529	558
DOE Security Clearance		65	121	?
DOE Whistleblowers			31	?
EEOC	6,227	See note <sup>52</sup>	8,086	10,363
EPA-EAB			about 60	
EOIR	152,372	IC 254,070	IC 284667 BIA 29,313	IC 457,106; BIA 16945
MSPB	7,124	7,174	6,340 AJ; 952 Board <sup>53</sup>	4586
USPTO-PTAB	5,782 APJ	5,319 APJ	10,000 appeals 2,000 trials	25,000 appeals; 700 trials
USPTO-TTAB	3,503	754	405 appeals 127 trials	119 appeals; 36 trials
VA BVA	42,000	31,557	56,000	67,000
PRRB			3,907	7,124

<sup>50</sup> See Frey, *supra* note 13.

<sup>51</sup> See Limon, *supra* note 13.

<sup>52</sup> Limon gives a figure of 21,734 for the EEOC workload. The figure does not seem comparable to current data. Limon may be counting non-government employees whose cases are investigated and mediated by the EEOC.

<sup>53</sup> MSPB had a temporary spike in its caseload during 2014. The figures given are for FY 2013.

Table 2 compares the number of AJs in the programs studied with the number of AJs in 1992 and 2002. It also makes a rough estimate of the current annual caseload per AJ (caseload divided by the number of AJs). Table 2 shows a steady increase in the number of AJs from 1992 to 2002 to the present (although complete data are not yet available and some of the 1992 and 2002 statistics are not comparable to the present).

TABLE 2: NUMBER OF AJS AND CASELOAD PER AJ

Agency/Scheme	# AJs Frey Study (1992)	# AJs Limon Study (2002)	# AJs (Current)	Caseload per AJ per Year (Current)
USDA PACA	86		?	?
CBCA			16	99 (panels of 3)
DOE (Security+ Whistleblowers)		19	12 OHA	21 OHA
EEOC	79	See note <sup>54</sup>	110	65
EPA EAB		4	4	45 (panels of 3)
EOIR	76	228	294 IJs; 17 BIA	>1,800 IJs; 1,750 BIA
MSPB	66	62	60	105
USPTO PTAB APJs	58	62 <sup>55</sup>	225	53
USPTO TTAB ATJs	9	15	23	23
VA BVA	44	56	76 (incl. temps)	737
PRRB		0		See note <sup>56</sup>

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<sup>54</sup> Figures not comparable.

<sup>55</sup> Limon figures are not comparable to current operations because PTAB's jurisdiction has greatly increased.

<sup>56</sup> PRRB has no AJs and decides all cases by the full five-member board. According to PRRM's website, the PRRM issues about 25 substantive decisions and hundreds of jurisdictional decisions per year. See App. A-9

## IV. BEST PRACTICES IN TYPE B ADJUDICATION

### A. BEST PRACTICES AND CAUTION

This section of the report summarizes proposals for best practices that should be spelled out in the procedural regulations of agencies engaged in Type B adjudication. These practices might be most useful when Congress creates a new scheme of Type B adjudication and the agency responsible for implementing it must adopt procedural regulations. The best practices should also be useful when existing agencies decide to re-examine and update their procedural regulations.

A majority of the agencies I studied have already adopted most of the proposed best practices in their procedural regulations, manuals, or adjudicatory decisions. It is worth pausing here to make an obvious point—Type B agencies are not required to adopt any particular procedures by statute, beyond whatever the vague word “hearing” would entail. Although due process is usually applicable to Type B adjudicatory decisionmaking, the demands of due process are modest. The procedural regulations of the agencies I studied provide protections far in excess of what due process would require. Agencies want their procedures to provide the optimum balance between accuracy, efficiency, and acceptability, and they provide far more procedural protection than is legally required.<sup>57</sup>

Table 3 indicates whether a particular agency has adopted a procedural regulation setting forth some version of the best practice in its regulations, manuals, or case law. Of course, it is possible that a best practice is observed in practice by an agency, but has not been codified in published sources of law.

The project of compiling “best practices” begs the question of how one should determine that a particular practice is “best.” Necessarily this is a judgmental decision, not one easily reducible to precise and measurable elements. A traditional method of analyzing whether a particular procedure should be required is to balance the factors of accuracy, efficiency, and acceptability to private parties.<sup>58</sup> “Accuracy” refers to correct determination of the facts, law, or agency policy; efficiency refers to minimizing cost and delay; and acceptability to private parties is a surrogate for the “fairness” of the procedure. Of course, these factors often run in different directions and a rather subjective balancing process is required. While I have not spelled out this calculus for each of the best practices proposed in this report, I have attempted to balance these factors in deciding whether to include a particular practice. In particular, I believe these

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<sup>57</sup> See Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1024-26 (2016) (rebutting the notion that agencies offer as little procedure as possible); Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009) (agencies often limit their options by adopting procedures or guidelines in excess of what is legally required).

<sup>58</sup> See Verkuil, note 11 at 740; Roger Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585 (1972).

proposals are efficient, in that they should not be costly to implement nor cause confusion or delay, and they will increase the acceptability of the agency's adjudication practices, while improving (or at least not causing a decline in) the accuracy of decisions. Indeed, as Table 3 shows, most agencies already have adopted most of these practices.<sup>59</sup>

Many of the best practices are drawn from the adjudicatory provisions contained in the APA. After all, like Type A adjudication, Type B adjudication involves legally required evidentiary hearings. While the decisionmaker in Type B adjudication is an AJ, rather than an ALJ, my judgment is that procedures in Type B adjudication should resemble those in Type A adjudication unless there is a good reason for the contrary conclusion.<sup>60</sup> The adjudicatory procedures for evidentiary hearings that have developed over generations, before and after enactment of the APA, should be generally applicable, whether or not the evidentiary hearing in question falls under Type A or B.

Here I suggest an obvious caution: the world of Type B adjudication is wildly diverse. The types of matters considered are all over the map—alien removal, civil penalties, government contracts, hospital Medicare claims, veterans' benefits, intellectual property disputes, employment disputes with the federal government, agriculture, and environmental permitting, just to mention those covered by the deep dive memos in the Appendix. Some of these involve disputes between the federal government and a private party; others involve disputes between two private parties. Some of the Type B agencies have the classic combined function structure—they investigate, decide whether to pay benefits, prosecute, and adjudicate. Others are adjudicatory tribunals, meaning that they adjudicate disputes between government agencies but have no function other than adjudication.

Type B evidentiary hearings vary enormously. Some are trial-type hearings that are at least as formal and private-party protective as those called for by the APA (except that the presiding officer is not an ALJ). Others are quite informal and some are purely in writing. Some programs are in the mass justice category with heavy caseloads and rushed proceedings. Others have much lower caseloads and call for leisurely and thorough consideration. Some have huge backlogs and long delays; others seem relatively current. Some proceedings are highly adversarial; others are inquisitorial. The structures for internal appeal also vary. Thus the

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<sup>59</sup> Professor Robbins criticizes the use of best practice methodology in legal education. Ira P. Robbins, *Best Practices on "Best Practices": Legal Education and Beyond*, 16 CLINICAL L. REV. 269 (2009). Robbins criticizes best practice proposals for legal education since there is no commonly shared goal for legal education, no objective standards for measuring what is "best," a lack of supportive research, and no methodology for putting such proposals into practice. I believe the present proposal for best practices in Type B adjudication is defensible because there is a commonly shared goal and a relatively objective standard for measuring whether any given proposal is "best" in achieving that goal (that is, the three-factor balance discussed in the text). Hopefully, the proposals are supported by adequate research and the proposals can be implemented through amendment of procedural regulations.

<sup>60</sup> ABA resolution 114, discussed in text at note 15, called on Congress to apply many of the adjudication provisions of the APA to Type B adjudication required by statute--except for the requirement that ALJs preside. See Asimow, *supra* note 16. The best practices discussed here often follow that approach but they also recommend a number of practices that are not specified in the APA.

heterogeneity of Type B adjudication makes it challenging to prescribe a set of best practices that would fit all of it.

I do not suggest that every best practice in the list that follows should be applicable to every Type B scheme or that every regulatory provision implementing a best practice should take the same form. The presumption is rebuttable. If a persuasive case can be made that a particular practice is inappropriate for a particular scheme, then the agency should not be encouraged to adopt it. For example, there is no need for a provision for internal separation of adversarial from adjudicatory functions when the agency engages only in adjudicatory functions and has no staff members engaged in investigation or prosecution. Whether a particular procedural device should be employed (and the precise form in which it is provided) always requires a careful balance of the conflicting variables involved in choosing optimal procedures--accuracy, efficiency, and acceptability to the parties.

In 1993, an ACUS consultant and the Model Adjudication Rules Working Group proposed a set of model rules intended for both Type A and Type B adjudication.<sup>61</sup> These rules were presented to the ACUS Assembly and published in the Federal Register. The approach taken by these model rules makes sense for Type A adjudication, but I do not believe this approach is appropriate for the highly diverse world of Type B adjudication. I have not sought to draft precise language to be incorporated into procedural regulations implementing the best practices itemized below, given the diversity of the adjudicatory schemes to which they would apply. Still, drafters of procedural regulations implementing these best practice recommendations should consult the 1993 Model Rules and may wish to borrow the language of those proposals.

Clearly these best practices cannot be applied to the even more wildly diverse world of Type C adjudication—individualized decisionmaking where no evidentiary hearing is legally required. This is true informal adjudication. Attempts to provide a procedural template for this vast universe of informal adjudication have failed to gain much traction.<sup>62</sup> Yet, the drafters of procedural regulations for Type C adjudication should consider whether some of these practices might work and improve the procedural protections for the parties without costing the agency too much in terms of additional staff, delays, unnecessary formality, or inflexibility.

## B. BEST PRACTICES FOR TYPE B ADJUDICATION

The list of best practices that follows is broken into five larger categories—integrity of the decisionmaking process, prehearing practices, hearing practices, post hearing processes, and procedural regulations. I frequently give examples found in the statutes, regulations, or manuals

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<sup>61</sup> Michael Cox, *The Model Adjudication Rules (MARS)*, 11 T.M. COOLEY L. REV. 75 (1994). ACUS has initiated a new Model Adjudication Working Group to revise and update the model rules. See <https://www.acus.gov/research-projects/office-chairman-model-adjudication-rules-working-group> for more information.

<sup>62</sup> See Gardner, *supra* note 17; Verkuil, *supra* note 11.

of the agencies described in the deep-dive memos. It would be tedious to list each of the regulations that implement these best practices in particular Type B schemes, and I have not sought to do so.<sup>63</sup>

## 1. Integrity of the decisionmaking process

### a. Exclusivity of the record

Type B adjudication means that the decision resulting from a legally required evidentiary hearing must be based on an exclusive record.<sup>64</sup> Consequently, procedural regulations should spell out this exclusive record requirement. The APA imposes the exclusive record requirement for Type A adjudication.<sup>65</sup>

The exclusive record requirement means that a decisionmaker (either an AJ or reconsidering authority) is limited to considering factual information presented in testimony or documents received by the decisionmaker before, at, or after the hearing to which all parties had access. The decision can also be based on matters officially noticed (the official notice procedure entails a rebuttal opportunity). The exclusive record concept means, for example, that the decisionmaker cannot receive *ex parte* submissions of factual information or rely on his or her personal knowledge of the facts (without giving the parties a chance to rebut it), or base a judgment on a personal inspection or test without allowing the parties a rebuttal opportunity.

Of course, the decisionmaker does not violate the exclusive record requirement by making use of his or her experience and expertise in evaluating the information that was introduced into evidence (or officially noticed) or in making predictions and forecasts based on that information. Concededly there is sometimes a fine line between the personal knowledge of the decisionmaker about facts in issue and the decisionmaker's use of expertise to evaluate the information submitted into evidence by the parties.

### b. Outsider *ex parte* communications

Best practices include a provision prohibiting *ex parte* communication relevant to the merits of the case between outsiders and adjudicatory decisionmakers.<sup>66</sup> The provision should also prohibit *ex parte* communication between outsiders and staff decisional advisers. For this purpose, the term "outsiders" includes parties to the case, third parties with an interest in the proceedings greater than that of the general public, or government officials outside the agency.

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<sup>63</sup> Obviously, this study could not determine whether the agency actually follows the procedures prescribed in its regulations. Follow up-studies would be necessary to determine this.

<sup>64</sup> See text at note 39, *supra*.

<sup>65</sup> "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title..." APA §557(e). See ABA Guide, note 14 *supra*, ¶ 7.08.

<sup>66</sup> APA § 557(d) prohibits outsider *ex parte* communication. See also ABA Guide, note 14 *supra*, ¶ 7.04.



Submissions by outsiders (whether concerning facts, law, discretion, or policy) to agency decisionmakers or their staff decisional advisers should occur only on the record.<sup>67</sup> If oral or written ex parte communications occur, they should be immediately placed on the record.

Outsider ex parte communications offend basic notions of adjudicatory fairness. Such communications are objectionable because they may influence the decisional process through off-record communication of arguments that opposing parties have no opportunity to rebut. Moreover, such communications of a factual nature can undermine the exclusive record concept. For those reasons, most Type B agencies I studied spell out the ex parte concept<sup>68</sup> but some do not do so.<sup>69</sup>

### c. Separation of functions

Separation of functions means that the agency must internally separate its adversary and decisional personnel. For this purpose, an “adversary” is a staff member who took an active part in investigating, prosecuting or advocating in the same case (but not in a different case).

The separation of functions principle precludes an adversary from serving as a decisionmaker (either an AJ or member of the reconsidering authority). The principle also precludes an adversary from furnishing ex parte advice to a decisionmaker or decisional adviser.

Best practices for Type B adjudication require adherence to the separation of functions concept.<sup>70</sup> It is a fundamental principle of adjudication that is fair and perceived to be fair. A staff adversary often develops a mindset opposed to the private party to the case that is inconsistent with the required impartiality of the decisionmaker; for that reason, adversaries should not serve as decisionmakers, or furnish ex parte advice to decisionmakers, in the same case in which they played adversarial roles.

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<sup>67</sup> Ex parte communications from staff members to decisionmakers present different considerations from outsider ex parte communications and are discussed below under “separation of functions” and “staff advice.”

<sup>68</sup> Thus the EAB as well as the EPA’s regional judicial officers are precluded from ex parte communication. “At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss ex parte the merits of the proceeding with any interested person outside the Agency...” 40 C.F.R. § 22.8.

<sup>69</sup> For example, there are no provisions precluding ex parte communication relating to the BVA. In the case of PTAB, ex parte communications are prohibited in trial cases but apparently not in appeals cases.

<sup>70</sup> See APA § 554(d); ABA Guide, note 14 *supra*, ¶ 7.06. The APA separation of functions rule does not apply to determining applications for initial licenses; to proceedings involving rates, facilities, or practices of public utilities or carriers; or to the agency or a member or member of the body comprising the agency. APA §§ 554(d)(A), (B), (C). These exceptions may not be needed in most Type B agencies and seem generally undesirable. In addition, the APA contains a command influence rule. An ALJ shall not “be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.” APA §554(d)(2). While a command influence provision is obviously desirable, it may not be feasible in smaller agencies.

The recommendation concerning separation of functions applies to agencies that have combined functions of prosecution, investigation, and adjudication. However, agencies that function as adjudicatory tribunals (without prosecuting or investigating functions) need not adopt such provisions.<sup>71</sup> Many of the regulations of combined-function Type B adjudicating agencies I studied contain separation of functions provisions,<sup>72</sup> but others do not.<sup>73</sup>

d. Staff advice

Ex parte advice to decisionmakers by *non-adversarial* agency staff members is customary and appropriate, so long as it does not violate the exclusive record principle by introducing new factual material. In technically difficult or complex cases, such advice is essential to making the best possible adjudicatory decisions, particularly at the level of the reconsidering authority (such as agency heads). For example, in cases presenting complex expert testimony on scientific or economic issues, decisionmakers may need help from staff experts in understanding the testimony. Decisionmakers may need help in locating and evaluating the agency's prior precedents or in exercising discretion to make wise policy. Decisionmakers need candid staff advice, but the advice is likely to be less than candid if it must be disclosed to the parties and to the general public. However, such advice may not be necessary or appropriate in many situations, such as mass justice adjudications or adjudications turning largely on credibility determinations.

Agencies should consider what types of non-adversarial ex parte staff advice is necessary and appropriate in their adjudicatory decisionmaking. Procedural regulations should spell out which non-adversarial staff members can give ex parte advice and which agency decisionmakers can receive such advice. The regulations should clearly screen staff adversaries in a case from

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<sup>71</sup> For example, CCAB, EEOC, MSPB, PRRB, and PTAB and TTAB (in their trial function) serve as tribunals. However, PTAB and TTAB also consider appeals by applicants for patent or trademark protection; in the appeal function, they combine investigatory and adjudicatory roles and should implement separation of functions.

<sup>72</sup> Several provisions of EPA's regulations implement the separation of functions principle. "At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss ex parte the merits of the proceeding with . . . any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person." 40 C.F.R. § 22.8. A member of the EAB shall not be employed in any office associated with matters that could come before the EAB and shall recuse him or herself from deciding a particular case if in previous employment the member was personally involved in the case. 40 C.F.R. 1.25(e)(3). In addition, in EPA Class I civil penalty cases, "A Regional Judicial Officer [RJO] shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as an [RJO]. [An RJO] shall not knowingly preside over a case involving any party concerning whom the [RJO] performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. [An RJO] shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel." 40 C.F.R. § 22.4(b).

<sup>73</sup> For example, there are no provisions for separation of functions in the regulations relating to USDA PACA hearings or BVA cases.

giving ex parte advice in the same case and should prohibit advisers from introducing factual material not in evidence into their advisory communications. In my study of procedural regulations of agencies conducting Type B adjudications, I found few examples of provisions that elucidate the advisory function.

e. Bias

A Type B decisionmaker (either the AJ or the reconsidering authority) should not be biased for or against any party. An impartial decisionmaker is an essential element of an evidentiary hearing. Impartiality is required both by the APA<sup>74</sup> and by due process.<sup>75</sup>

For this purpose, the term “bias” includes three different types of disqualifying mindsets:<sup>76</sup> i) a financial or other personal interest in the decision; ii) personal animus against the private party or the group to which that party belongs, or against an agency or its attorney; (iii) prejudgment of the adjudicative facts at issue in the proceeding (meaning facts specific to the parties). Procedural regulations and manuals should spell out this standard and explain how and when parties should raise bias claims. Some Part B procedural regulations and manuals do not contain explicit provisions concerning bias or explain how and when bias claims should be raised.<sup>77</sup>

Some agencies have dealt with the issue of bias by providing parties the option of making one peremptory challenge against an AJ (meaning that they could disqualify a particular AJ without establishing that the AJ fails to meet the criteria for impartiality). However, a peremptory challenge procedure could be difficult and costly for agencies to implement (especially a mass justice agency), and I do not propose it as a best practice.

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<sup>74</sup> See APA ¶ 556(b): “The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.”

<sup>75</sup>Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

<sup>76</sup> See ABA Guide, *supra* note 14, ¶ 7.02 for discussion and illustration of the different types of mindsets that should and should not disqualify an adjudicatory decisionmaker.

<sup>77</sup> For example, I found no provisions concerning bias in the procedural regulations or manuals for USPTO or VA. The regulations relating to PACA contain a disqualification provision that covers only financial or family relationship, but not other types of bias. Similarly, the EAB regulations refer only to financial interest or personal relationships. MSPB regulations provide that an AJ can be disqualified for “personal bias,” and a manual defines this to include “A party, witness or representative is a friend or relative of, or has had a close professional relationship with the AJ; or personal bias or prejudice of the AJ.” 8 C.F.R. § 47.11(a), (b).

## 2. Pre-hearing practices

### f. Notice

Basic fairness to litigants requires that they receive proper notice of the issues in the case. The notice must be sufficient to allow parties to prepare for hearings (or for settlement negotiations).<sup>78</sup> In his study of optimum informal adjudication procedures, Verkuil identified proper notice as one of the essential and irreducible elements of administrative procedure (along with the ability to make written or oral comments and to receive a statement of reasons).<sup>79</sup>

Thus the procedural regulations for Type B adjudication should contain a provision calling for notice that is tailored to the specific circumstances of the particular adjudicatory scheme. The agency's notice documents should furnish information about the agency's position as to issues of fact, law, and discretion. This information should be specific enough to enable the party to prepare for the legally required evidentiary hearing.

The notice should contain a copy of the agency's procedural regulations and procedural manuals or a citation to the internet address where such materials are located.

The notice should explain how a party can request a hearing and furnish information about discovery options. It should contain information about representation at the hearing, including self-representation and lay representation if that is permitted and about any legal assistance options offered by the agency. The notice should include information about the procedural choices open to the private party or parties (such as the choice between written and oral hearings and ADR opportunities) and the deadlines for filing pleadings and documents. It should contain information about subpoenaing documents and witnesses. The notice should also contain information about whether the agency offers an opportunity for reconsideration of the initial decision at a higher agency level and about judicial review. Each of the administrative schemes I studied included notice provisions but they are too disparate to justify summarizing them here.

### g. Self-representation and lay representation

In many cases, private parties involved in agency adjudication cannot afford lawyers or others and must represent themselves.<sup>80</sup> Self-represented parties are often at a great

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<sup>78</sup> The APA requires that persons entitled to notice shall be timely informed of the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing is to be held; and the matters of fact and law asserted. APA §554(b). See *ABA Guide*, supra note 14, ¶ 4.02.

<sup>79</sup> Verkuil, note 11 *supra*, at 748-49.

<sup>80</sup> Depending on how proceedings are classified, between 37% and 55% of respondents appearing before the Immigration Court in removal proceedings are represented by counsel. [See App. A-6, note 192] Although most Social Security disability applicants are represented by lawyers, about 20% are self-represented. Additional numbers of applicants have representation for only a portion of the disability hearing process. Connie Vogelmann,

disadvantage. Best practices include provisions that are designed to assist self-represented parties. For example, the regulations might require AJs to assist self-represented parties, provide them with plain language forms, assist them in locating pro bono providers, or provide for staff members whose job it is to assist self-represented parties prepare for and participate in hearings. ACUS is currently studying this problem and may propose best practices.<sup>81</sup> Most of the procedural regulations studied for this report make no explicit provision for assisting self-represented parties.<sup>82</sup>

Best practices should enable private litigants to be represented by non-lawyers in agency proceedings.<sup>83</sup> For parties who cannot afford lawyers, having the assistance of a knowledgeable lay representative is better than nothing. Agencies should be permitted to license lay representatives (including requirements of an examination and experience), require them to be insured, permit them to charge fees, and make them subject to ethical conduct codes. Obviously, lay representation may be inappropriate in cases in which the subject matter of the dispute is highly technical and requires specialized knowledge.<sup>84</sup>

The procedural regulations of many agencies permit representation by authorized agents who are not lawyers, as well as by law students in supervised clinical programs.<sup>85</sup> The VA is notable for its heavy reliance on representation by employees of veterans' service organizations at both the Veterans Affairs Regional Office (VARO) and BVA levels.<sup>86</sup>

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*Administrative Conference Study: Self-Represented Parties in Administrative Hearings*, 41-3 ADMIN. & REGUL. L. NEWS 28 (Spring 2016)

<sup>81</sup> See <https://www.acus.gov/research-projects/self-represented-parties-administrative-hearings>.

<sup>82</sup> The Ethics and Professionalism Guide for Immigration Judges (Part V.) states that IJs “should encourage and facilitate pro bono representation” and Operating Policies and Procedures Memorandum 8-01 2008) provides specific instructions on how this should be done. The MSPB Judges Handbook requires special efforts to assist pro se appellants such as an early status conference to explain what is required. Filings by pro se appellants should not be rejected on technical grounds and they should be allowed great latitude in questioning witnesses. The statutes and regulations concerning VA benefit claims at the VARO level are very solicitous of self-represented parties, requiring the VA to develop any issues raised in the documents or testimony even if not flagged by the veteran.

<sup>83</sup> The APA authorizes (but does not require) adjudicating agencies (not limited to agencies conducting Type A adjudication) to permit parties to be represented by a “qualified representative” (other than a lawyer). APA §555(b). See generally Deborah L. Rhode, *What We Know and Need to Know about the Delivery of Legal Services by Nonlawyers*, 67 SO. CARO. L. REV. 429 (2016) (urging courts to permit lay representation and facilitate self-representation).

<sup>84</sup> TTAB permits representation only by lawyers. PTAB but not TTAB allows representation by registered non-lawyer patent agents. See App. A-8. CBCA permits self-representation but not lay representation.

<sup>85</sup> Thus EOIR allows representation by law students, law graduates not yet admitted to the Bar, reputable individuals with a pre-existing relationship to the person represented, accredited representatives, and accredited officials of a foreign government. However, it does not allow representation by non-lawyer immigration specialists, visa consultants, and notaries.

<sup>86</sup> See App. A-10. The statute prohibits compensation of attorneys at the VARO level but permits it at the BVA level.

## h. Alternative Dispute Resolution

The Administrative Dispute Resolution Act (ADRA) applies to both Type A and B adjudication. ADRA broadly validates and encourages adjudicating agencies to use all available ADR tools, including mediation and arbitration.<sup>87</sup> ACUS has consistently sought to promote ADR by federal agencies.<sup>88</sup> Properly used, ADR techniques can make the adjudicatory process less adversarial and can facilitate settlements, thus avoiding contentious and costly hearings.

Thus best practices of Type B adjudication agencies encourage and facilitate ADR, particularly mediation in its various forms. The regulations should provide a system whereby neutral mediators can be selected by agreement of the parties. The regulations should assure confidentiality of communications occurring during the mediation process and they should spell out who pays for mediation services provided outside the agency.

EEOC,<sup>89</sup> MSPB, CBCA, PRRB<sup>90</sup> and USDA-PACA have well developed provisions for mediation. Note that each of these schemes with well-developed ADR practice is a tribunal in which the adjudicating agency is not a party to the dispute; mediation may be more acceptable to the parties in tribunal situations. In addition, DOE makes provision for mediation in its security clearance and whistleblower cases, though DOE is not a tribunal.

## i. Pretrial conferences

Pretrial conferences are a common feature of modern litigation because they can shorten and simplify the hearing and promote settlement discussions. Pretrial conferences should play a role in administrative litigation as well. Thus best practices should include the ability of an AJ to require the parties to participate in a pretrial conference (in person or by telephone or videoconference), if the AJ believes that such a conference would simplify the hearing or promote settlement.<sup>91</sup> Parties should be required to exchange witness lists and expert reports before the pretrial conference. The AJ should be allowed to require that both sides be represented

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<sup>87</sup> 5 U.S.C. §§ 571 to 583.

<sup>88</sup> See ACUS Rec. 2014-1 and 95-1, relating to ADR and FOIA; 95-7, relating to ADR and the Americans with Disability Act.

<sup>89</sup> EEOC emphasizes ADR at all stages of its adjudicatory process relating to discrimination against federal employees. Complaining employees must first consult an EEO counselor within the employing agency. The counselors offer mediation as an option. ADR continues to be available during the time the employing agency considers the complaint. When the dispute comes before EEOC, the employing agency can make an offer of resolution and if the ultimate result is less favorable than the offer, the complainant can be denied attorney fees. See Appendix A-4.

<sup>90</sup> PRRB decides complex accounting disputes arising out of hospital and other provider claims against Medicare. It has no AJs and its hearings are before the full five-member board. It has a well-developed mediation practice and 90-95% of all cases are settled. See Appendix A-10.

<sup>91</sup> See APA § 556(c)(6).

at the pretrial conference by persons with authority to agree to a settlement. Many agencies I studied include provisions for pretrial conferences in procedural regulations.<sup>92</sup>

#### j. Electronic document filing

Best practices should include provisions allowing parties to file documents with the agency and the AJ electronically, as is now broadly permitted in the court system. Electronic filing has significant efficiency benefits for both the agency and outside parties. Most agencies now permit or require electronic document filing. MSPB and EAB have detailed regulations governing electronic filing that could serve as models.<sup>93</sup>

#### k. Discovery

Pre-trial discovery is commonplace in the world of court litigation and it should be considered in administrative litigation as well. The regulations should explain what unprivileged information in the agency's case files is subject to disclosure obligations or to inspection by outside parties. In addition, AJs should be empowered to order discovery through depositions, interrogatories, and the other methods of discovery used in civil trials, upon a showing that discovery is needed (such as cases involving conflicting expert reports or in which a witness will not be available to testify at the hearing).<sup>94</sup> Requiring AJ permission for discovery should avoid the problem of costly excess discovery (including unnecessary depositions or detailed interrogatories) that plagues the court system.<sup>95</sup> Discovery provisions are probably not appropriate in mass adjudication situations because of caseload pressures on AJs, but may have a useful role in Type B adjudication that involves larger disputes and lengthier hearings.

PTAB and TTAB conduct their trial proceedings (that is, disputes between patentees and challengers) entirely through discovery. Evidence, including witness statements, is received in deposition form and the depositions are then introduced at the hearing. No additional testimony is permitted at the hearings. This is an interesting model that may work for other agencies in cases in which cases seldom involve credibility disputes.

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<sup>92</sup> In DOE security clearance cases," At least 7 calendar days prior to the date scheduled for the hearing, the Administrative Judge will convene a prehearing conference for the purpose of discussing stipulations and exhibits, identifying witnesses, and disposing of other appropriate matters. The conference will usually be conducted by telephone." 10 C.F.R. § 710.25(f).

<sup>93</sup> See 5 C.F.R. § 1201.14 (MSPB); 40 C.F.R. § 124.19(i) (EAB).

<sup>94</sup> Both EEOC and DOE allow discovery by agreement of the parties or in the AJ's discretion. 29 C.F.R. § 1614.109(d); 10 C.F.R. § 708.28(b)(1) and (2).

<sup>95</sup> For example, CBBA provides for depositions, interrogatories, and other methods of discovery but requires board judge permission for their use.

## I. Subpoena power

Best practices for Type B adjudication includes subpoena power.<sup>96</sup> Subpoenas enable the agency and private parties to compel the production of documents and the appearance of witnesses at the hearing. Most Type B agencies have subpoena power. However, the agency cannot give itself subpoena power; it must be provided by a statute.<sup>97</sup> Procedural regulations should explain an agency's subpoena practice in detail.

### m. Open hearings

Under best practices, a Type B adjudicating agency should open its hearings to the public.<sup>98</sup> Some of the procedural regulations I studied provide for open hearings but others are silent on the issue. Allowing members of the public (including the media) to be present is an important accountability mechanism and part of the American tradition of open trials.<sup>99</sup> However, agencies should have the ability to close a hearing in particular cases due to concerns about protection of law enforcement or national security<sup>100</sup> or to protect confidentiality of business documents or the privacy of parties to the hearing.<sup>101</sup>

## 3. Hearing practices

### n. Use of administrative judges

Best practice for Type B agencies that decide a significant number of cases is to use AJs to conduct hearings and provide an initial decision. The initial decision is usually subject to review by upper-level decisionmakers such as the agency heads.

Of the agencies studied, only PRRM did not utilize AJs to conduct hearings and make initial decisions. The five-member PRRM board conducts its hearings en banc. PRRM has a large inventory of pending cases. The use of en banc hearings by the PRRM seems to be an inefficient use of resources and drastically reduces the number of hearings that can be provided.

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<sup>96</sup> See ABA Guide, note 14 *supra*, ¶ 4.04.

<sup>97</sup> APA § 555(c), (d). EEOC lacks power to subpoena non-party witnesses.

<sup>98</sup> See ABA Guide, *supra* note 14, ¶ 5.03.

<sup>99</sup> See *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (First Amendment requires open deportation hearings involving persons suspected of terrorist involvement unless agency establishes compelling interest for closing the hearing.) *Contra*: *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002).

<sup>100</sup> EOIR provides for open hearings but hearings may be closed to protect witnesses, parties, or the public interest. EOIR hearings shall be closed in cases of spousal or child abuse and in national security cases. 8 C.F.R. § 1003.27(a). DOE closes its hearings in security clearance cases, which, by definition, involve security issues not appropriate for public hearings. 10 C.F.R. § 710.26(c).

<sup>101</sup> Thus the EEOC closes its hearings in employee discrimination cases in order to protect the privacy of the complainant. 29 C.F.R. § 1614.109(e).



o. Video conferencing and telephone hearings

Agencies can achieve substantial economies by making use of video conference technology in conducting adjudicatory hearings (or parts of the hearing). Video allows the agency to avoid spending time and money to bring AJs, witnesses, and other staff members to locations away from their office. It also promotes the convenience of parties and witnesses, especially those living in remote locations, who need not travel long distances to participate in hearings; obviously, however, at least with existing technology, the parties and witnesses must still travel to an agency office that has video facilities. ACUS recently studied the video conference procedure and suggested best practices.<sup>102</sup>

Nevertheless, video conference is controversial and it is not always appropriate.<sup>103</sup> The efficiency savings possible through the use of video must be balanced against the possible dissatisfaction of private parties and their advocates. When video is used, the agency should make every effort to structure the experience to maximize participant satisfaction, as discussed in ACUS Rec. 2014-7.

Best practices for Type B adjudication include the ability to hold hearings through video conference. DOE,<sup>104</sup> EOIR,<sup>105</sup> USDA-PACA,<sup>106</sup> and BVA<sup>107</sup> are among the agencies that hold a substantial portion of their Type B hearings through video conference.

Video conference is obviously superior to the use of the telephone, since video allows the AJ and the parties and their representatives to see as well as hear the witnesses and to see documents. Nevertheless, in cases involving smaller stakes or which do not present credibility issues, best practices include the ability to make use of telephone hearings, even if the private party does not consent.

p. Written-only hearings

Best practices for Type B adjudication include the use of written-only hearings in appropriate cases. Most agencies confront budget and caseload pressures and the use of written

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<sup>102</sup> ACUS Rec. 2014-7, 2011-4.

<sup>103</sup> Video conference hearings are extensively used in EOIR proceedings, particularly when the respondent is located at a remote detention facility.

<sup>104</sup> See App. A-3 (about 60% of DOE hearings are conducted by video-conference).

<sup>105</sup> See App. A-6. Video is heavily used for cases of respondents in detention since detention facilities are often located at remote locations.

<sup>106</sup> In cases of claimed damages in excess of \$30,000, USDA-PACA provides oral hearings. However, oral hearings are conducted by video-conference unless the examiner determines that an in-person hearing is necessary to prevent prejudice to a party, or is necessary because of a disability of an individual expected to participate in the hearing, or because an in-person hearing “would cost less than conducting the hearing by audio-visual communication.” 7 C.F.R. § 47.15(c)(3).

<sup>107</sup> See App. A-10. Most BVA cases are written only. In cases in which hearings occur, 54% are by video conference.

hearings can yield substantial efficiencies for both sides.<sup>108</sup> Numerous agencies employ a written summary judgment practice when affidavits reveal there is no disputed issue of material fact. Normally, best practice is to allow oral argument in connection with a written-only hearing or a summary judgment motion, but the agency should have discretion to dispense with oral argument if it appears to be of little utility in a given case.

Written hearings are appropriate in cases that do not involve resolution of credibility conflicts. Such cases may involve disputes concerning the interpretation of statutes or regulations or may involve only the question of how to exercise discretion or may involve disputes concerning legislative facts (that is, factual disputes that do not involve the conduct or motivations of the parties to the case) in which experts offer conflicting views. Oral hearings (including oral testimony and cross-examination) are of questionable utility in such cases.

CBCA regulations offer a useful model. The regulations permit either party to opt for a written-only hearing in which the case is submitted on the written record. If one party (A) wants an oral hearing and the other (B) wants to submit the case on the record, A receives an oral hearing and B receives a written-only hearing; however, B is permitted to cross-examine A's witnesses.<sup>109</sup>

EPA permit cases are handled through a two-stage process that does not include an oral evidentiary hearing. The initial decision stage is a written notice and comment type proceeding, often with a public non-evidentiary hearing. The appellate stage before the EAB involves a written hearing with clearly-erroneous review of the fact findings made at the initial decision stage.<sup>110</sup>

In cases involving disputes of adjudicative fact but relatively small stakes, it should be possible to substitute written for oral testimony, as occurs in USDA-PACA adjudication.<sup>111</sup> Even when the stakes are large, some agencies offer a quicker decision if the parties agree to a written-only consideration of their case.<sup>112</sup> PTAB and TTAB use an innovative approach in which oral testimony of parties and experts is taken exclusively through depositions; the AJ then decides the case on these depositions plus oral argument.<sup>113</sup>

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<sup>108</sup> The APA provides that "In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." § 557(d).

<sup>109</sup> See App. A-2.

<sup>110</sup> See App. A-5.

<sup>111</sup> See App. A-1; 7 C.F.R. § 47.15(a) (documentary rather than oral hearings in cases in which claimed damages do not exceed \$30,000).

<sup>112</sup> BVA backlogs are quite long. Most parties appealing to BVA agree to a written-only hearing in order to receive a quicker decision. See App. A-10.

<sup>113</sup> App. A-8.

#### q. Evidentiary rules

Best practice requires that an agency's procedural regulations prescribe the evidentiary rules that the AJ will apply. Many agencies follow the APA provisions on evidence that apply to Type A adjudication. Under the APA, the ALJ should exclude irrelevant, immaterial, or unduly repetitious evidence but otherwise should admit any oral or documentary evidence.<sup>114</sup> The Federal Rules of Evidence (FRE) are not applicable; hearsay evidence is admissible. The advantage of the APA approach is that it avoids disputes about esoteric rules of evidence, such as the many exceptions to the hearsay rule. AJs may not be competent to resolve disputes about the rules of evidence and self-represented parties (or parties assisted by lay representatives) are certainly not competent to deal with them.

One variation of the general rule is that the FRE can be consulted but not necessarily followed. In DOE security clearance cases, the regulations provide that formal rules of evidence do not apply but the FRE may be used as a guide to assure production of the most probative evidence available; hearsay evidence "may in the AJ's discretion and for good cause be admitted without strict adherence to technical rules of admissibility and shall be accorded such weight as the circumstances warrant."<sup>115</sup> In my view, this type of unclear formulation is likely to cause confusion and time-consuming evidentiary disputes about whether specific FRE rules should be applied.<sup>116</sup>

There are situations in which agencies should follow the FRE. PTAB and TTAB provide examples of this situation. Administrative patent judges (APJs) and administrative trademark judges (ATJs) apply the FRE (along with all of the discovery rules) in trial cases.<sup>117</sup> The apparent rationale is that such private-party patent disputes could be tried either in federal district court or the PTAB or TTAB and the evidence rules should not differ between the two fora. However, the FRE are not applicable in appeal proceedings before PTAB and TTAB (that is, cases involving disputes between the patent examiner and the applicant or patentee). In appeal proceedings, the judges admit any evidence that tends to prove or disprove alleged facts.<sup>118</sup>

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<sup>114</sup> "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." APA § 557(d).

<sup>115</sup> 10 C.F.R. § 710.26(h). Similarly, in whistleblower cases, OHA is not bound by the formal rules of evidence but can use the FRE as a guide. 10 C.F.R. § 708.28(a)(4). In EEOC hearings, "the rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence." 29 C.F.R. § 1614.109(e).

<sup>116</sup> See ACUS Rec. 86-2: "Congress should not require agencies to apply the FRE, with or without the qualification, 'so far as practicable,' to limit the discretion of presiding officers to admit evidence in formal adjudications." A footnote states that the term "formal adjudication" refers not only to adjudication governed by the APA but also to "agency adjudications which by regulation or agency practice are conducted in conformance with these provisions." See Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1 (1987).

<sup>117</sup> 37 C.F.R. § 42.62; 37 C.F.R. § 2.122(a).

<sup>118</sup> 37 C.F.R. § 41.30.

#### r. Opportunity for rebuttal

Best practice for evidentiary hearings includes an opportunity for rebuttal. In cases presenting credibility issues, the right to rebuttal normally entails cross-examination of an adverse witness. However, best practice permits the abridgement of cross-examination in appropriate circumstances.<sup>119</sup>

In agency proceedings involving disputes concerning legislative facts where the evidence consists of expert testimony, the costs of cross-examination may outweigh its benefits. Similarly, cross seems unnecessary if credibility is not in issue or the only issue is how an AJ should exercise his or her discretion. The agency should be able to limit or preclude cross examination in such cases. The right of rebuttal of such evidence takes the form of additional written evidence and oral argument.

Agencies appropriately limit or preclude cross examination if cross might jeopardize national security or might reveal the identity of confidential informants. For example, in DOE security clearance cases, the AJ can dispense with cross if a witness is a confidential informant, or if cross-examination would jeopardize restricted data or national security.<sup>120</sup> Instead, the employee receives a summary or description of the information. The AJ should give appropriate consideration to the lack of opportunity to cross examine.<sup>121</sup> Similarly, in EOIR hearings, the IJ must permit a reasonable opportunity for cross-examination,<sup>122</sup> but the respondent cannot examine national security information that the government introduces in opposition to admission or discretionary relief.<sup>123</sup>

### 4. Post-hearing practices

#### s. Written decisions

Best practices require Type B decisionmakers to furnish a written opinion. The decision should set forth findings of fact and an explanation of how the AJ resolved credibility conflicts. The opinion should also furnish conclusions of law and an explanation of the AJ's legal interpretations of statutes or regulations. Finally, the opinion should state the AJ's reasons for discretionary choices.<sup>124</sup> In some mass justice situations, the requirement of a written

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<sup>119</sup> Under the APA, a party is entitled only "to conduct such cross-examination as may be required for a full and true disclosure of the facts." APA § 557(d). See ABA Guide, note 14 *supra*, ¶ 5.09.

<sup>120</sup> 10 C.F.R. § 710.26(l).

<sup>121</sup> 10 C.F.R. § 710.26(m).

<sup>122</sup> Immigration Court Practice Manual § 4.16(d).

<sup>123</sup> 8 U.S.C. § 1229a(b)(4); 8 C.F.R. § 1240.10(a)(4).

<sup>124</sup> The APA requires that all decisions (including initial, recommended and tentative decisions) include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.

§ 557(c)(A). See ABA Guide, note 14 *supra*, ¶ 6.02.

opinion can be satisfied by an oral decision delivered from the bench that is transcribed in the record of the hearing.

A requirement of written findings and reasons improves the quality of agency decisionmaking, assists parties in determining whether to seek judicial review, and improves the quality of administrative reconsideration and judicial review.

Type B procedural regulations frequently prescribe the content of written AJ opinions. For example, the regulations relating to DOE security clearance cases provide:

The Administrative Judge shall make specific findings based upon the record as to the validity of each of the allegations contained in the notification letter and the significance which the Administrative Judge attaches to such valid allegations. These findings shall be supported fully by a statement of reasons which constitute the basis for such findings.<sup>125</sup>

t. Higher-level reconsideration

Best practice is that agencies should furnish an opportunity for a higher-level reconsideration of an initial adjudicatory decision.<sup>126</sup> The ability to obtain a higher-level reconsideration of an adverse decision is useful to correct the inevitable errors made by AJs and enhances the feelings of private parties that their case has been dealt with fairly and impartially. To facilitate such reconsideration, the AJ decision should be disclosed to the parties and they should have an opportunity to make arguments to the reconsidering authority. The reconsidering body should be entitled to summarily affirm the lower-level decision without being required to write a new opinion.

The intra-agency appellate structures vary greatly and provide a variety of models from which regulation drafters can choose. Any of these models would satisfy the best practice requirement that there be an opportunity for reconsideration of the initial decision.

Some reconsideration structures provide for reconsideration of AJ decisions as a matter of right. Reconsideration is normally based on written briefs with or without oral argument. For example, EOIR provides for both an initial Type B decision by an IJ followed by an appellate procedure at the BIA level.<sup>127</sup> Similarly, EEOC cases involve both an initial decision by an AJ followed by an appellate-level decision by OFO.<sup>128</sup>

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<sup>125</sup> 10 C.F.R. § 710.27(c).

<sup>126</sup> See generally ABA Guide, note 14 *supra*, ¶ 6.03. The term “reconsideration” is also used to refer to a request to an AJ to reopen and reconsider the AJ’s decision (as might occur if it contains errors in referring to the record or there is newly discovered evidence). The reference to reconsideration in the text is to review of an initial decision by a *higher level official*, either within the agency or within another agency. Of course, both forms of reconsideration may be available in a given case.

<sup>127</sup> See App. A-6.

<sup>128</sup> See App. A-4.

Other agencies use different reconsideration models. In environmental permitting cases, the initial decision is based on a notice and comment procedure that includes a public hearing; the EAB functions as a reconsideration body and provides a Type B written procedure.

Similarly, in VA benefit cases, the only type B hearing occurs at the reconsideration level. The Board of Veterans Appeals (BVA) reviews a regional office decision denying benefits. The regional office decision is made by a ratings specialist that is reviewed in by a Decision Review Officer (DRO). Both the regional office and DRO proceedings should probably be classified as Type C adjudication.

PTAB and TTAB do not provide for reconsideration of decisions by APJs or ATJs. The same is true of CBCA Board Judge decisions, but the regulations allow full Board reconsideration to secure uniformity of decisions or because of a case's exceptional importance.<sup>129</sup>

Best practices also include regulations that allow and encourage the reconsidering body to designate its important decisions as precedential in order to improve the consistency of lower level decisions by staff or AJs.<sup>130</sup> The use of a system of precedent decisions makes the decisional process more transparent to outsiders and makes it much easier for them to research the agency's decisional law.

## 5. Procedural regulations

### u. Complete statement of important procedures

Best practice is that all important procedures and practices that affect persons outside the agency should be set forth in procedural regulations that are published in the Federal Register and the Code of Federal Regulations. This is required by the APA.<sup>131</sup> Important practices relating to the decisional process should not be buried in practice manuals or guides for AJs.

Such practice manuals are quite useful to staff, AJs, and private litigants. The manuals should spell out smaller details of procedures that are already set forth in the regulations, rather than stating important procedures and practices that are not covered by the procedural regulations. Manuals should be as user-friendly as possible and contain examples, illustrations, model forms, and checklists.

In addition, agencies should periodically seek feedback on their procedures and re-examine and update their procedural regulations as well as their practice manuals and guidelines.

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<sup>129</sup> See App. A-2.

<sup>130</sup> See, e.g., CMS Prop. Reg. 81 Fed. Reg. 43789 (July 5, 2016), creating a precedent decision system in the OMHA Medicare Appeals program. OMHA conducts a severely backlogged Type A adjudicatory scheme and the provision for precedent decisions may reduce the burden on ALJs. PTO guidelines provide for designating decisions by APJs as precedential but have been rarely used. See Stuart Minor Benjamin & Arti K. Rai, *Administrative Power in the Era of Patent Stare Decisis*, 65 DUKE L.J. 1563, 1586 (2016).

<sup>131</sup> APA § 552(a)(1)(C).

TABLE 3: TYPE B AGENCIES AND BEST PRACTICE PROPOSALS

The following table indicates whether each agency I studied embodied the best practices recommended in this report in its generally available written procedural documents (procedural regulations, manuals, or other sources of procedure law). Of course, agencies might be observing these best practices without having codified them in regulations or manuals.

TYPE B SCHEMES⇒	USDA PACA	BCBA	DOE	EEOC	EPA EAB	EOIR	MSPB	PTAB & TTAB	PRRB	BVA
RECOMMENDATIONS↓										
INTEGRITY OF PROCSS										
a. Exclusive Record	N	Y	Y	Y	Y	Y	Y	Y	Y	N
b. Bias	Y	N	N	Y	Y	Y-N <sup>132</sup>	Y	N	Y	N
c. Ex Parte Comm.	N	Y	Y	N	Y	Y-N	Y	Y-N <sup>133</sup>	Y	N
d. Sep. of Functions	N	N/A <sup>134</sup>	Y-N	N/A	Y	Y-N	N/A	Y-N	N/A	N
PREHEARING										
a. Written Notice	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
b. Lay Representation	Y	N	Y	Y	Y	Y	Y	N	Y	Y
c. ADR	Y	Y	Y	Y	Y	N	Y	N	Y	N
d. Pretrial Conf.	N	Y	Y	N	Y	Y	Y	Y	Y	N
e. Electronic Filing	N	Y	Y	N	Y	N	Y	Y	Y	N
f. Discovery	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
g. Subpoena Power	Y	Y	Y	N	Y	Y	Y	Y	Y	N
h. Open Hearings	N	Y	N	N	Y	Y	Y	N	N	N
HEARING										
a. Use of AJs	Y	Y	Y	Y	Y	Y	Y	Y	N	Y
b. Videoconference	Y	N	Y	N	N	Y	Y	N	Y	Y
c. Written-only Opp.	Y	Y	Y	Y	Y	N	Y	Y	Y	Y
d. Evidence Rules	N	Y	Y	Y	Y	N	N	Y	Y	N
e. Rebuttal Opp.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
POST-HEARING										
a. Written Opinion	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
b. Reconsideration	Y	N	Y	Y	Y	Y	Y	N	Y	N
PROCEDURAL REGS										
a. Complete Statement	Y	Y	Y	N	Y	N	Y	Y	N	N
NUMBER OF YESSES	13	15	17.5	12	19	13.5	18	13	16	7

<sup>132</sup> Provisions in guidelines on bias, ex parte communication, and separation of functions apply to IC but not BIA.

<sup>133</sup> PTAB and TTAB have separation of functions and ex parte communication restrictions for trials (meaning disputes between patentees and challengers) but not appeals (meaning disputes between patent applicants and examiners).

<sup>134</sup> No separation of functions in security clearance cases; separation of functions is required in whistleblower cases.

## APPENDICES

### APP. A-1: DEPARTMENT OF AGRICULTURE

#### A. TYPE A USDA SCHEMES

Numerous USDA adjudicatory programs are Type A adjudication.

<sup>135</sup> These are USDAOALJ0001 in our database. The regulations provide for Type A hearings before ALJs; appeals from ALJ decisions are decided by USDA's judicial officer.

Many of the statutes covered by these regulations call for a "hearing on the record" and thus trigger Type A adjudication. However, some statutes do not call for a hearing "on the record" but USDA nevertheless has included these programs in its list of Type A adjudication. For example, licensing provisions of the Animal Welfare Act call only for "notice and an opportunity for hearing."<sup>136</sup> The same is true of licensing provisions in the Perishable Agricultural Commodities Act. (PACA).<sup>137</sup>

The National Appeals Division (NAD) is an independent unit within USDA that conducts evidentiary hearings arising from adverse decisions by agencies engaged in USDA's credit, soil conservation, and insurance functions.<sup>138</sup> It is USDANADO0002 in the ACUS database. NAD is headed by a Director who appoints its hearing officers.<sup>139</sup> The hearing officers have no duties other than adjudicating.<sup>140</sup> In *Lane v. USDA*,<sup>141</sup> the 8th Circuit held that NAD hearings are covered by the APA; consequently, they are subject to the Equal Access to Justice Act. The *Lane* decision has been followed by cases from two other circuits.<sup>142</sup> USDA has acquiesced in the *Lane* decision and the regulations now provide that the APA and EAJA apply to NAD

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<sup>135</sup> See 7 C.F.R. §§ 1.130 to 151. § 1.131 lists the USDA regulatory programs subject to these regulations.

<sup>136</sup> 7 U.S.C. § 2149 (a) (license suspension or revocation) and (b) civil penalties.

<sup>137</sup> See, e.g., 7 U.S.C. § 499h(b).

<sup>138</sup> Agencies covered are the Farm Service Agency, Commodity Credit Corporation, Farmers Home Administration, Federal Crop Insurance Corporation, Rural Development Administration, Natural Resources Conservation Service, and certain state and local committees. 7 U.S.C. § 6991(2); 7 C.F.R. § 11.1. NAD does not provide review of statutes or regulations, only of individualized decisions. 7 C.F.R. § 11.3(b).

<sup>139</sup> The Director serves for a 6-year term and is not subject to removal during that term except for cause. 7 U.S.C. § 6992(b)(2).

<sup>140</sup> 7 U.S.C. § 6992

<sup>141</sup> 120 F.3d 106 (8th Cir. 1997).

<sup>142</sup> *Five Points Road Joint Venture v. Johanns*, 542 F.3d 1121 (7th Cir. 2008); *Aageson Grain & Cattle v. USDA*, 500 F.3d 1038 (9th Cir. 2007). This line of cases is questionable, however. Prevailing law gives *Chevron* deference to an agency's interpretation of whether its governing statute triggers the APA. *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006). The *Lane* decision gave no deference to USDA's interpretation. See discussion at note 28-29, *supra*.



hearings.<sup>143</sup> Thus I have treated NAD hearings as Type A adjudication—except that, by statute, its hearings are conducted by hearing officers appointed by its Director, rather than by ALJs.<sup>144</sup>

## B. TYPE B USDA SCHEMES—PACA

PACA (originally enacted in 1930) includes provisions for reparation orders.<sup>145</sup> PACA provides for dispute resolution between private participants in the fresh or frozen fruit and vegetable markets. The producers of fruits and vegetables are on one side; commission merchants, brokers, and dealers in such products (who must hold licenses) are on the other side. PACA allows USDA to adjudicate damage claims by producers against licensees for non-payment or other delinquencies (such as unfair, deceptive, unreasonable, or discriminatory practices, including unreasonable rejection of produce).<sup>146</sup> PACA reparation proceedings are not presently included in the ACUS database but should be included.<sup>147</sup>

USDA decisions in PACA reparation cases are reviewable in federal district court. Review can occur either in a proceeding by a petitioner to enforce a reparation order or by either party to review a reparation order. The cases are tried *de novo*, but USDA's findings and conclusions are treated as *prima facie* correct.<sup>148</sup> In addition, producers who are victims of breach of contract can go directly to court and bypass the USDA reparation procedure entirely.<sup>149</sup> These unusual review provisions reflect the fact that the USDA reparation proceedings might otherwise be treated as an unconstitutional delegation of adjudicative power or a denial of the right to a jury trial. The existence of these unusual judicial review provisions may explain why reparation orders are treated as Type B adjudication rather than Type A (like most of the other USDA regulatory programs).

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<sup>143</sup> 7 C.F.R. § 11.4(a). See 74 Fed. Reg. 57401 (Nov. 6, 2009) (USDA's acquiescence in *Lane*).

<sup>144</sup> In NAD hearings, the initial decisions are by AJs instead of ALJs, but this is a permissible arrangement for Type A adjudication. The APA allows a statute to supersede the APA requirement that hearings be conducted by ALJs. APA §556(b).

<sup>145</sup> See 7 U.S.C. § 499a et seq. PACA reparation hearings are not included in the USDA's list of Type A adjudications. See 7 C.F.R. § 1.131(a).

<sup>146</sup> See 7 U.S.C. § 499b. PACA also treats the proceeds of sale of produce as being held in trust for producers as well as giving the producers a floating lien over the producers' assets. These provisions greatly improve the position of the producers as creditors if a licensee files for bankruptcy. See 7 U.S.C. § 499e(c).

<sup>147</sup> PACA procedure is discussed in Verkuil, *supra* note 11 at 764-65.

<sup>148</sup> 7 U.S.C. § 499g(b), (c). This means that either party can introduce additional evidence in court. *Smith v. White*, 48 F. Supp. 554 (E.D. Mo. 1942). The Secretary's findings are rebuttably presumed to be correct. The presumption is rebutted if a party introduces sufficient evidence to overcome them. *Spano v. Western Fruit Growers, Inc.*, 83 F.2d 150 (10th Cir. 1936).

<sup>149</sup> See 7 U.S.C. § 499e(b), stating that victims can recover damages either through the USDA process or by suing in any court of competent jurisdiction. "[T]his section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this chapter are in addition to such remedies."

The procedures for PACA reparation orders are set forth in USCA's regulations.<sup>150</sup> The examiners in PACA hearings are attorneys employed in the Office of the USDA General Counsel.<sup>151</sup> Examiners can be disqualified for bias, but the regulations define bias rather narrowly to cover only a pecuniary interest or a blood or marital relationship to one of the parties.<sup>152</sup> There are no provisions prohibiting ex parte communications to the examiner or involvement by USDA investigators in the proceedings. Examiners are given various powers including subpoena power, power to order depositions, or to conduct hearings by telephone or audiovisual equipment.<sup>153</sup>

Parties seeking PACA reparations trigger the process by filing an "informal complaint." Staff members of the Deputy Administrator investigate the complaint and a copy of the investigational report is provided to the parties.<sup>154</sup> During this period, the parties may settle the dispute.<sup>155</sup> The PACA branch also provides mediation services at this stage.<sup>156</sup> If the case does not settle, the petitioner files a "formal complaint" which is served on the respondent.<sup>157</sup>

The regulations provide for an oral hearing if the amount of the claimed damages exceeds \$30,000. If the damages do not exceed \$30,000, a documentary rather than an oral hearing is provided (unless the examiner finds that peculiar circumstances make an oral hearing necessary).<sup>158</sup>

Oral hearings can be conducted by an in-person proceeding or by telephone or by audio-visual telecommunication equipment. The default is audio-visual equipment unless the examiner determines that an in-person hearing is necessary to prevent prejudice to a party, or is necessary because of a disability of any individual expected to participate in the hearing, or because an in-person hearing "would cost less than conducting the hearing by audio-visual communication."<sup>159</sup> The examiner can substitute a telephone hearing for an in-person hearing or one by audio-visual

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<sup>150</sup> 7 C.F.R. §§ 47.1 to .22.

<sup>151</sup> 7 C.F.R. § 47.2(i). In documentary reparation proceedings, the term "examiner" means "any other employee of the PACA Branch whose work is reviewed by an attorney employed in the Office of the General Counsel."

<sup>152</sup> 7 C.F.R. § 47.11(a). The regulations also provide for "disqualification" of the examiner. It is not clear if the grounds for disqualification go beyond a pecuniary or family relationship to the parties. *Id.*, § 47.11(b).

<sup>153</sup> 7 C.F.R. § 47.11(c).

<sup>154</sup> 7 C.F.R. § 47.7.

<sup>155</sup> "The Deputy Administrator, in an effort to effect an amicable or informal adjustment of the matter, shall give written notice to the person complained against of the facts of conduct ... and shall afford such person an opportunity, within a reasonable time fixed by the Deputy Administrator, to demonstrate or achieve compliance..." 7 C.F.R. § 47.3(a), (b).

<sup>156</sup> <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=PACAMediationServices>

<sup>157</sup> 7 C.F.R. § 47.6(a).

<sup>158</sup> 7 C.F.R. § 47.15(a).

<sup>159</sup> 47 C.F.R. § 47.15(c)(3). "If the examiner determines that a hearing conducted by audio-visual telecommunication would measurably increase the [USDA's] cost of conducting the hearing, the hearing shall be conducted by personal attendance of any individual who is expected to participate in the hearing or by telephone." *Id.*

equipment if a phone hearing would provide a full and fair evidentiary hearing, would not prejudice any party, and would cost less than conducting the hearing by audio-visual equipment or personal attendance of any individual.<sup>160</sup> The parties must exchange (ten days before the hearing) a written verified narrative of the testimony any of its witnesses (including experts) will present by phone.<sup>161</sup>

At the hearing, a party may appear in person or by counsel or other representative. Thus USDA permits lay representation.<sup>162</sup>

After the hearing, the parties have an opportunity to submit proposed findings and conclusions and submit briefs. They must also make claims for attorney fees and other costs (although they do not yet know if they will be prevailing parties entitled to recover such costs).<sup>163</sup> The examiner “with the assistance and collaboration of department employees assigned for this purpose” shall prepare a report on the basis of evidence received at the hearing. It is prepared in the form of a final order for the signature of the Secretary of Agriculture but not served on the parties until the Secretary signs it.<sup>164</sup>

The documentary procedure (applicable to most cases involving less than \$30,000 in damages<sup>165</sup>) dispenses with oral proceedings. The verified pleadings, investigation reports, stipulations, and additional written verified statements or deposition transcripts serve as the evidentiary record. The parties may submit briefs.<sup>166</sup> The examiner’s report is the same as in the case of oral hearings.<sup>167</sup>

The examiner’s report and the record in the case are transmitted to the Secretary of Agriculture.<sup>168</sup> If the Secretary agrees with the examiner’s report, the Secretary signs it without further ado. If the Secretary disagrees with the examiner’s report and if the Secretary “deems it advisable to do so,” the examiner’s proposed order is served on the parties as a tentative order and the parties are allowed a period of time (not exceeding 20 days) to file exceptions to the report and written argument or briefs in support thereof.<sup>169</sup>

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<sup>160</sup> 7 C.F.R. § 47.15(c)(4).

<sup>161</sup> 7 C.F.R. § 47.15(f).

<sup>162</sup> 7 C.F.R. § 47.15(d)(1). The regulations provide for disqualification of counsel or a lay representative because of unethical or unprofessional conduct. The examiner shall report such action to the Secretary who can, after notice and hearing, bar counsel or other representative from participating in other hearings.

<sup>163</sup> 7 C.F.R. § 47.19(b), (c), (d).

<sup>164</sup> 7 C.F.R. § 47.19(e).

<sup>165</sup> Parties in cases where the claimed damages exceed \$30,000 can consent to use the documentary procedure in lieu of oral hearings. 7 C.F.R. §47.20(b)(2).

<sup>166</sup> 7 C.F.R. § 47.20(a), (c) to (i).

<sup>167</sup> 7 C.F.R. § 47.20(k).

<sup>168</sup> 7 C.F.R. § 47.21.

<sup>169</sup> 7 C.F.R. § 47.23.

## APP. A-2: CIVILIAN BOARD OF CONTRACT APPEALS<sup>170</sup>

CBCA (housed within the General Services Administration) is an adjudicating tribunal that is responsible for resolving contract disputes between private contractors and most non-military federal agencies.<sup>171</sup> It is identified as GSAOCB0004 in the ACUS website. CBCA also is responsible for resolving a variety of other types of disputes involving the federal government. These include federal employee monetary claims and disputes relating to Federal Crop Insurance, Federal Motor Carrier Safety, and Indian Self-Determination.<sup>172</sup>

Under the Contract Disputes Act, a private contractor who has a contract dispute with an executive agency can take an “appeal” from an adverse decision of the agency’s contracting officer to CBCA.<sup>173</sup> Contractors have the choice of proceeding before CBCA or litigating in the Court of Federal Claims.<sup>174</sup> CBCA appeals are Type B adjudication. The exclusive record principle applies.<sup>175</sup> Unlike other Type B agencies, CBCA awards attorney fees to prevailing private contractors under the Equal Access to Justice Act.<sup>176</sup>

CBCA cases are usually heard by panels of three Board Judges (BJs). BJs have many of the job protections enjoyed by ALJs. BJs must have at least five years of experience in public contract law.<sup>177</sup> Unlike most AJs, they are not subject to performance evaluations. CBCA currently has 16 BJs.<sup>178</sup>

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<sup>170</sup> This appendix does not discuss the Armed Service Board of Contract Appeals. ACUS excluded military and foreign affairs adjudication from this study because of resource constraints. The appendix also does not discuss two contract-related schemes operated by General Accountability Office (GAO). GAO’s scheme for making non-binding recommendations concerning bid protests (GAOBIDS0003) appears to be Type C adjudication; neither the statute nor the regulations appear to call for an evidentiary hearing although GAO may hold hearings. See 31 U.S.C. §§ 3554(a) and 3555; 4 C.F.R. Part. 21. GAO’s scheme for resolving disputes relating to contracts by a legislative branch agency does appear to be Type B adjudication but the number of cases appears to be very small. The ACUS database does not include this scheme. See 4 C.F.R. Part. 22 (these regulations parallel those of CBCA).

<sup>171</sup> A 2006 statute consolidated numerous agency-specific boards of contract appeals into CBCA. See Jeri Kaylene Somers, *The Boards of Contract Appeals: A Historical Perspective*, 60 AMER. UNIV. L. REV. 745 (2011).

<sup>172</sup> ACUS website lists 11 case types. See <http://www.cbca.gov/board/index.html>.

<sup>173</sup> 41 U.S.C. § 7104(a).

<sup>174</sup> 7104(a). See Michael Schaengold, *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Boards of Contract Appeals*, 17 FED. CIR. BAR J. 279 (2008).

<sup>175</sup> 48 C.F.R. § 6101.9, .24.

<sup>176</sup> 5 U.S.C. § 504(b)(1)(C)(ii); 48 C.F.R. § 6101.1(b)(2) and .30.

<sup>177</sup> 41 U.S.C. § 7105(b)(2)(B). Board judges (referred to Board Members in the statute) are subject to removal in the same manner as ALJs.

<sup>178</sup> <http://www.cbca.gov/board/judges.html>

CBCA regulations prohibit ex parte communications by any person “directly or indirectly involved in an appeal” to any Board member or Board staff.<sup>179</sup> Because the Board is an adjudicating tribunal, it has no need for a separation of functions provision. The regulations contain no provision dealing with possible bias by BJs.

CBCA does not allow lay representation. Private parties can represent themselves and an officer can appear on behalf of a corporation.<sup>180</sup>

The procedural regulations contain elaborate rules for pleading and notice to opposing parties.<sup>181</sup> Electronic filing is permitted.<sup>182</sup> BJs have subpoena power.<sup>183</sup> The Board permits all forms of discovery (including depositions, interrogatories, and requests for production) but discovery is permitted only to the extent authorized by BJs. The Board may limit the frequency or extent of discovery if it would be burdensome or unduly expensive.<sup>184</sup> BJs are authorized to conduct pre-hearing conferences.<sup>185</sup>

ADR is strongly encouraged and the Board provides trained neutrals to attempt to settle disputes by any ADR method (including mini-trials). ADR is even available before an agency contracting officer has filed a written report (which is normally required before a contractor can appeal to CBCA).<sup>186</sup>

CBCA’s rules provide that either party can waive an oral hearing and request a decision based on documents in the file.<sup>187</sup> The other party, however, may request an oral hearing. When one party requests an oral hearing, the party who waived the oral hearing is allowed to appear to cross-examine live witnesses. The rules direct BJs to admit any relevant and material evidence including hearsay unless found to be unreliable or untrustworthy. As to other matters relating to evidence, BJs look to the FRE for guidance.<sup>188</sup> CBCA hearings are open to the public but can be closed to protect confidential information.<sup>189</sup> A written decision is required based on evidence in the record and judicially noticed facts.<sup>190</sup>

The statute and regulations provide for small claims hearings if the dispute involves \$50,000 or less or the contractor is a “small business concern.” Small claims hearings are heard

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<sup>179</sup> 48 C.F.R. § 6101.33(b) and (c).

<sup>180</sup> 48 C.F.R. § 6101.5.

<sup>181</sup> 48 C.F.R. § 6101.2 et seq.

<sup>182</sup> 48 C.F.R. § 6101.1(b)(2).

<sup>183</sup> 48 C.F.R. § 6101.16.

<sup>184</sup> 48 C.F.R. § 6101.13 to .15.

<sup>185</sup> 48 C.F.R. § 6101.11.

<sup>186</sup> 48 C.F.R. § 6101.54. See <http://www.cbca.gov/adr/index.html>.

<sup>187</sup> 48 C.F.R. § 6101.18 and .19.

<sup>188</sup> 48 C.F.R. § 6101.10.

<sup>189</sup> 48 C.F.R. § 6101.21.

<sup>190</sup> 48 C.F.R. § 6101.25.

by a single BJ and an accelerated time table.<sup>191</sup> If the amount in dispute is \$100,000 or less, the regulations provide for an accelerated decision by only two BJs.<sup>192</sup>

There is no procedure for higher-level administrative reconsideration of BJ decisions. However, a party can request full Board reconsideration of a case in order to secure uniformity of decisions or because of the case's exceptional importance. Such requests are disfavored.<sup>193</sup> CBCA decisions can be appealed by either side to the Court of Appeals for the Federal Circuit.

According to ACUS website, in FY 2013, CBCA opened 529 cases and decided 451. 558 cases were pending at the end of the year. Of the 529 cases opened, 242 involved contract disputes, 77 involved motor carriers, 64 involved federal employee relocation claims, and 51 involved the Indian Self Determination Act. The workload was about 99 cases per judge per year (computed by dividing the number of cases by the number of BJs and multiplying by 3 to take account of the three-judge panels—though this is imprecise since there are one-judge and two-judge panels in smaller cases).

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<sup>191</sup> 48 C.F.R. § 6101.52.

<sup>192</sup> 48 C.F.R. § 6101.53.

<sup>193</sup> 48 C.F.R. § 6101.28.

## APP. A-3: DEPARTMENT OF ENERGY<sup>194</sup>

The Department of Energy's (DOE) Office of Hearings and Appeals (OHA) adjudicates six case types. The identifier code in the ACUS database is DOENOOH0001.

### A. General information

The caseload of OHA (measured by cases opened in FY 2014) is as follows.<sup>195</sup>

Personnel security	121
Whistleblowing	31
FOIA & privacy	79
Exceptions, med certify, safety, others	26
TOTAL CASELOAD	257

This memo focuses on the first two categories—personnel security and whistleblowing, which appear to be examples of Type B adjudication. The remaining case types do not involve evidentiary hearings and thus do not qualify as Type B adjudication.

OHA has 12 administrative judges (AJs) who provide initial hearings. They work full-time as judges and are subject to performance evaluation based on the timeliness and quality of their work product. They are paid in the GS 13-15 range. Their title was formerly Hearing Officer; the AJ title was adopted in 2013. The purpose of the change was to enhance their stature and to bring them in line with the titles used at other federal agencies. Assuming 257 cases per year distributed among the 12 AJs, their caseload is about 21 cases per year or about 1.75 cases per month.

In initial hearings, DOE is represented by a lawyer. About half of respondents are represented (some representatives are non-lawyers).

Discovery is permitted in all types of cases in the discretion of the AJ.<sup>196</sup> Discovery includes depositions and documents produced in response to a subpoena.<sup>197</sup> AJs have subpoena authority. Ex parte contacts are prohibited. Parties receive notice of the hearing. The exclusive record principle applies.<sup>198</sup>

The formality of DOE hearings varies by case type. About 20% are document-only hearings (meaning no live-witness testimony or cross-examination). About 20% involve in-

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<sup>194</sup> Thanks for assistance by Dan Solomon, Ann Augustyn, and Alan Morrison.

<sup>195</sup> The figures in the ACUS database are for FY 2013 and show 266 cases opened in that year.

<sup>196</sup> See 10 C.F.R. § 708.28(b)(1), (2).

<sup>197</sup> See *id.* at §§ 708.28, 1003.8.

<sup>198</sup> 10 C.F.R. § 1003.62(g).

person hearings and 60% are conducted via video. Some hearings are open to the public; others (such as security clearance cases) are closed.<sup>199</sup>

The AJ drafts the agency decision. In some cases, there is a time limit for preparing the decision (60 days for whistleblower cases, 45 days for medical certificate cases).

Cases are generally heard on a first-in/first-out basis. However, this may vary based upon the complexity of the issues presented and unforeseen difficulty in scheduling the hearing. Web-based electronic filing is permitted. Final decisions are published or posted on the agency website (except for those involving classified or other sensitive information). The record is not closed at the initial decision phase but can be supplemented on agency appeal. The regulations do not establish the contents of the record.

Voluntary ADR is available at all stages, from before the case or claim is filed to the post-hearing stage. ADR includes mediation and arbitration as well as neutral evaluation, mini-trials, peer review panels, ombudsmen, and partnering. ADR is provided by an agency ADR official who is part of the Office of Conflict Prevention and Resolution (OCPR).<sup>200</sup> During FY 2014, OCPR processed 38 mediations. During that year, mediations occurred in eight cases, four of which were resolved, and four of which were pending at the end of the year. 26 cases were withdrawn from mediation. Most mediations concern equal employment opportunity issues, an area where OHA does not otherwise provide for hearings.

A party is dissatisfied with the decision of an AJ may appeal to the Director of OHA.<sup>201</sup> The appeal structure varies depending on which case type is involved. Appeals are considered on a document-only basis and must be decided within 60 days. During FY 2013, four appeals were initiated. OHA decided four appeals (all whistleblower cases), some which were initiated in earlier years. In security clearance cases, a further appeal is available to the Secretary of Energy.

## B. Detailed treatment of personnel and whistleblowing cases

The remainder of this memo is a more detailed description of the Type B adjudication handled by DOE OHA. The hearings provided in personnel security and whistleblowing cases are quite formal and serve as examples of Type B adjudication that is as formal as Type A adjudication.

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<sup>199</sup> See *id.* at § 1003.62(a).

<sup>200</sup> See *Alternative Dispute Resolution*, OFFICE OF CONFLICT PREVENTION AND RESOLUTION, U.S. DEPARTMENT OF ENERGY, <http://energy.gov/oha/services/applications-exceptions/alternative-dispute-resolution> (last visited May 22, 2015).

<sup>201</sup> See 10 C.F.R. § 1003.30 (2014).



## 1. Generic hearing regulations

OHA hearings are governed by a set of generic procedural regulations set forth in 10 C.F.R. Part 1003. These regulations provide for an evidentiary hearing if it would materially advance the proceeding.<sup>202</sup> “If material factual issues remain in dispute after an application or appeal has been filed, the Director of OHA or his designee may issue an order convening an evidentiary hearing in which witnesses shall testify under oath, subject to cross-examination, for the record and in the presence of a Presiding Officer. A Motion for Evidentiary Hearing should specify the type of witness or witnesses whose testimony is sought, the scope of questioning that is anticipated, and the relevance of the questioning to the proceeding.”<sup>203</sup>

The regulations described below furnish additional procedural protections beyond those provided in the generic hearing regulations.

## 2. Personnel security cases

Personnel security cases (sometimes referred to as security clearance cases) involve challenges by DOE or contractor employees to a decision that the employee be denied or deprived of access to classified material (which presumably means that the applicant does not get the job or an employee loses the job). The regulations<sup>204</sup> applicable to personnel security cases implement Executive Orders 12968<sup>205</sup> and 10865.<sup>206</sup> Executive Order 10,865 provides for a right to an adjudicatory hearing for a person denied access to classified material or whose access is revoked. It appears that the right to an evidentiary hearing arises from these executive orders rather than from an applicable statute.<sup>207</sup>

The regulations provide for detailed notice by the Manager of a DOE facility to an employee about whom there is substantial doubt concerning access.<sup>208</sup> The notice (which shall be as comprehensive and detailed as national security permits) states the information that creates a substantial doubt. The employee can choose to have the Manager make the decision without a hearing or can elect a hearing before an AJ. If the employee selects a decision by the

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<sup>202</sup> See *id.* at § 1003.62(a).

<sup>203</sup> *Id.* at § 1003.62(e).

<sup>204</sup> 10 C.F.R. Part 710.

<sup>205</sup> See Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 7, 1995).

<sup>206</sup> See Exec. Order No. 10,865, 25 Fed. Reg. 1,583 (Feb. 24, 1960).

<sup>207</sup> 42 U.S.C. § 2201 (2012) provides that the agency is authorized to “hold such meetings and hearings as the [agency] may deem necessary or proper . . .” A summary of procedures for the Human Reliability Program (10 C.F.R. Part 712), which involves continuous evaluation of employees in sensitive positions for problems such as drug and alcohol abuse and which can also trigger OHA hearings is not included here because there were no OHA hearings under the Human Reliability Program in 2013 or 2014.

<sup>208</sup> See 10 C.F.R. § 710.21 (2014).

Manager without a hearing and it is unfavorable, the employee can appeal the decision to the DOE Headquarters Appeals Panel.<sup>209</sup>

If the employee opts for an AJ hearing, the case is assigned to an AJ. The AJ has subpoena authority. The AJ holds a prehearing conference and conducts a hearing within 90 days after a request for hearing is received.<sup>210</sup> At the hearing, the employee can be represented by a “person of his own choosing.”<sup>211</sup> The AJ is prohibited from engaging in ex parte contacts (with the exception of procedural or scheduling matters). Hearings are not open to the public. “DOE Counsel shall assist the [AJ] in establishing a complete administrative hearing record in the proceeding and bringing out a full and true disclosure of facts, both favorable and unfavorable.”<sup>212</sup> It is unclear whether this provision permits ex parte contact between DOE Counsel and the AJ.

All witnesses are subject to cross-examination, “if possible,” and “[w]henver reasonably possible, testimony shall be given in person.”<sup>213</sup> The AJ has the duty to assure that restricted data or national security information is not disclosed to persons who are not authorized to receive it. Formal rules of evidence do not apply but the Federal Rules of Evidence (FRE) may be used as a guide to “assure production of the most probative evidence available.”<sup>214</sup> The regulations provide that the utmost latitude shall be permitted with respect to relevancy, materiality, and competence. Every effort is made to obtain the best evidence available.

Hearsay is admissible in the AJ’s discretion for good cause without strict adherence to technical rules of admissibility and shall be accorded such weight as circumstances warrant. Cross-examination can be dispensed with if the witness is a confidential informant and disclosure of identity would be harmful to the national interest; or in various circumstances relating to jeopardy to restricted data or national security. The employee receives a summary or description of the information in these circumstances and appropriate consideration is given to the lack of opportunity to cross-examine.<sup>215</sup>

The AJ’s decision must contain detailed and specific fact findings and a statement of reasons. To decide favorably to the employee, the AJ must determine that “the grant or

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<sup>209</sup> *See id.* at § 710.22(c).

<sup>210</sup> *See id.* at § 710.25.

<sup>211</sup> *Id.* at § 710.26(a).

<sup>212</sup> *Id.* at § 710.26(d).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at § 710.26(h).

<sup>215</sup> *See id.* at § 710.26(m).

restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest.”<sup>216</sup>

Both the employee and the Manager can appeal an unfavorable decision to the DOE Headquarters Appeals Panel. The Appeals Panel has three members consisting of DOE headquarters employees; one member is the Principal Deputy Chief for Mission Support Operations. The second member is a DOE attorney designated by the General Counsel. The third member is designated by the head of the DOE Headquarters element with cognizance over the employee. Only one member of the Appeal Panel shall be from the “security field.”<sup>217</sup> The Appeals Panel can consider new information submitted by either side, provided that the other side has an opportunity to respond. Appeals must be decided within 45 days of the closing of the administrative record.<sup>218</sup> A further appeal to the Secretary of Energy is afforded whenever an individual was denied an opportunity to cross-examine adverse witnesses; the Secretary must personally review the record.<sup>219</sup>

According to the 2014 OHA Annual Report, average case processing time for personnel security cases was a brisk 96 days. In 59% of the cases, the AJ determined that the individual should not be provided or should not retain a security clearance. The 2014 Annual Report, provides an example of an individual whose security clearance was restored. He previously had foreign citizenship and his wife had close contact with her family members in a foreign country.<sup>220</sup> The individual’s clearance was restored on a finding that his “heart and mind” are allied with the US and that if he is ever confronted with the choice of deciding between the interests of the US and his foreign national family or place of birth, he will choose US interests.

### 3. Whistleblower complaints

Detailed regulations prescribe the rules for hearings in the case of whistleblower complaints by employees of DOE contractors. The statutory authorization for these hearings is somewhat unclear. The regulations claim to be authorized by various statutes, most of which confer rulemaking authority on DOE but do not provide for hearings. The most relevant of the statutes cited as authority<sup>221</sup> (a statute administered by the Department of Labor) calls for “notice and opportunity for public hearing” in connection with whistleblower complaints.<sup>222</sup> However, DOL apparently ruled that it had no jurisdiction over complaints by DOE contractors. Consequently, DOE had to adopt its own whistleblower regulations.<sup>223</sup> Thus, it

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<sup>216</sup> *Id.* at § 710.27(a).

<sup>217</sup> *Id.* at § 710.29(b).

<sup>218</sup> *See id.* at § 710.29(f).

<sup>219</sup> *See id.* at § 710.31.

<sup>220</sup> *See* Case No. PSH-14-0011.

<sup>221</sup> 42 U.S.C. § 5851(b)(2)(A).

<sup>222</sup> *See* 42 U.S.C. § 5851(b)(2)(A) (2012).

<sup>223</sup> *See* 10 C.F.R. Part 708. *See* 57 Fed. Reg. 7,533 (Mar. 3, 1992).

may be these regulations do not implement any statutory hearing requirement. However, by virtue of the detailed procedural regulations, they should be considered Type B adjudication. The regulations are a welcome example of user-friendly language; they are directed to “you,” meaning the complaining employee.

Whistleblower complaints by employees of DOE contractors allege retaliation by employers for disclosure of information concerning dangers to public or worker safety, substantial violations of law, fraud, or gross mismanagement. They also concern complaints for retaliation because an employee participated in congressional proceedings or refused to participate in dangerous activities.<sup>224</sup> DOE encourages informal settlement of whistleblower complaints, including through mediation.<sup>225</sup>

If complaints are not resolved informally, the employee can choose to have the complaint referred to OHA for an investigation followed by a hearing. The employee can also elect a hearing without an investigation. If there is an investigation by OHA, the investigator “may not participate or advise in the initial or final agency decision” and may not supervise or direct the AJ who hears the case.<sup>226</sup>

An OHA AJ schedules a hearing to be held by the 90th day after receipt of the complaint or after issuance of the investigator’s report, whichever is later.<sup>227</sup> The AJ may recommend, but not require, mediation at any time before the initial agency decision.<sup>228</sup>

At the hearing, the parties have the right to be represented by a person of their own choosing or proceed without representation. Testimony is given under oath and witnesses are subject to cross-examination. Formal rules of evidence do not apply, but OHA may use the Federal Rules of Evidence (FRE) as a guide. A court reporter makes a transcript. The AJ may order discovery on a showing that discovery is designed to produce evidence regarding a matter that is unprivileged and relevant. The AJ may permit discovery by deposition on oral examination or written questions; written interrogatories; production of documents or things; permission to enter upon land or other property for inspection; and requests for admission. The AJ may issue subpoenas for appearance of witnesses or production of documents or physical evidence. The AJ has typical powers over evidence and other procedural matters. “The [AJ] is prohibited, beginning with his or her appointment and until a final agency

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<sup>224</sup> See 10 C.F.R. § 708.1.

<sup>225</sup> See *id.* at § 708.20.

<sup>226</sup> See *id.* at §§ 708.22(b), 708.25(b).

<sup>227</sup> See *id.* at § 708.26.

<sup>228</sup> See *id.* at § 708.27.

decision is issued, from initiating or otherwise engaging in ex parte (private) discussions with any party on the merits of the complaint.”<sup>229</sup>

The employee has the burden of proof to establish by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding or refused to participate in dangerous activity, and that such act was a contributing factor to alleged retaliatory acts by the contractor. Once the employee meets this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee’s disclosure, participation, or refusal.<sup>230</sup>

The AJ must issue an initial decision after receiving the transcript of the hearing (or if later, after receiving post-hearing submissions). The initial decision contains appropriate findings, conclusions, an order remedying retaliation (if retaliation is found), and the factual basis for each finding. The AJ may rely on, but is not bound by, the investigator’s report.<sup>231</sup>

A dissatisfied party may file a notice of appeal with the OHA Director within 30 days after receiving the initial decision. Such an appeal is necessary to exhaust administrative remedies. Within 15 days, the appellant must file a statement identifying the issues it wishes the OHA Director to review. The Director may consider any source of information that will advance the evaluation, provided that all parties have a right to respond to third party submissions.<sup>232</sup> The appeal decision must be issued within 60 days after the record is closed.

In whistleblower cases, a second level of appeal is provided. Any party can file a petition for review by the Secretary of Energy within 30 days after receiving an appeal decision from the OHA Director. The Secretary will reverse or revise an appeal decision by the OHA Director only under “extraordinary circumstances.”<sup>233</sup>

According to the 2014 Annual Report, whistleblowing cases are concluded in an average of 87 days.

#### 4. FOIA & Privacy Act requests

The regulations provide for written appeals to OHA of denials by DOE officials of requests for documents under the Freedom of Information Act (FOIA) and for information about an individual under the Privacy Act.<sup>234</sup> These appeals consist of written reviews without an oral hearing and without opportunity for further review within the agency.

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<sup>229</sup> *Id.* at § 708.28(b)(9).

<sup>230</sup> *See id.* at § 708.29.

<sup>231</sup> *See id.* at § 708.30(c).

<sup>232</sup> *See id.* at § 708.33(b)(3).

<sup>233</sup> *Id.* at § 708.35(d).

<sup>234</sup> *See* 10 C.F.R. §§ 1004.8, 1008.11 (2014).

The review is initiated based on a request filed by the private party whose request for information or documents was denied. The 2014 Annual Report states that a majority of the FOIA requests are from labor unions seeking to determine whether DOE contractors are complying with federal wage and hour laws. The average case processing time is 12 days. The most common type of case concerns the adequacy of DOE's search in response to a FOIA request.

These written reviews are not required to be conducted by any statute or other source of law and are not evidentiary hearings. The reviews provide an opportunity for the requestor to make arguments concerning the applicability of FOIA or the Privacy Acts and presumably to introduce relevant factual material. The reviews do not seem constrained by an exclusive record requirement.

## 5. Exceptions

The case type concerns the process for granting exceptions or waivers to generally applicable DOE requirements, such as energy conservation standards. An exception is granted where the application of a rule or order would constitute a gross inequity, serious hardship, or unfair distribution of regulatory burdens. Presumably, these cases are governed by the generic procedure regulations of Part 1003 and probably involve an exchange of written documents. Again, exception proceedings would appear to be Type C adjudication.

## 6. Medical certificates

Under the regulations, OHA provides a review in the case of a determination that a security officer at DOE or its contractors is medically unqualified for the job. The determination can be challenged by an "independent review" by DOE's Office of Health, Safety and Security following which OHA provides a final review.<sup>235</sup> The regulations do not explain what sort of procedure OHA should use in conducting its final appeal beyond an examination of the file and the security officer's written request that states "with specificity" the basis for disagreement with the independent review.<sup>236</sup> It can be inferred, therefore, that no oral proceeding is available. This appears to be Type C adjudication as no evidentiary hearing is provided.

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<sup>235</sup> See 10 C.F.R. § 1046.15(c)–(d) (2014).

<sup>236</sup> See *id.*

## 7. Worker safety provisions

This case type concerns worker safety programs administered by DOE. The only programs currently in force involve compensation for beryllium exposure to workers at DOE contractors,<sup>237</sup> and civil penalties for contractors who violate DOE worker safety standards.<sup>238</sup> OHA provides hearings under these programs under its generic procedural regulations.<sup>239</sup> Neither the 2013 nor 2014 annual reports of OHA list any cases decided under the worker safety provisions (although they might be included under the “others” category).

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<sup>237</sup> *See id.* at Part 850.

<sup>238</sup> *See id.* at Part 851.

<sup>239</sup> *See id.* at Part 1003.

## APP. A-4: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION<sup>240</sup>

The primary work of the Equal Employment Opportunity Commission (EEOC) is enforcement of statutes and regulations against private companies and state/local employers—first through investigation and conciliation, and failing that, through federal-court litigation. However, the EEOC serves an adjudicatory function in connection with complaints of employment discrimination by federal employees of certain federal agencies. Covered agencies include executive branch agencies, non-uniformed employees of the military, the United States Postal Service, and a few others. The EEOC functions as a neutral arbiter between federal employees and their employer agencies. In the ACUS database, this function is coded as EEOCFEDS0002 at the hearing level and EEOCGOVT0001 at the appellate level.

The adjudication is Type B because the EEOC’s procedural regulations provide for an evidentiary hearing. The statutes that require EEOC to enforce anti-discrimination principles against the federal government do not require hearings but authorize the EEOC to adopt procedural regulations.

There are five case types: (i) discrimination based on race, color, religion, sex, and national origin; (ii) discrimination based on age for employees aged 40 or older; (iii) discrimination based on disability; (iv) discrimination based on genetic information; and (v) unequal pay based on gender.<sup>241</sup>

The process by which federal employees adjudicate discrimination claims is carefully prescribed and is idiosyncratic.<sup>242</sup> EEOC maintains a helpful website.<sup>243</sup> An ACUS study about EEOC federal sector adjudication evaluated the status and organizational placement of EEOC’s administrative judges (AJs).<sup>244</sup>

The following discussion assumes that an “employee” works for a covered agency or was rejected when applying for employment by a covered agency. The employee believes that he or she is the victim of a prohibited form of discrimination. The discussion omits various exceptions and other nuances which are unnecessary for present purposes.

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<sup>240</sup> Thanks to Chai Feldblum and Anne Torkington for assistance with this memorandum.

<sup>241</sup> The procedures for all five case types are set forth in 29 C.F.R. Part 1614.

<sup>242</sup> See generally ROBERT E. MCKNIGHT, JR., REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS, ch. 14 (3d ed. & 2014 supp.).

<sup>243</sup> See *Federal Sector*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://eoc.gov/federal/> (last visited May 26, 2015).

<sup>244</sup> See Admin. Conf. of the U.S., *Equal Employment Opportunity Commission: Evaluating the Status and Placement of Adjudicators in the Federal Sector Hearing Program* (2014), available at <https://www.acus.gov/report/equal-employment-opportunity-commission-evaluating-status-and-placement-adjudicators-federal> [hereinafter ACUS EEOC study]. Much information from the ACUS study is incorporated in this appendix.



The employee must first consult an Equal Employment Opportunity (EEO) counselor at the employing agency within 45 days from the day the alleged discrimination occurred or the employee became aware of it. The counselor explains the employee's rights and duties under Title VII. Only claims discussed during the counseling period can be the basis for a complaint and eventually litigated in court. The counselor offers the employee a choice to participate in EEO counseling or in an ADR process (including mediation).<sup>245</sup> If the dispute does not settle, the counselor issues a notice of right to file a complaint. This notice triggers a 15-day period for filing a formal complaint with the employing agency (normally on a standard form complaint document).

The agency can either dismiss the complaint (for a variety of reasons) or conduct an impartial investigation that must be completed within 180 days.<sup>246</sup> ADR continues to be available during the investigation. When the investigation is completed, the employing agency issues a notice giving the complainant two choices: (i) request a hearing before an EEOC AJ; or (ii) ask the agency to issue an immediate final decision.<sup>247</sup>

The regulations relating to AJ hearings<sup>248</sup> provide that the agency can make an offer of resolution prior to the hearing. If the complainant rejects it and the AJ decision provides a less favorable result than the offer of resolution, the complainant can be denied recovery of attorney fees. The AJ can order discovery from the employer or the employee agency (including depositions, interrogatories, disclosure of documents, or requests for admission)<sup>249</sup> but lacks subpoena power over third parties (such as ex-employees of the employer agency). The hearing is closed to the public. AJs do not apply the rules of evidence, but shall exclude irrelevant or repetitious evidence. The AJ can impose sanctions for non-disclosure of evidence. Summary judgment is possible as to an issue or to the entire case if there is no issue of material fact.<sup>250</sup> The hearing is transcribed by a court reporter; the employing agency pays for a verbatim transcript if needed. The exclusive record principle applies.<sup>251</sup> The AJ must furnish a decision within 180 days after receiving the file. Neither the regulations nor the EEOC's annual reports discuss whether videoconferencing is used for hearings.

The AJ Handbook defines and prohibits AJs from deciding cases in which they have a conflict of interest or are biased in favor of or against any party.<sup>252</sup> It also prohibits *ex parte*

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<sup>245</sup> See 29 C.F.R. § 1614.105 (2014).

<sup>246</sup> See *id.* at § 1614.106.

<sup>247</sup> See *id.* at § 1614.108(f).

<sup>248</sup> 29 C.F.R. § 1614.109.

<sup>249</sup> 29 C.F.R. § 1614.109(f)(1). The Handbook for Administrative Judges, Ch. 4 (2002), contains a detailed treatment of discovery. <https://www.eeoc.gov/federal/ajhandbook.cfm#hearing>

<sup>250</sup> 29 C.F.R. § 1614.109(g)

<sup>251</sup> 29 C.F.R. § 1610(h); Handbook for Administrative Judges, Ch. 7H, *supra* note 115.

<sup>252</sup> Handbook for Administrative Judges, Ch. 7, III.A. 1 and 2. The bias provision is noteworthy: "Bias: The Administrative Judge should not participate in any conduct during the hearing that presents the appearance of or demonstrates actual bias in favor of or against one of the parties. For example, it is improper for the Administrative

communications.<sup>253</sup> There is no provision in the regulations or the Handbook for separation of functions, but such provision would probably be superfluous since the EEOC functions as a tribunal to decide disputes between employees and other federal agencies and does not have investigating or prosecuting staff members in federal employment cases.

The AJ's decision is submitted to the employer agency, which has 40 days to issue a final decision. The final decision states whether the agency agrees with the AJ decision and will grant any relief the judge ordered or whether it elects to reject or modify the AJ decision. If the employing agency rejects or modifies the AJ's decision, it must file an administrative appeal with the EEOC Office of Federal Operations (OFO) at the same time that it issues its final decision on the complaint.

A complainant might disagree with the employing agency's final decision in one of two situations. First, the complainant requested a final agency decision instead of an AJ hearing. Second, the complainant requested an AJ hearing but disagrees with the agency's final order issued after the AJ hearing. In either case, the complainant can appeal the agency's final decision to OFO within 30 days (or can proceed directly to court for a de novo trial without further exhausting EEOC remedies).<sup>254</sup>

The EEOC's decision on such appeals is made by appellate attorneys in OFO who review the entire file. The appeal does not involve oral proceedings, only examination of the written record and written statements or briefs.<sup>255</sup> The EEOC appellate decision is de novo but no new evidence is submitted. The substantial evidence rule applies to review of the AJ's findings of fact. Complainants or agencies can request reconsideration of the appeal decision.

A complaining employee (but not the employer agency) can seek de novo review in the federal district court after exhausting this complaint process (and in some situations without exhausting it, such when the complainant requested a final agency decision and does not appeal that decision).<sup>256</sup> Alternatively, if an employee is satisfied with the EEOC's decision but the employing agency has not complied with it, the employee can seek judicial enforcement.<sup>257</sup>

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Judge to eat lunch with a representative of one party during the course of the hearing. If a party or a witness accuses the Administrative Judge of bias during the course of the hearing, the Administrative Judge should document the allegations and the response on the record.”

<sup>253</sup> *Id.* Ch. I. E.

<sup>254</sup> If the complainant goes to court, the action is not an appeal from agency action. Rather, it is an original action, subject to an exhaustion requirement. The AJ's decision may be entered as evidence, though the courts give it no deference.

<sup>255</sup> See 29 C.F.R. § 1614.403 (providing for filing statements or briefs with OFO).

<sup>256</sup> See ACUS EEOC study, *supra* note 244, at 14–15; *Chandler v. Roudebush*, 425 U.S. 840 (1976) (federal employee claiming prohibited discrimination entitled to de novo judicial trial).

<sup>257</sup> *Id.*

The EEOC currently employs approximately 110 AJs. In FY 2013, employees sought AJ hearings in 7,077 cases. In FY 2013, 6,789 cases were resolved at the AJ level; the number of cases pending at the end of the year was 8,313. In FY 2014, 8,086 cases were filed and 6,347 were resolved at the AJ level. Cases pending at end of FY 2014 were 10,363. The average processing time for each case increased from 383 days in FY 2013 to 419 days in FY 2014. Thus, the workload per AJ is about 65 cases per year or about 1.3 per week.<sup>258</sup> Of the cases heard by AJs in FY 2014, 126 found that discrimination had occurred.

The EEOC currently employs about 30 appeals attorneys. In FY 2014, OFO received 4,003 appeals from final agency decisions and resolved 3,767 of them. 4,541 were pending at the end of FY 2014. By comparison, OFO received 4,244 such appeals in FY 2013. Thus, the workload of the appeals attorneys is about 125 per year or about 2.5 per week.

A complainant can be represented by an attorney or a lay advocate (such as a union representative).<sup>259</sup> If the representative is an employee of the agency, the representative must be given time during the workday to prepare the case. There is provision for the recovery of attorney fees if the employee is the prevailing party, but only if the employee was represented by an outside attorney.

Alternative dispute resolution (ADR) is extensively employed in the EEOC's federal employee process.<sup>260</sup> EEOC encourages federal agencies to provide ADR in employment discrimination cases including counseling (which is mandatory as explained above), negotiation, mediation and settlement conferences at various points in the process, including before and after the complaint is filed.

The AJs and appeals attorneys are subject to performance evaluation. They are evaluated quarterly and annually. Their opinions are read by supervisors and by other judges. Judges or appeals attorneys perceived to be doing a poor job are placed on a performance improvement plan. There is pressure to meet annual quotas. The AJs are almost all paid at the GS 14 levels (7% were GS 13s).<sup>261</sup>

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<sup>258</sup> The statistics in this paragraph and the following paragraph are drawn from the EEOC's Annual Report on the Federal Work Force, Part I (2014). <http://www.eeoc.gov/federal/reports/fsp2014/upload/Final-FY-2014-Annual-Report-Part-I.pdf>, pp. I-21 to I-25 (last visited Dec. 18, 2015).

<sup>259</sup> See 29 C.F.R. §1614.605.

<sup>260</sup> See *id.* at §§ 1614.102(b)(2), 105(b)(2), 603; U.S. Equal Employment Opportunity Commission Handbook for Administrative Judges, ch. 3 (2002); *Federal Sector Alternative Dispute Resolution Fact Sheet*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://eeoc.gov/federal/adr/facts.cfm> (last visited May 26, 2015).

<sup>261</sup> See ACUS EEOC study, *supra* note 244, at 43.

## APP. A-5: ENVIRONMENTAL PROTECTION AGENCY<sup>262</sup>

The EPA conducts a large volume of adjudication.<sup>263</sup> Most adjudication involving EPA enforcement (such as assessment of major civil penalties) is conducted as Type A adjudication.<sup>264</sup> Our database EPAOOALJ0001 contains 48 case types. EPA employs 4 ALJs who preside over Type A adjudicatory hearings.<sup>265</sup>

Adjudication involving minor civil penalties and the issuance, modification, reissuance, and revocation of various environmental permits is conducted as Type B adjudication and is the subject of this memorandum.<sup>266</sup> Generally, the applicable statutes relating to permitting provide for a “public hearing,”<sup>267</sup> language that would not trigger the APA’s Type A adjudication provisions. EPA’s Type B adjudication (EPAOPRMT0006 in our database) is governed by detailed regulations.<sup>268</sup> Many of the permit programs are administered by state environmental agencies; the regulations require that states provide procedures parallel to those used by the EPA.<sup>269</sup> After an initial decision in *either* Type A or Type B adjudication, the parties can appeal to an internal EPA appellate body called the Environmental Appeals Board (EAB).<sup>270</sup> The EAB is the final EPA decisionmaker on administrative appeals under all major environmental statutes the EPA administers.

The EPA originally treated permit cases as Type A adjudication (that is, subject to the APA’s adjudication provisions), but transitioned to a non-APA system in 1980 and 2000.<sup>271</sup> The decision to conduct permitting hearings as Type B adjudication was upheld by the First Circuit in the *Dominion Energy* case. *Dominion Energy* applied *Chevron* to uphold the EPA’s interpretation of statutes using the term “public hearing.”<sup>272</sup> The EPA treats permit cases under the environmental statutes it administers as Type B proceedings.

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<sup>262</sup> Thanks to Kathie Stein, Jonathan Fleuchaus, and Randy Hill for assistance with this memo.

<sup>263</sup> See generally Randolph L. Hill, et al., *Internal Administrative Appeals of Governmental Decisions on the Environment*, in ENVIRONMENTAL DECISIONMAKING (forthcoming 2016) (hereinafter *Hill*); Anna L. Wolgast et al., *The United States Environmental Adjudication Tribunal*, 3 J. COURT INNOV. 185 (2010) (hereinafter *Wolgast*).

<sup>264</sup> Regulations for EPA APA hearings are set forth in 40 C.F.R. Part 22. See Wolgast 188-90.

<sup>265</sup> <http://www2.epa.gov/aboutepa/about-office-administrative-law-judges-oalj>

<sup>266</sup> EPA treats termination of a permit before its expiration date as a Type A proceeding as it is akin to a sanction. See 40 C.F.R. § 22.3; EAB Practice Manual 4, 36.

<sup>267</sup> E.g. 33 U.S.C. § 1342(a), relating to NPDES permits

<sup>268</sup> 40 C.F.R. Part 124.

<sup>269</sup> See 40 C.F.R. § 124.1

<sup>270</sup> The EAB is described in 40 C.F.R. § 1.25(e) and discussed further below.

<sup>271</sup> 40 C.F.R. § 124.21.

<sup>272</sup> *Dominion Energy Brayton Point, LLC v Johnson*, 443 F.3d 12 (1st Cir. 2006) (interpreting language under the Clean Water Act).

## A. Minor civil penalties

Smaller civil penalties under several statutes, including the Clean Water Act, are adjudicated as Type B cases. The smaller civil penalties are referred to as Class I cases; larger civil penalties are referred to as Class II.<sup>273</sup>

The regulations relating to Class I cases provide that the presiding officer is a regional judicial officer (RJO). The RJO is an EPA attorney rather than an ALJ.<sup>274</sup> The detailed regulations covering penalty adjudication are virtually the same for Class I and Class II cases, except that RJOs preside in Class I cases.<sup>275</sup> Discovery in Class I cases is limited.<sup>276</sup> The regulations contain detailed provisions preventing ex parte communication<sup>277</sup> and assuring separation of functions in Class I cases.<sup>278</sup> Provisions relating to bias are the same for RJOs and ALJs.<sup>279</sup> RJOs can exercise subpoena power and order pre-hearing conferences.<sup>280</sup> The Federal Rules of Evidence do not apply.<sup>281</sup> ADR is encouraged.<sup>282</sup>

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<sup>273</sup> See 33 U.S.C. § 1319(g)(2)—Class I penalties under Clean Water Act cannot exceed \$10,000 per violation with a maximum of \$25,000. The APA does not apply to adjudication of Class I penalties but the statute calls for an evidentiary hearing in such cases. “Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence.” Class II penalties, which cannot exceed \$10,000 per day with a \$125,000 maximum, are adjudicated under the APA. Similarly, see 42 U.S.C. § 300h-2(c)(3) (Safe Drinking Water Act); 42 U.S.C. § 9609(a) (Superfund); 42 U.S.C. § 11045(b)(1) & (2) (Emergency Preparedness). See generally William Funk, *Close Enough for Government Work? Using Informal Procedures for Imposing Administrative Penalties*, 24 SETON HALL L. REV. 1 (1993) (ACUS consultant’s report).

<sup>274</sup> 40 C.F.R. § 22.51.

<sup>275</sup> The excluded provisions are 40 CFR §§ 22.11, 22.16(c), 22.21(a), 22.29. These sections relate to intervention and non-party briefs and interlocutory appeals.

<sup>276</sup> The normal discovery rules do not apply in Class I proceedings except that discovery of the respondent’s economic benefit from the violation and respondent’s ability to pay civil penalties is permitted. 40 CFR § 22.52, 22.19.

<sup>277</sup> 40 CFR § 22.8.

<sup>278</sup> “[An RJO] shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as a Regional Judicial Officer. [An RJO] shall not knowingly preside over a case involving any party concerning whom the [RJO] performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. [An RJO] shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel.” 40 C.F.R. § 22.4(b).

<sup>279</sup> 40 CFR § 22.4(d).

<sup>280</sup> 40 C.F.R. § 22.4(c)(8), (9).

<sup>281</sup> 40 C.F.R. § 22.22(a).

<sup>282</sup> 40 C.F.R. § 22.18(b).

In the period 2010-2015, 26 Class I civil penalties were adjudicated by RJOs and 11 were appealed to EAB. In that period, ALJs adjudicated 6 Class II penalties.<sup>283</sup>

## B. Initial decisions to grant, deny, or terminate permits

Broadly speaking, the regulations create a notice-and-comment system for making initial permitting decisions. The process is collaborative and institutional. This procedure applies both to the issuance (or refusal to issue) a permit as well as to terminate a permit.<sup>284</sup> The regional administrator (or state authority) first issues a draft permit or draft denial of an application, accompanied by a statement of basis or a fact sheet explaining the decision including any conditions placed on the permit.<sup>285</sup> Members of the public and local governments are notified of the draft decision and are invited to submit comments.<sup>286</sup>

EPA will hold a public hearing whenever the Regional Director finds a significant degree of public interest in a draft permit (or on the Director's own motion).<sup>287</sup> The regional administrator designates a presiding officer for the hearing who is responsible for its scheduling and orderly conduct.<sup>288</sup> Any person may submit oral or written statements and data concerning the draft permit. The public comment period on the draft permit is extended to the close of the public hearing and may be extended further.<sup>289</sup> A tape recording or written transcript of the hearing shall be made available to the public.<sup>290</sup> Persons must "raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing)" and supply all supporting materials during that period.<sup>291</sup>

The regional director issues a "final permit decision" after the public comment period concludes. The final permit decision contains a response to comments specifying which

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<sup>283</sup> Email from Kathie Stein to Michael Asimow, Feb. 23, 2016.

<sup>284</sup> See 40 C.F.R. § 124.13. Some permit revocation proceedings are handled as Type A adjudication.

<sup>285</sup> 40 C.F.R. §§ 124.6 to .8.

<sup>286</sup> 40 C.F.R. § 124.10 and .11.

<sup>287</sup> 40 C.F.R. § 124.12(a)(1) to (3). See generally *Sierra Pacific Industries*, 16 EAB – (July 18, 2013), pp. 33-36 (available on EAB website). The *Sierra Pacific* opinion held that the Director's decision to deny a public hearing was clearly erroneous. It enumerated the factors to be considered in determining whether the "significant degree of public interest" standard has been met. These include the materiality of issues in the request for a hearing, the number of requests and comments, media coverage, significance of the issues, and demographic information such as environmental justice concerns.

<sup>288</sup> 40 C.F.R. § 124.12(b). The presiding officer is ordinarily a regional judicial officer (RJO).

<sup>289</sup> 40 C.F.R. § 124.12(c).

<sup>290</sup> 40 C.F.R. § 124.12(d).

<sup>291</sup> 40 C.F.R. § 124.13.

provisions, if any, of the draft permit were changed in the final decision. It also includes the reasons for the changes, and describes and responds to all significant comments on the draft permit.<sup>292</sup>

### C. Appeal to the EAB

The EAB hears appeals from EPA enforcement and permit decisions (but not decisions made under state authority). The EAB was created in 1992 “to recognize the growing importance of EPA adjudicatory proceedings as a mechanism for implementing and enforcing the environmental laws and to ‘inspire confidence in the fairness of Agency adjudication.’”<sup>293</sup> It alleviated decisionmaking burdens on the EPA administrator.<sup>294</sup> The EAB is independent of all Agency components and answers only to the Administrator.<sup>295</sup>

When the EAB is the decisionmaker in an enforcement proceeding (whether Type A or Type B), its members and their decisional advisers are prohibited from engaging in ex parte discussion on the merits of the proceeding with Agency staff members who performed a prosecutorial or investigative function in the proceeding (or a factually related proceeding) or with any interested person outside EPA.<sup>296</sup> The principle of exclusive record applies to the EAB.<sup>297</sup>

Any person who filed comments on the draft permit or participated in a public hearing on the draft permit may file a petition for review, including review of any conditions imposed by the permit.<sup>298</sup> Only issues raised by the petitioner or by others at the permit issuance stage will be considered by the EAB.<sup>299</sup> The EAB assigns a lead judge to the case who works with an assigned staff attorney to determine whether the case is properly within the scope of the Board’s jurisdiction, has been timely filed, and whether it should be dismissed on jurisdictional grounds without an adjudication of the merits. For the vast majority of appeals, the case then proceeds to briefing.<sup>300</sup>

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<sup>292</sup> 40 C.F.R. § 124.17.

<sup>293</sup> EAB Practice Manual, p. 1. See also 57 Fed. Reg. 5320 (Feb. 13, 1992) (amending 40 C.F.R. 1.25 to establish the EAB). This preamble has a thorough discussion of the reasons for establishing the Board.

<sup>294</sup> See Wolgast 186-87.

<sup>295</sup> Ibid.

<sup>296</sup> 40 C.F.R. § 22.8.

<sup>297</sup> 40 C.F.R. § 124.18.

<sup>298</sup> EAB permits electronic filing of documents. Practice Manual 11.

<sup>299</sup> Practice Manual 43.

<sup>300</sup> Wolgast 191.

The EAB may hold oral argument on its own initiative or at its discretion if requested. The request must explain why oral argument should be permitted.<sup>301</sup> Opinions are published in Environmental Appeals Decisions and posted on the web.<sup>302</sup>

The EAB acts as an appellate body. It considers cases solely on the administrative record<sup>303</sup> and exercises a limited scope of review of the initial permit decision. A petition to the EAB must demonstrate that each challenge to the permit decision is based on: (A) A finding of fact or conclusion of law that is clearly erroneous, or (B) An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review.”<sup>304</sup> The EAB’s review power is exercised sparingly because most permit issues should be resolved at the regional level.<sup>305</sup> However, the Board thoroughly considers the merits of the issues presented to it, and will remand a permit if the region’s analysis is incomplete or its rationale unclear, if the region failed to follow required procedures, or if the region failed to address significant comments.

The EAB is composed of four Environmental Appeals Judges appointed by the EPA Administrator.<sup>306</sup> The Board sits in randomly-assigned panels of three and decides each matter by a majority vote. Each EAB judge is a career member of the government’s Senior Executive Service with significant experience in EPA permit and enforcement matters.<sup>307</sup> An EAB judge shall recuse him or herself from deciding a particular case if the member in previous employment performed prosecutorial or investigative functions with respect to the case, participated in the preparation or presentation of evidence in the case, or was otherwise personally involved in the case.<sup>308</sup>

Statistics concerning the regional appeal process are not available. We understand that the EAB has considered about 600 appeals over the last 10 years, about 2/3 of the cases involving permit appeals and 1/3 penalties.<sup>309</sup> As of Sept. 2015, of 1,058 final decisions issued

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<sup>301</sup> 40 C.F.R. § 124.19. Video conference facilities are available so counsel can argue from a remote location. Documents can be filed electronically. 40 C.F.R. §124.19(i)(ii); Wolgast 192

<sup>302</sup> Wolgast 192.

<sup>303</sup> 40 C.F.R. § 124.19(a)(4)(ii); Hill 10.

<sup>304</sup> 40 C.F.R. § 124.19(a)(4)(i).

<sup>305</sup> In Re Charles River Pollution Control District 16 E.A.D. 622, 624 (EAB 2015) (citing Consolidated Permit Regulations, 45 Fed. Reg. 33290, 33412 (May 19, 1980).

<sup>306</sup> The Board is assisted by eight attorneys who serve as counsel to the Board and three administrative professionals. Wolgast 191; Email from EAB Judge Kathie Stein to Michael Asimow.

<sup>307</sup> Hill 2.

<sup>308</sup> 40 C.F.R. § 1.25(e). Board members are also disqualified by reason of financial bias. Wolgast 191.

<sup>309</sup> Email from EAB Judge Kathie Stein to Michael Asimow.



by EAB (including Type A, Type B, and CERCLA reimbursement cases), approximately 91% were not judicially reviewed. Of the 9% of cases in which review was sought, 2% were settled on appeal or voluntarily dismissed, 6% were won by EPA, and less than 1% were reversed.<sup>310</sup>

The EAB encourages ADR and offers the services of an EAB judge acting as a neutral evaluator and mediator. Video-conferencing equipment is available for use in ADR proceedings.<sup>311</sup>

The EAB also considers petitions for reimbursement of reasonable costs incurred by persons who have complied with orders issued by EPA or another federal agency under CERCLA to abate actual or threatened releases of hazardous substances. The statute provides for a reimbursement petition to the President.<sup>312</sup> The President delegated his authority to decide claims for reimbursement to the EPA Administrator<sup>313</sup> who re-delegated that authority to the EAB.<sup>314</sup> The Board is also authorized, as appropriate, to authorize payment of such claims.

The Board has established procedures for submission and review of reimbursement petitions. Under these procedures, petitioners must demonstrate that they were not liable for response costs or that EPA's selection of the ordered response action was arbitrary and capricious. If the petition raises fact issues, EAB can designate an EPA employee who had no prior involvement in the matter to serve as a hearing officer and issue a recommended decision. EAB may also decide to hold oral argument. If reimbursement is granted, there is a further proceeding to determine the amount. Reimbursement decisions are reviewable by a de novo proceeding in federal court.

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<sup>310</sup> Id.

<sup>311</sup> EAB FAQ, item 40; EAB ADR Program Information Sheet.

<sup>312</sup> CERCLA § 106, 42 U.S.C. § 9606(a), (b)(2).

<sup>313</sup> Exec. Order 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987).

<sup>314</sup> EPA Deleg. of Auth. 14-27, Petitions for Reimbursement (June 27, 2000).

## APP. A-6: EXECUTIVE OFFICE FOR IMMIGRATION REVIEW<sup>315</sup>

This Appendix discusses the adjudicatory process in immigration cases, including disputes relating to admissibility, removal (formerly referred to as deportation), and asylum.<sup>316</sup> The Executive Office of Immigration Review (EOIR), a division of the Department of Justice, is responsible for conducting adjudicatory hearings and administrative appeals in immigration cases.<sup>317</sup> This Appendix considers adjudicatory evidentiary hearings required by law, but excludes informal adjudication that precedes evidentiary hearings in immigration cases or entirely supplants them.<sup>318</sup>

Adjudicatory hearings are conducted by Immigration Courts (ICs). Immigration judges (IJs) preside at IC hearings. IJs are supervised by the Chief Immigration Judge. Decisions of IJs are appealed to the Board of Immigration Appeals (BIA). This administrative process is DOJXEOIR0001 in the ACUS database which lists 11 case types.

### A. Immigration Court

There are presently about 294 IJs in 58 ICs, although EOIR is trying to hire more.<sup>319</sup> Each IJ on average currently handles more than 1800 matters per year, although per-judge caseloads range from less than 1,000 to over 3,000.<sup>320</sup> IJs are subject to performance evaluation.

Respondents (that is, non-citizens placed in removal proceedings) may face waiting times of several years. In FY 2015, the IC received 284,667 cases and completed 262,293.<sup>321</sup> There

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<sup>315</sup> Thanks to Dana Leigh Marks, Russell Wheeler, and Jennifer Chacon for assistance with this Appendix.

<sup>316</sup> For a summary of the removal process, see Lenni Benson & Russell Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudications* 9-12 (ACUS 2012) (hereinafter Benson & Wheeler). Many immigration cases are criminal prosecutions, but these are not discussed in this memo.

<sup>317</sup> See 8 C.F.R. § 1003.0. EOIR also conducts hearings through its Office of the Chief Administrative Hearing Officer (OCAHO) in cases involving employer sanctions, anti-discrimination provisions and document fraud. These are Type A hearings and are not discussed in this Appendix.

<sup>318</sup> Numerous adjudicatory decisions by immigration personnel do not trigger adjudicatory hearings are thus should be considered Type C adjudication. For example, there is no right to an adjudicatory hearing in connection with expedited removal by a DHS officer at ports of entry of an alien who makes no claim to refugee status. 8 U.S.C. § 1225(b)(1)(A)(i). See Jennifer Lee Koh, *Removal in the Shadows of Immigration Courts*, 90 SO. CALIF. L. REV. – (2017) (vast majority of removal orders are not reviewable by Immigration Court).

<sup>319</sup> See generally Benson & Wheeler 6-7, for discussion of the legal status of IJs. EOIR is severely underfunded, a reality that constrains the hiring of additional IJs or providing them with additional staff support. *Id.* 31-32. Additional appropriations allocated in FY 2016 have permitted hiring of additional personnel. Some IJs have administrative responsibilities and thus do not carry full caseloads.

<sup>320</sup> For analysis of IJ workloads, see Benson & Wheeler 24-30. These are much heavier caseloads than in other federal Type B adjudications. *Id.* at 27.

<sup>321</sup> EOIR, FY 2015 Statistics Yearbook, pp. A7–A8.

were 457,106 pending cases at the end of FY 2015.<sup>322</sup> This number has increased steadily from 262,681 cases at the end of FY 2010. Because many respondents are held in detention, the lengthy waiting times are a matter of serious concern, although EOIR does prioritize cases of respondents in detention.

Detailed regulations (supplemented by a practice manual) provide the rules of practice at IC proceedings.<sup>323</sup> IC jurisdiction commences when the Department of Homeland Security (DHS) files charging documents (often called the “Notice to Appear”) with an IC and serves them on the respondent.<sup>324</sup> An attorney represents DHS. Generally, the first encounter between respondents and an IC is a “master calendar” proceeding at which an IJ explains the respondent’s rights, notifies the respondent of the right to retained counsel, and schedules further proceedings.<sup>325</sup>

The respondent may be represented by an attorney (at no expense to the government) who is eligible to practice in any state and is registered with EOIR.<sup>326</sup> EOIR permits representatives to make a limited appearance (for example appearing in a bond or motions proceeding without having to represent the respondent in other proceedings). EOIR provides respondents with lists of pro bono providers.

EOIR also permits lay representation in IC proceedings according to detailed regulations.<sup>327</sup> Permitted lay representatives include law students,<sup>328</sup> law graduates not yet

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<sup>322</sup> EOIR, FY 2015 Statistics Yearbook, p. W1. As of December, 2015, the backlog was 457,106 cases. Statement of Juan P. Osuna, Director of EOIR, before the House of Representatives Committee on the Judiciary, “Oversight of the Executive Office of Immigration Review,” Dec. 3, 2015.

<sup>323</sup> See 8 C.F.R. §§ 1003.12 et seq., 1240.1 et seq.; Immigration Court Practice Manual (hereinafter Practice Manual).

<sup>324</sup> See 8 C.F.R. §§ 1003.13 to 15; Practice Manual ¶ 4.2.

<sup>325</sup> Benson & Wheeler 14-15.

<sup>326</sup> 8 C.F.R. § 1003.16. According to EOIR, approximately 55% of respondents before the IC are represented. See FY 2014 Statistics Yearbook, p. F1. However, Eagly & Shafer conclude that only 37% of respondents had counsel in removal proceedings (using as a sample all cases decided between 2007 and 2012) and only 45% of that number had representation at all IC hearings. Less than 2% of respondents facing removal secured pro bono representation from nonprofits or law school clinics. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV [ms. p. 6-9] (2016). The discrepancy arises from the fact that respondents with counsel are involved in more proceedings than unrepresented respondents; consequently, counting only proceedings inflates the percentage of parties who are represented. Only about 14% of respondents held in detention were represented. Success rates of respondents represented by counsel were much better than for unrepresented parties. In addition, Eagly & Shafer report that the presence of counsel produced substantial efficiency gains. See also Benson & Wheeler 56 (reporting that almost all IJs believe that the presence of attorneys enhances efficiency and makes their jobs easier); Ryo 30-32 (represented detainees have much better results in bond hearings than unrepresented detainees).

<sup>327</sup> 8 C.F.R. § 1292.1 et seq.; Practice Manual, ch. 2.

<sup>328</sup> The student must file a statement that he or she is participating under the direct supervision of a faculty member, licensed attorney, or accredited representative, in a legal aid program or clinic conducted by the law school or non-profit organization and is appearing without remuneration from the respondent.

admitted to the bar,<sup>329</sup> reputable individuals with a pre-existing relationship to the person represented,<sup>330</sup> accredited representatives,<sup>331</sup> and an accredited official of a foreign government to which the respondent owes allegiance. Both attorney and lay representatives practicing before the IC or BIA are subject to disciplinary sanctions.<sup>332</sup> Non-lawyer immigration specialists, visa consultants, and “notaries” are not authorized to represent parties before the IC.<sup>333</sup>

The statute and regulations make no provision for ADR. However, an IJ may schedule a pre-hearing conference to narrow issues, obtain stipulations, exchange information voluntarily, and otherwise to simplify and organize the proceeding.<sup>334</sup> The ACUS study of IC procedures indicates that IJs used various techniques to narrow the issues, but that prehearing conferences are not routine (largely because of caseload pressures). The study recommends better utilization of various devices to narrow the issues and improve pre-hearing document sharing.<sup>335</sup> It also recommended that the ICs employ pro se law clerks to assist self-represented parties; it has not done so but has set up helpdesks in a few ICs.

The regulations and the practice manual relating to the IC and the BIA do not require separation of functions or prohibit ex parte contacts. However, the “Ethics and Professionalism Guide For Immigration Judges” (2011) prohibits ex parte contacts (unless expressly authorized by law).<sup>336</sup> This Guide superseded an earlier code of conduct for both IJs and BIA (2007) that prohibited ex parte communications from outsiders. It permitted ex parte contacts with DOJ employees unless those employees were witnesses or counsel in the case.<sup>337</sup> Neither the

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<sup>329</sup> The law graduate must file a statement that he or she is appearing under the supervision of a licensed attorney or accredited representative without remuneration. In the case of law students or graduates, the IJ (or other official before whom he or she wishes to appear) has discretion not to permit such appearance or to require the presence of the supervising faculty member, attorney, or accredited representative.

<sup>330</sup> Practice Manual ¶2.9. The relationship may be as a relative, neighbor, clergyman, business associate or personal friend. The pre-existing relationship requirement may be waived in cases where adequate representation would not otherwise be available. The IC must give permission for this representation. Such permission shall not be granted with respect to any individual who regularly engages in immigration and naturalization practice or preparation or holds himself out to the public as qualified to do so.

<sup>331</sup> Accredited representatives work for non-profit charitable organizations recognized by the Board that make only nominal charges for representation. Such representatives must be of good moral character and be accredited by the Board. 8 C.F.R. § 1292.2; Practice Manual ¶ 2.4.

<sup>332</sup> 8 C.F.R. § 1292.3.

<sup>333</sup> Practice Manual ¶2.7.

<sup>334</sup> 8 C.F.R. § 1003.21(a); Practice Manual ¶4.18. The IJ may also order any party to file a pre-hearing statement of position that may include stipulated facts, a statement that the parties have communicated in good faith to stipulate to the fullest extent possible, a list of proposed witnesses and what they will establish, a list of and copies of exhibits, the time required to present the case, and a statement of unresolved issues. The IJ may also require both parties to make any evidentiary objections regarding matters in the pre-hearing statement.

<sup>335</sup> Benson & Wheeler 68-74.

<sup>336</sup> <http://www.justice.gov/eoir/immigration-judge-conduct-and-professionalism> (Rule XXXII) (2011).

<sup>337</sup> 72 Fed. Reg. 35510 (2007), Canon XV (IJs), Canon XV (BIA members). Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 Duke L.J. 1635, 1674 (2010) (hereafter Legomsky). These provisions achieved some separation of functions but did not apparently prohibit ex parte communications from staff members who had served as investigators in the case (but were not counsel or witnesses).

regulations nor the practice manual contains provisions on bias; however, the Guide requires IJs to be impartial and avoid the appearance of prejudice or bias and a memorandum outlines procedures for issuing recusal orders in immigration proceedings.<sup>338</sup>

IJs have subpoena power and can order the taking of depositions of witnesses who are not available to testify at the hearing.<sup>339</sup>

IC hearings are generally conducted in person or through video conference.<sup>340</sup> Video conference hearings are generally used to hear cases of respondents in detention<sup>341</sup> and are quite controversial.<sup>342</sup>

The IC provides interpreters for the native language of the respondent.<sup>343</sup> It has embarked on a program to provide full and complete interpretation to all respondents in court proceedings but has had some difficulties in doing so.<sup>344</sup>

At IC hearings (often referred to as individual calendar or merits hearings), respondents are provided with a reasonable opportunity to examine the evidence against them and to present evidence on their behalf and to cross-examine witnesses.<sup>345</sup> The respondent cannot examine national security information proffered by the government in opposition to admission or discretionary relief.<sup>346</sup> In absentia hearings are conducted if the respondent fails to appear.<sup>347</sup> IC hearings are generally open to the public.<sup>348</sup>

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<sup>338</sup> Rules V and IX; Operating Policies and Procedure Memorandum 05-02 (March 21, 2005).

<sup>339</sup> 8 C.F.R. § 1003.35; Practice Manual ¶4.20.

<sup>340</sup> Telephone hearings are also possible but only with consent of the respondent. 8 U.S.C. § 1229(b)(2)(B); 8 C.F.R. § 1003.2(c); IC Practice Manual Chapter 4.6, 4.7. Credible fear determinations may be reviewed by the IJ through telephone conferences without consent of the respondent. 8 C.F.R. § 1003.25(c); IC Practice Manual Ch.4.7, 7.

<sup>341</sup> In 2012, IJs conducted about 134,000 hearings by video conference. See Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933 (2015).

<sup>342</sup> The ACUS study canvassed the arguments on both sides of the video conference issue and made various suggestions for improving video hearings, assuming that video conferencing is here to stay. Benson & Wheeler 89-100. EOIR contends that video conference is a “force multiplier” that improves efficiency, lowers transportation costs, strengthens court safety, expands access to counsel, and reduces the time immigrants spend in detention. Critics of televised adjudication believe that the practice prejudices respondents as opposed to those who receive face-to-face hearings. Eagly concludes that IJs do not appear to be biased against respondents whose cases are heard by video conference rather than in person. However, she contends that video conferencing depresses the engagement of respondents with the adversarial process, making them less likely to retain counsel or request a hearing or apply for discretionary relief.

<sup>343</sup> Practice Manual 4.11.

<sup>344</sup> <https://www.linkedin.com/pulse/immigration-courts-could-lose-third-interpreters-jim-harvill?articleId=6057577953682866176> (discussing potential pay cuts for interpreters).

<sup>345</sup> See Practice Manual ¶4.16 for discussion of IC hearings.

<sup>346</sup> 8 U.S.C. § 1229a(b)(4).

<sup>347</sup> 8 C.F.R. § 1003.26.

<sup>348</sup> 8 C.F.R. § 1003.27(a); Practice Manual ¶4.9. However, hearings may be closed to protect witnesses, parties, or the public interest. Hearings shall be closed in cases of spousal or child abuse, and in national security cases. 8 C.F.R. §§ 1003.27(b), (c), (d); 1246.

IJ decisions shall be based only on evidence produced at the hearing.<sup>349</sup> An applicant for admission has the burden of establishing admissibility “clearly and beyond doubt.” Respondents have the burden to establish by clear and convincing evidence that they are lawfully present in the U.S. pursuant to a prior admission. In contrast, DHS has the burden to establish removability by clear and convincing evidence in the case of a respondent who has been admitted to the U.S. No decision on removability is valid unless based on reasonable, substantial, and probative evidence.<sup>350</sup> A respondent has the burden of proof (presumably by a preponderance of the evidence) to establish eligibility for relief from removal and has the burden to establish that he or she merits a favorable exercise of discretion.<sup>351</sup>

Many IC decisions require an assessment of witness credibility. The statute allows the IJ to consider a variety of circumstances in assessing credibility including demeanor and consistency of the statements.<sup>352</sup>

The IJ’s decision may be in writing or oral. If oral, a memorandum summarizing the oral decision shall be served on the parties.<sup>353</sup> A respondent may file one motion to reconsider an IJ decision that the respondent is removable; the motion must specify the errors of law or fact in the IJ order. The respondent may also file one motion to reopen proceedings based on newly discovered facts.<sup>354</sup> An IJ’s decision is final unless the respondent or the government appeals to the BIA.<sup>355</sup>

## B. Board of Immigration Appeals

The BIA is authorized to consist of 17 members headed by a Chair.<sup>356</sup> The EOIR director can appoint temporary Board members for a term not exceeding six months. Temporary members are present or retired IJs, retired BIA members, or senior EOIR

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<sup>349</sup> 8 U.S.C. § 1229a(c)(1)(A).

<sup>350</sup> 8 U.S.C. § 1229a(c)(3).

<sup>351</sup> 8 U.S.C. § 1229a(c)(4).

<sup>352</sup> The IJ may base a credibility determination on the demeanor, candor, or responsiveness of the witness, the inherent plausibility of the account, the consistency between witness’ oral and written statements (considering the circumstances under which the statements were made), the internal consistency of such statements with other evidence of record, and any inaccuracies or falsehoods in such statements whether or not they go to the heart of the applicant’s claim, or any other relevant factor. There is no presumption of credibility, but if no adverse credibility determination is explicitly made, the witness shall have a rebuttable presumption of credibility on appeal. 8 U.S.C. § 1229a(c)(4)(C).

<sup>353</sup> 8 C.F.R. § 1003.37.

<sup>354</sup> 8 U.S.C. § 1229a(c)(6) and (7). See 8 C.F.R. § 1003.23 for treatment of motions to reconsider and reopen.

<sup>355</sup> 8 C.F.R. § 1003.39.

<sup>356</sup> 8 C.F.R. § 1003.1(a)(1), (2); BIA Practice Manual. The Chair supervises and issues operating instructions for the Board but has no authority to direct the result of an adjudication assigned to another Board member.

attorneys.<sup>357</sup> The BIA hears appeals of decisions by IJs or DHS.<sup>358</sup> Cases can also be certified to the BIA or the BIA can certify a case to the Attorney General.<sup>359</sup>

The Chairman divides the Board into three-member panels and designates a presiding member of each panel. Panels decide cases by majority vote.<sup>360</sup> The majority of cases at the Board are adjudicated by a single Board Member. In general, a single Board Member decides the case unless the case falls into one of six categories that require a decision by a panel of three Board Members. These categories are:

- the need to settle inconsistencies among the rulings of different immigration judges
- the need to establish a precedent construing the meaning of laws, regulations, or procedures
- the need to review a decision by an Immigration Judge or DHS that is not in conformity with the law or with applicable precedents
- the need to resolve a case or controversy of major national import
- the need to review a clearly erroneous factual determination by an Immigration Judge
- the need to reverse the decision of an Immigration Judge or DHS in a final order, other than nondiscretionary dispositions.<sup>361</sup>

BIA does not engage in de novo review of fact findings. It is permitted to overturn IJ findings (including findings relating to credibility) only if they are clearly erroneous. The Board decides questions of law, discretion and judgment de novo. If further fact-finding is needed, the BIA remands the case to the IJ.

Board decisions are rendered either by a single Board member, by a panel of three, or in rare instances by the entire Board. Single member BIA members frequently make decisions without opinions, adopting the IJ decision without further explanation, or writing brief opinions of a few sentences.<sup>362</sup> Oral argument can be scheduled at the discretion of a three-judge panel but no oral argument is allowed in a case assigned to a single Board member.<sup>363</sup>

In FY 2015, BIA received 229,313 appeals and completed 34,244.<sup>364</sup> Pending cases at the end of FY 2014 totaled 16,945, which is considerably less than the pending case total of

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<sup>357</sup> 8 C.F.R. § 1003(a)(4). In Sept. 2016, there were 15 BIA members and 4 temporary members.

<sup>358</sup> For list of decisions that can be appealed to BIA, see 8 C.F.R. § 1003.1(b); BIA Practice Manual Chapter 1.4.

<sup>359</sup> 8 C.F.R. §§ 1003.1(c), 1(h).

<sup>360</sup> 8 C.F.R. § 1003(a)(3).

<sup>361</sup> 8 C.F.R. § 1003(e)(6); BIA Practice Manual Chapter 1.3.

<sup>362</sup> 8 C.F.R. § 1003(e)(4). Legomsky 1657.

<sup>363</sup> 8 C.F.R. § 1003(e)(7). Oral argument is extremely rare—perhaps no more than three per year. Benson & Wheeler 21.

<sup>364</sup> EOIR FY 2014 Statistics Yearbook, p. Q1.

30,133 at the end of FY 2010.<sup>365</sup> The respondent but not the government) can seek judicial review of BIA decisions in the Court of Appeals; such cases are a significant part of the caseload of the courts of appeal.<sup>366</sup>

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<sup>365</sup> *Id.* p. W3. For further analysis of the types of matters heard by BIA, see Benson & Wheeler 21-22.

<sup>366</sup> In FY 2015, immigration appeals accounted for 84% of administrative agency appeals and constituted the largest category of administrative agency appeals in each circuit except the DC Circuit. There was a 10% reduction of immigration appeals in FHY 2015. Administrative Office of US Courts. <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015>



## APP. A-7: MERIT SYSTEMS PROTECTION BOARD

The Merit Systems Protection Board (MSPB) is MSPBAPPJ0001 in the ACUS database. It functions as an independent tribunal, adjudicating appeals taken by federal employees who complain of adverse job action by their employer agencies. The most frequent cases heard by MSPB involve removal and other disciplinary action taken by federal agencies against their civil service employees. In addition, MSPB adjudicates cases concerning veterans employed by the federal government as well as retirement plan issues, whistleblower disputes and numerous other schemes involving federal employment. The ACUS database lists 13 case types.<sup>367</sup> For the most part, the same procedural regulations apply to all of them.<sup>368</sup>

MSPB primarily conducts Type B adjudication. However, in several classes of cases (involving complaints by federal ALJs, Hatch Act cases, removal of Senior Executive Service employees and complaints by employees of the MSPB itself) it conducts Type A adjudication.<sup>369</sup>

In FY 2014, MSPB resolved 17,466 appeal cases. This figure includes 16,354 cases resolved at the AJ level, 11 initial decisions by ALJs, and 1101 final decisions issued by the three-member Board after a petition for review of an AJ decision.<sup>370</sup> Of the 16,354 cases resolved at the AJ level, about 33% were dismissed (for example, because MSPB lacked jurisdiction of the case). Of the balance, about 10% were settled and 90% were adjudicated. Of the cases adjudicated, about 98% affirmed the agency decision.

The number of initial AJ decisions in FY 2014 was about double the normal MSPB workload. The increase resulted from a surge of 32,400 appeals filed during FY 2013 from furlough decisions forced by budget sequestration. Of AJ initial decisions in FY 2014, 11,109 resulted from furlough appeals. This should not be a recurring problem. Excluding furlough cases, about 42% of initial decisions resulted from adverse agency personnel actions and the balance resulted from the numerous other federal employment statutes administered by MSPB.

In comparison, in FY 2013, AJs issued 6340 initial decisions and the Board issued 952 final decisions.<sup>371</sup> In FY 2013, MSPB employed 74 AJs.

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<sup>367</sup> See 5 C.F.R. § 1201.2

<sup>368</sup> 5 C.F.R. § 1201 et seq.

<sup>369</sup> These cases are heard by ALJs at other agencies including the FTC and the Coast Guard. MSPB 2013 Annual Report, p. 4.

<sup>370</sup> A recent statute involving removal of Senior Executive Service employees at the VA provided for review of such decisions by MSPB AJs but without review by MSPB. 38 U.S.C. § 713(e)(2). The DOJ has announced it will not defend a challenge to the constitutionality of this provision.

<https://www.documentcloud.org/documents/2852384-DOJHelmanlet.html>.

<sup>371</sup> MSPB 2014 Annual Report, p. 9, 18. MSPB 2013 Annual Report, p. 7, 29.

MSPB conducts formal evidentiary hearings. Most such hearings are required by statute<sup>372</sup> but some of them are required by regulations.<sup>373</sup> With the exception of its Type A hearings (not discussed in this memorandum), the presiding officers are MSPB administrative judges (AJs). AJ decisions are subject to review by the Board.

The procedural regulations provide that an employer agency that takes action against its employee must furnish the employee with a notice that spells out the employee's right to appeal to MSPB.<sup>374</sup> The employee then has 30 days to file an appeal with one of the Board's regional offices. The regulations provide for class as well as individual appeals.<sup>375</sup> Electronic filing of documents is permitted and encouraged.<sup>376</sup>

An employee is entitled to be represented by any person the employee chooses.<sup>377</sup> The MSPB Judge's Handbook<sup>378</sup> requires special efforts to accommodate pro se appellants such as an early status conference to explain what is required. The Handbook provides that filings by pro se appellants should not be rejected on technical grounds and such appellants should receive great latitude in questioning witnesses.

MSPB strongly encourages settlement and mediation. The AJ can initiate settlement activity at any time.<sup>379</sup> The AJ will suspend a pending hearing for 30 days in order to allow the parties to seek mediation through MSPB's Mediation Appeals Program (MAP).<sup>380</sup> MAP offers the services of certified mediators as an alternative to the formal appeals processes set forth in the agency's regulations. Participation in MAP is free and confidential. The MAP website states that, since the program's inception in FY 2005, approximately 60% of all mediated cases have settled by the conclusion of the MAP process. Surveys of MAP participants note that 95% of such participants would use the program again.

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<sup>372</sup> By statute, an employee subject to various adverse personnel actions may submit an appeal to the MSPB and shall have the right to "a hearing for which a transcript will be kept..." 5 U.S.C. § 7701(a)(1). The statute makes clear that the hearing can be conducted by either by an ALJ or by an AJ employed by the Board. In case of a removal, the Board employee shall be "experienced in hearing appeals." 5 U.S.C. § 7701(b).

<sup>373</sup> For example, a regulation relating to claims that OPM has an unfair employment practice (such as an irrationally discriminatory examination or job qualification) provides for an "appeal" to MSPB. 5 C.F.R. § 104(a). In turn, MSPB regulations provide for an evidentiary hearing in this class of cases. 5 C.F.R. § 1201.3(a)(7).

<sup>374</sup> 5 C.F.R. § 1201.21 to .24.

<sup>375</sup> 5 C.F.R. § 1201.27. See guidelines for class actions in the Judge's Handbook, ch. 3, ¶4.

<sup>376</sup> 5 C.F.R. § 1201.14.

<sup>377</sup> 5 C.F.R. § 1201.31.

<sup>378</sup> Judge's Handbook, Ch. 2, ¶7. The handbook is available on line.

<sup>379</sup> 5 C.F.R. § 1201.41(c). See Judge's Handbook ch. 11.

<sup>380</sup> 5 C.F.R. § 1201.28(d). See <http://www.mspb.gov/appeals/mediationappeals.htm>.

MSPB judges can be disqualified for “personal bias.”<sup>381</sup> A party asserting such bias must file a withdrawal motion as soon as the party has reason to believe there is a basis for disqualification. If the judge denies the motion, the party requesting withdrawal may request certification of the issue to the Board as an interlocutory appeal.

The regulations prohibit written or oral ex parte communications between an interested party and a decision-making official (DMO). Interested parties are the parties to the case and their representatives or any other person whose interest might be affected by the decision. A DMO is any judge or employee designated to hear and decide cases. Prohibited communications are those that involve the merits of the case or that violate rules requiring submissions to be in writing. Accordingly, it is not a prohibited ex parte communication if a party asks about such matters as the status of a case, when it will be heard, or methods of submitting evidence to the Board.<sup>382</sup> Ex parte communications are prohibited from the time the persons involved know that the Board may consider the matter until the time the board has issued a final decision on the matter.<sup>383</sup>

There are no specific provisions for separation of functions, but such provisions seem unnecessary since MSPB is an independent tribunal that has no prosecuting or investigating staff members.

The MSPB has subpoena power.<sup>384</sup> In addition, the regulations provide for all the methods of discovery contained in the Federal Rules of Civil Procedure (FRCP), including depositions.<sup>385</sup> The FRCP provisions on discovery are instructive but not controlling. A prehearing conference or a status conference is held in nearly every case.<sup>386</sup>

MSPB regulations also provide for intervention as of right by the Office of Personnel Management and Office of Special Counsel and by interested parties at the AJ’s discretion.<sup>387</sup> The AJ can certify important issues of law and policy to the Board for an interim appeal.<sup>388</sup>

The normal procedure calls for a trial-type adversarial hearing with oral witness testimony and cross examination.<sup>389</sup> On most issues, the agency has the burden to establish the

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<sup>381</sup> 5 C.F.R. § 1201.42(b). The grounds for disqualification are expanded in the Judge’s Handbook to include “A party, witness, or representative is a friend or relative of, or has had a close professional relationship with the AJ; or personal bias or prejudice of the AJ.” Ch. 3, ¶2.

<sup>382</sup> 5 C.F.R. § 1201.101. See Judge’s Handbook ch. 14.

<sup>383</sup> 5 C.F.R. § 1201.102.

<sup>384</sup> 5 C.F.R. § 1201.81; Judge’s Handbook ch. 7.

<sup>385</sup> 5 C.F.R. § 1201.71 to -75.

<sup>386</sup> Judge’s Handbook, ch. 9.

<sup>387</sup> 5 C.F.R. § 1201.34. Judge’s Handbook ch. 3, ¶5.

<sup>388</sup> 5 C.F.R. § 1201.91 - .93. Judge’s Handbook ch. 6. ¶2.

<sup>389</sup> 5 C.F.R. § 1201.51 - .58. This provision is not applicable to written (document-only) hearings or to and oral arguments.

validity of its action by a preponderance of the evidence.<sup>390</sup> The AJ can take official notice of matters of common knowledge or matters that can be verified.<sup>391</sup>

The regulations do not state whether the AJ should follow the Federal Rules of Evidence, noting only that “Any evidence and testimony that is offered in the hearing and excluded by the judge will be described, and that description will be made a part of the record.”<sup>392</sup>

Hearings are normally open to the public but may be closed by the AJ where necessary to protect the appellant’s privacy or for other reasons such as protection of trade secrets or national security.<sup>393</sup>

MSPB’s regulations do not address the use of video or telephonic hearings. However, the Board has held that AJ’s can order video conference in any case, even if a party objects.<sup>394</sup>

The AJ must prepare an initial decision including provision for interim relief, if any.<sup>395</sup> The losing party has 35 days to file a petition for review by MSPB.<sup>396</sup> MSPB has discretion as to whether to accept the petition for review. It may but need not provide for oral argument.<sup>397</sup> Its final decisions may be designated as precedential.

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<sup>390</sup> 5 C.F.R. §1201.56

<sup>391</sup> 5 C.F.R. § 1201.64. The parties may be given an opportunity to object to the taking of official notice. The taking of official notice of any fact satisfies a party’s burden of proving that fact.

<sup>392</sup> 5 C.F.R. § 1201.61. The Judge’s Handbook is also silent on this issue, but cautions against receiving irrelevant evidence. Ch. 10, ¶14.

<sup>393</sup> 5 C.F.R. § 1201.52(a); Judge’s Handbook ch. 10, ¶3.

<sup>394</sup> Judge’s Handbook, ch. 10, ¶6. The Handbook also notes that, when facts are undisputed and sole purpose of hearings is to provide opportunity for oral argument, hearings by telephone may be appropriate.

<sup>395</sup> 5 C.F.R. § 1201.111. The Judge’s Handbook provides detailed guidelines for the contents of the initial decision. Ch. 12.

<sup>396</sup> 5 C.F.R. § 1201.113.

<sup>397</sup> 5 C.F.R. § 1201.117.

## APP. A-8: UNITED STATES PATENT AND TRADEMARK OFFICE

The United States Patent and Trademark Office (PTO) is located in the Department of Commerce.<sup>398</sup> This memo covers the PTO’s adjudication of patent and trademark disputes.

### A. Patent Trial and Appeal Board (PTAB)

The Patent Trial and Appeal Board (PTAB)<sup>399</sup> carries out the USPTO’s adjudicatory functions related to patents. In the ACUS database PTAB is USDCPATE0021. PTAB consists of the PTO Director and Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and administrative patent judges (APJs). Decisions of PTAB are not further reviewable at the administrative level but are subject to judicial review.

APJs shall be “persons of competent legal knowledge and scientific ability who are appointed by the Secretary of Commerce in consultation with the Director.”<sup>400</sup> There are about 225 APJs,<sup>401</sup> earning \$137,200 to \$168,700 per year. The APJs are highly experienced; most of them are former private patent attorneys.<sup>402</sup> Most of the APJs are located at the PTAB office in Alexandria, Va., but some are located at one of the four satellite office of the Board.

PTAB has two different functions—appeals and trials. It hears *appeals* by patent applicants of adverse decisions by patent examiners and from ex parte re-examination decisions.<sup>403</sup> It conducts *trials* in cases of disputes between patent holders and third parties.<sup>404</sup> A three-member APJ panel decides each appeal or trial.<sup>405</sup>

The statute does not specifically provide for evidentiary hearings. In context, however, the statutory provisions calling for “appeals,” “reviews,” and “proceedings,” require evidentiary hearings, although as discussed below these hearings are based entirely on written evidence. Therefore, PTAB conducts Type B adjudication.

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<sup>398</sup> 35 U.S.C. § 1.

<sup>399</sup> PTAB is the successor to the Board of Patent Appeals and Interferences. See America Invents Act, Pub. L. 112-29, 125 Stat. 284 (2011).

<sup>400</sup> 35 U.S.C. § 6(a).

<sup>401</sup> Michael Wagner, *An Introduction to Administrative Patent Judges at the Patent Trial and Appeal Board*, FEDERAL LAWYER (March 2015, p. 36) (hereinafter Wagner). Wagner says that the USPTO plans to add an additional 60 judges.

<sup>402</sup> *Id.*

<sup>403</sup> 35 U.S.C. § 6(b).

<sup>404</sup> *Id.*

<sup>405</sup> 35 U.S.C. § 6(c). The judges are connected by video conference facilities so they may be located at different offices of the Board. Wagner 36.

The regulations permit parties to be represented by a registered patent attorney or a registered non-attorney patent agent.<sup>406</sup> In appeal cases, the Board may allow the appearance of counsel who is other than a registered representative, but not by an unregistered lay representative.<sup>407</sup> In trial cases, parties may represent themselves but, if represented by counsel, must appoint both a lead and backup counsel, both of whom must be registered representatives. The Board may allow a backup counsel who is not a registered practitioner “upon showing that counsel is an experienced litigating attorney and has an established familiarity with the subject matter at issue in the proceeding.”<sup>408</sup> In either case, counsel can be disqualified and subject to sanctions.<sup>409</sup>

The regulations prohibit ex parte communications with PTAB members or employees assigned to the proceeding in trial cases<sup>410</sup> but this provision does not apply to appeal cases.<sup>411</sup> It is unclear whether the ex parte provision applicable to trials prohibits communications by PTAB staff members to decisionmakers or decisionmaking staff. Electronic document filing is accepted.<sup>412</sup>

## 1. Appeals (ex parte cases)

Part 41 of the regulations prescribe procedures for appeals.<sup>413</sup> Appeals are sometimes referred to as ex parte proceedings, meaning that the only parties are the patent examiner and a patent applicant or a patentee. The ex parte reexamination process can be triggered by any person through a request to the PTO claiming that a “substantial new question of patentability” exists with respect to the patent.<sup>414</sup> An applicant can appeal if a patent application has been rejected or an ex parte reexamination request has been granted. Appeals are Case Type 6 in USDCPATE0021.

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<sup>406</sup> 37 C.F.R. § 1.31.

<sup>407</sup> 37 C.F.R. § 41.5(a). The regulations do not permit lay representation before the PTAB.

<sup>408</sup> 37 C.F.R. § 42.10(c).

<sup>409</sup> 37 C.F.R. § 41.5(b), (e); 37 C.F.R. §42.10(d). See 37 C.F.R. §37 Part 11 for detailed regulations about registration of patent attorneys and agents.

<sup>410</sup> “Communication regarding a specific proceeding with a Board member...is not permitted unless both parties have an opportunity to be involved in the communication.” 37 C.F.R. § 42.5(d).

<sup>411</sup> 37 C.F.R. § 41.11.

<sup>412</sup> 37 C.F.R. § 42.6(b).

<sup>413</sup> 37 C.F.R. § 41.30 et seq. Part 41 of the regulations describes procedures for both trials and appeals. Part 42 of the regulations (promulgated in 2013) describes procedures for trials. Yet the regulations relating to trials in Part 41 have not been explicitly repealed or superseded by Part 42. In this memo, I apply Part 41 to appeals and Part 42 to trials. In the ACUS database, the references are only to Part 41 of the regulations, not Part 42. I believe this should be corrected.

<sup>414</sup> 35 U.S.C. § 303(a). See Stefan Blum, *Ex Parte Reexamination: A Wolf in Sheep's Clothing*, 73 OHIO ST. L. J. 395, 413-19 (2012); Jacob S. Sherkow, *Administrating Patent Litigation*, 90 WASH. L. REV. 205, 236 (2015) (in most patent infringement cases in court, the defendant requests USPTO re-examination and district court case is often stayed until USPTO acts).

All the evidence considered by the PTAB in deciding an appeal is presented in the appellant's briefs. The briefs can rely only on evidence previously considered by the examiner (except when a new administrative or judicial precedent arose after the examiner's consideration).<sup>415</sup> The appellant can request an oral argument if the appellant believes it to be necessary or desirable; cases are given the same consideration whether or not there is an oral argument. The Board can refuse the application for an oral argument if it is determined to be unnecessary.<sup>416</sup>

## 2. Trials (inter partes cases)

Part 42 of the regulations describes the procedure in trials.<sup>417</sup> Trial cases involve a third party that is challenging a patent (in other words, a party other than the patent applicant or owner and the USPTO). These include inter partes reviews,<sup>418</sup> post-grant reviews,<sup>419</sup> derivations,<sup>420</sup> and challenges to covered business method patents.<sup>421</sup> These are case types 1 through 5 in USDCPATE0021. As an alternative, proceedings challenging the validity of a patent can also be brought as civil actions in federal district court.<sup>422</sup> The trial remedy before PTAB is attractive to patent challengers because the proceedings cost much less than federal court litigation and the APJs are more expert than federal district judges in matters of patent law; moreover, the burden of proof before PTAB on the issue of invalidity is preponderance of the evidence, rather than the clear and convincing standard used in federal court.<sup>423</sup>

Under the regulations, the term "trial" means a "contested case instituted by the PTAB based upon a petition." A trial begins with a written decision notifying the petitioner and patent owner of the institution of the trial.<sup>424</sup> PTO trial proceedings have two phases: the APJ panel first decides whether the petition shows a reasonable likelihood that at least one claim would be

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<sup>415</sup> 37 C.F.R. § 41.47(e).

<sup>416</sup> 37 C.F.R. § 41.47(f).

<sup>417</sup> For detailed procedural rules including a timeline, see the Patent Office Trial Practice Guide, 77 Fed. Reg. 48756 (2012).

<sup>418</sup> An inter partes review arises when a third party challenges a patent because it lacks novelty or is obvious, based on the prior art. See 35 U.S.C. §§ 311, 102, 103; 37 C.F.R. § 42.100 et seq. This replaces the former category of inter partes re-examination. The provision for inter partes review does not violate Art. III of the Constitution. *MCM Portfolio LLC v. Hewlett-Packard*, 812 F.3d 1284 (Fed. Cir. 2015).

<sup>419</sup> Post-grant review involves a challenge to a patent on grounds other than lack of novelty or obviousness, such as a failure to meet the clear statement requirements of §112. See 35 U.S.C. § 321 et seq.; 37 C.F.R. § 42.200 et seq.

<sup>420</sup> In a derivation proceeding, a patent applicant B complains that an earlier patent held by A was derived from B's idea and A's application was not authorized. See 35 U.S.C. § 135(a)(1); 37 C.F.R. § 42.400 et seq.

<sup>421</sup> 37 C.F.R. § 42.300 et seq.

<sup>422</sup> See 35 U.S.C. § 315. When PTAB declares a patent valid, the patentee must pursue issues of infringement and damages in federal district court.

<sup>423</sup> See Stuart Minor Benjamin & Arti K. Rai, *Administrative Power in the Era of Patent Stare Decisis*, 65 DUKE L.J. 1563, 1565-67, 1570-71 (2016) (hereafter Benjamin & Rai).

<sup>424</sup> 37 C.F.R. § 42.2.

invalid. If so, the panel institutes review. After institution of review, the panel must generally make the final decision on the patent's validity within one year.<sup>425</sup>

The regulations provide for discovery during trial proceedings.<sup>426</sup> Discovery includes a series of initial disclosures (either by agreement or by order)<sup>427</sup> plus additional discovery (either by agreement or by order on a showing that additional discovery is in the interest of justice).

Uncompelled direct testimony must be submitted in the form of an affidavit or deposition transcript; compelled testimony (including cross-examination of affiants) is also presented in the form of depositions.<sup>428</sup> Expert testimony is furnished in affidavit form.<sup>429</sup> The Federal Rules of Evidence are applicable to trial proceedings.<sup>430</sup> Any party can request oral argument.<sup>431</sup> The parties may agree to settle any case but the proposed settlement is not binding on the Board.<sup>432</sup> The parties may resort to binding arbitration but the Board is not a party to the arbitration.<sup>433</sup> The case terminates in a judgment rendered by the Board.<sup>434</sup>

### 3. Statistical information<sup>435</sup>

In FY 2014, 1494 trial petitions were filed with PTAB.<sup>436</sup> In FY 2014, PTAB instituted 650 trials and rendered 143 written decisions.<sup>437</sup> In FY 2015 (through 7/16/15), 1528 trial petitions were filed which projects to about 2000 cases for the year.<sup>438</sup> In FY 2015 (through 7/16/15), PTAB instituted 706 trials; there were 337 final written decisions.<sup>439</sup> At the end of FY 2015, there were about 700 undecided cases.<sup>440</sup>

In FY 2013, there were 10,758 ex parte appeals filed with PTAB; in FY 2014, there were 9,585 appeals filed. In FY 2013, PTAB decided 9,489 appeals and decided 5,619 in FY 2014.

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<sup>425</sup> Benjamin & Rai at 1569.

<sup>426</sup> See 37 C.F.R. § 42.51.

<sup>427</sup> See 77 Fed. Reg. 48756, 48761-62 (2012).

<sup>428</sup> See 37 C.F.R. § 42.53(a).

<sup>429</sup> 37 C.F.R. § 42.65.

<sup>430</sup> 37 C.F.R. § 42.62(a).

<sup>431</sup> 37 C.F.R. § 42.70(a).

<sup>432</sup> 37 C.F.R. § 42.74(a).

<sup>433</sup> 37 C.F.R. § 42.410.

<sup>434</sup> 37 C.F.R. § 42.73.

<sup>435</sup> [http://www.uspto.gov/sites/default/files/documents/aia\\_statistics\\_07-16-2015.pdf](http://www.uspto.gov/sites/default/files/documents/aia_statistics_07-16-2015.pdf).

<sup>436</sup> Of the 1494 filings, 1310 were for inter partes review; 177 for covered business method review; 2 for post-grant review; and 5 for derivation proceedings.

<sup>437</sup> In FY 2014, there were 226 denials (that is PTAB dismissed the case before the hearing). 239 cases were settled; 42 petitioners gave up (meaning they requested an adverse decision).

<sup>438</sup> Of the 1528 filings, 1385 were for inter partes review, 130 for covered business methods, 8 for post-grant review, and 5 for derivations.

<sup>439</sup> In FY 2015 (through 7/16/15), there were 358 denials; 434 cases were settled; 63 requests for adverse decision.

<sup>440</sup> See Lex Machina, Patent Trial and Appeal Board, 2015 Report.



There were 23,508 appeals pending at the end of FY 2013, 25,527 pending at the end of FY 2014, and 24,403 pending as of March, 2015.<sup>441</sup>

If we assume that in FY 2015, there will be about 2,000 trial petitions filed and 10,000 appeals filed, the trial workload per each of the 200 APJs would be about 60 cases per year.

## B. Trademark Trial and Appeal Board (TTAB)

Trademark adjudication occurs before the Trademark Trial and Appeal Board (TTAB). The governing statute is the Lanham Act.<sup>442</sup> Procedural regulations are set forth in 37 C.F.R. Part 2. USPTO has published a useful practice manual.<sup>443</sup> The TTAB is USDCTRAD0020 in the ACUS database.

Like PTAB, TTAB practice is divided into trials (often called “inter partes” proceedings, meaning that they involve disputes between a third party and a trademark registrant) and appeals (often referred to as “ex parte” cases, meaning challenges by persons whose application for registration of a mark were rejected by a trademark examiner). Trials are case type 1 in USDCTRAD0020; appeals are case type 2.

The TTAB includes the Director and Deputy Director of the USPTO, the Commissioner for Patents, the Commissioner for Trademarks, and administrative trademark judges (ATJs). There are currently about 23 ATJs.<sup>444</sup>

As in the case of patents, the relevant statutes do not call for evidentiary hearings. Instead the statute provides for an “appeal” to the TTAB from the final decision of a trademark examiner.<sup>445</sup> The TTAB shall “determine and decide” in cases of interference, opposition to registration, application to register as a concurrent user, or application to cancel the registration of a mark.<sup>446</sup> In context, however, it is clear that an evidentiary hearing is required (although these hearings are entirely in writing except for oral argument). Oral argument is voluntary and can be done through videoconference.<sup>447</sup> The exclusive record principle is protected.<sup>448</sup> Therefore TTAB proceedings are Type B adjudication.

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<sup>441</sup> See Wagner, stating that at the end of 2014, PTAB had a “staggering” 25,370 ex parte appeals pending. Of these, 14,508 have been pending more than 14 months. Data on appeals were supplied in an email from Saurabh Vishnubhakat to Michael Asimow, Feb. 29, 2016.

<sup>442</sup> 15 U.S.C. § 1051 et seq.

<sup>443</sup> [http://www.uspto.gov/sites/default/files/trademarks/process/appeal/TBMP\\_full\\_version.pdf](http://www.uspto.gov/sites/default/files/trademarks/process/appeal/TBMP_full_version.pdf).

<sup>444</sup> <http://thettablog.blogspot.com/2012/10/updated-roster-of-ttab-administrative.html>.

<sup>445</sup> 15 U.S.C. § 1070.

<sup>446</sup> 15 U.S.C. § 1067(a).

<sup>447</sup> TTAB Practice Manual § 802.03.

<sup>448</sup> See TTAB Practice Manual § 1.2.03, 803.

There is no administrative appeal from a TTAB decision; TTAB decisions are reviewable by the US Court of Appeals for the Federal Circuit<sup>449</sup> or alternatively by a de novo federal district court action.<sup>450</sup> In addition, the Code provides that any person who could seek judicial review in the Federal Circuit can bring a civil action in federal district court.<sup>451</sup>

Only attorneys can represent parties before the Trademark Office.<sup>452</sup> Unlike patent litigation, there is no registration requirement for attorneys. Although parties can represent themselves,<sup>453</sup> non-lawyers cannot represent clients.<sup>454</sup> Thus there is no lay representation in trademark practice.

## 1. Appeals (ex parte cases)

An applicant for trademark registration may appeal a final refusal by the examiner to the TTAB.<sup>455</sup> The applicant and the examiner file briefs with the TTAB.<sup>456</sup> The record is complete prior to the filing of an appeal. The TTAB will ordinarily not consider additional evidence after an appeal is filed.<sup>457</sup> The appellant may on request receive an oral argument before at least three ATJs. In that case, the examiner will also make an oral argument.<sup>458</sup>

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<sup>449</sup> 15 U.S.C. § 1071(a)(1); 37 C.F.R. § 2.145(a), (b).

<sup>450</sup> 15 U.S.C. § 1071(b).

<sup>451</sup> 15 U.S.C. § 1071(b); 37 C.F.R. § 2.145(c). If a defeated party seeks review in the Court of Appeal, the adverse party may elect to transfer the matter to district court.

<sup>452</sup> 37 C.F.R. § 11.14(a). However, foreign lawyers are permitted. § 11.14(c). This rule applies to TTAB proceedings as well as to proceedings before examiners. 37 C.F.R. § 2.17(a).

<sup>453</sup> Self-representation includes representation by a non-lawyer representing a corporation in which the person is an officer, a partnership in which the person is a partner, or a firm in which the person is a member. *Id.* § 11.14(e).

<sup>454</sup> 37 C.F.R. §§ 11.14(b), (e); 2.17(f).

<sup>455</sup> See 15 U.S.C. § 1062(b)

<sup>456</sup> 37 C.F.R. § 2.142(b).

<sup>457</sup> If either party desires to introduce additional evidence, it can request the Board to suspend the appeal and remand the application for further examination. 37 C.F.R. § 2.142(d).

<sup>458</sup> 37 C.F.R. § 2.142(e)

## 2. Trials (inter partes cases)<sup>459</sup>

Inter partes trademark disputes (such as opposition to registration,<sup>460</sup> cancellation of registration,<sup>461</sup> interference,<sup>462</sup> or concurrent use<sup>463</sup>) commence upon filing a notice with the Trademark Office.<sup>464</sup> The applicant or registrant must file an answer to this notice.<sup>465</sup>

The Federal Rules of Civil Procedure (FRCP) govern inter partes proceedings.<sup>466</sup> The assignment of testimony periods corresponds to setting a case for trial in court proceedings and the taking of depositions during the assigned testimony periods corresponds to the trial in court proceedings. The oral hearing corresponds to the oral summation in court proceedings.<sup>467</sup>

The discovery rules are modeled on the FRCP,<sup>468</sup> including the requirement of mandatory initial disclosures<sup>469</sup> and a mandatory conference to discuss settlement and agree on a discovery plan.<sup>470</sup> A TTAB attorney or an ATJ may participate in this conference. In general, the material so discovered can be offered in evidence by the adverse party.

The TTAB then schedules a second discovery period in which the plaintiff and defendant present their case in chief, again by taking the deposition of the party's witnesses<sup>471</sup> either upon written or oral questions.<sup>472</sup> Adverse parties can cross-examine the witnesses.<sup>473</sup> Objections to questions are noted in the record. The Federal Rules of Evidence apply to TTAB proceedings.<sup>474</sup>

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<sup>459</sup> TTAB decisions in opposition cases have collateral estoppel effect when the same issue arises in infringement litigation in court. *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293 (2015).

<sup>460</sup> 15 U.S.C. § 1063.

<sup>461</sup> 15 U.S.C. § 1064. Typically, cancellation petitions allege that a registered mark would cause the owner of an existing mark damages by blurring or dilution.

<sup>462</sup> 15 U.S.C. § 1066.

<sup>463</sup> 15 U.S.C. § 1052(d).

<sup>464</sup> 37 C.F.R. §§ 2.101, 2.111. 054

<sup>465</sup> 37 C.F.R. § 2.104.

<sup>466</sup> 37 C.F.R. § 2.116. The opponent in an opposition proceeding or petitioner in a cancellation proceeding shall be in the position of a plaintiff,

<sup>467</sup> 37 C.F.R. § 2.116(d), (e), (f).

<sup>468</sup> 7 C.F.R. § 2.120(a), (b).

<sup>469</sup> FRCP 26(a).

<sup>470</sup> FRCP 26(f).

<sup>471</sup> See 7 C.F.R. § 2.121

<sup>472</sup> 37 C.F.R. § 2.123(a). If the parties so stipulate, an affidavit can be substituted for a deposition. *Id.* § 2.123(b). If the witness' deposition is to be by written questions, the opposing party must receive copies of the questions and can submit cross examination questions. 37 C.F.R. § 2.124.

<sup>473</sup> 37 C.F.R. § 2.123(e)(3).

<sup>474</sup> 37 C.F.R. § 2.2.122(a).

After completion of the discovery period, the parties file briefs with the TTAB.<sup>475</sup> On request, the parties conduct oral argument before at least 3 ATJs.<sup>476</sup>

### 3. Statistical information<sup>477</sup>

In FY 2014, the TTAB received 2794 appeals.<sup>478</sup> Of these, 456 matured to the point they were ready for decision and 405 were actually decided.<sup>479</sup> At the end of FY 2014, 81 appeals were awaiting decisions.<sup>480</sup> The mean time from commencement of an appeal to completion was 43.8 weeks; the median was 36 weeks.

Of inter partes (trial) cases in FY 2014, there were 5509 oppositions<sup>481</sup> and 1722 cancellations.<sup>482</sup> Of these, 127 matured to the point that they were ready for decision and 132 cases were decided.<sup>483</sup> At the end of FY 2014, 24 trials were awaiting decisions.<sup>484</sup>

It is unclear what happened to most of the appeals, oppositions, and cancellations. Did parties give up or were most of the cases settled? For purposes of the workload statistics (Tables 2 and 3), I used the actual number of appeals and trial cases heard by the ATJs, rather than the much larger number of filings.

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<sup>475</sup> 37 C.F.R. § 2.128.

<sup>476</sup> 37 C.F.R. § 2.129.

<sup>477</sup> <http://www.uspto.gov/trademarks-application-process/appealing-trademark-decisions/ttab-incoming-filings-and-performance>.

<sup>478</sup> There were 2219 appeals during the first three quarters of FY 2015.

<sup>479</sup> In the first three quarters of 2015, 355 appeals matured to be ready for decision and 291 were decided.

<sup>480</sup> At the end of the third quarter of 2015, 119 appeals and 36 trials were awaiting decision.

<sup>481</sup> 3800 in first three quarters of FY 2015.

<sup>482</sup> 1288 in first three quarters of FY 2015.

<sup>483</sup> In the first three quarters of 2015, 106 trial cases matured to be ready for decision and 86 were decided.

<sup>484</sup> At the end of the d quarter of 2015, 119 appeals and 36 trials were awaiting decision.

## APP. A-9: PROVIDER REIMBURSEMENT REVIEW BOARD<sup>485</sup>

The Provider Reimbursement Review Board (PRRB) is one of numerous adjudicatory schemes arising out of Medicare, Medicaid, and the Affordable Care Act.<sup>486</sup> It was established in 1972. PRRB is HHSOPRRB0005 in the ACUS database. PRRB reviews certain determinations concerning the amounts that Medicare will pay to providers of services under Medicare Part A, which, broadly speaking, applies to hospital care.

Providers of services request reimbursement for services provided under Part A. These claims are reviewed by private fiscal intermediaries (referred to by the regulations as “contractors”). If the dispute involves at least \$1,000 but less than \$10,000, providers that disagree with contractor decisions have a right to a hearing by a contractor hearing officer or panel of hearing officers<sup>487</sup> who are unbiased and have had no “direct responsibility” for the decision under review.<sup>488</sup> The exclusive record principle applies.<sup>489</sup> Decisions by contractor hearing officers are subject to a further review by a reviewing officer of the Centers for Medicare and Medicaid Services (CMS).<sup>490</sup> Because contractor hearing officers are private rather than government adjudicators, they are beyond the scope of this study.

If the dispute is for \$10,000 or more (or in the case of a group appeal, the aggregate claims involving a common issue total \$50,000 or more<sup>491</sup>), the providers can appeal an unfavorable contractor decision to the PRRB. PRRB hearings are subject to discretionary review by the Administrator or Deputy Administrator of CMS (on its own motion or on request from a party)<sup>492</sup> and then to judicial review.<sup>493</sup>

PRRB hearings are subject to the exclusive record requirement.<sup>494</sup> Hence PRRB provides Type B adjudication. PRRB consists of five members.<sup>495</sup> All members participate in each PRRB decision. The parties may opt for a “record hearing” in which the case is submitted based on the

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<sup>485</sup> Thanks to Eleanor Kinney and Suzanne Cochran for assistance on this Appendix.

<sup>486</sup> Many such programs, such as the Medicare Office of Hearings and Appeals, utilize Type A adjudication. See HHSOEBEN0001 in the ACUS website.

<sup>487</sup> Provisions for contractor hearings are provided in 42 C.F.R. §§ 405.1809 to .1834.

<sup>488</sup> 42 C.F.R. § 405.1817,1831(b).

<sup>489</sup> Id. § 405.1827(b); 42 C.F.R. § 405.1845(g).

<sup>490</sup> Id. § 405.1834.

<sup>491</sup> Id. § 405.1837

<sup>492</sup> Id. §405.1875.

<sup>493</sup> Id. § 405.1877. According to the ACUS website, there are 12 appellate officials at CMS and each appeal is considered by a panel of three CMS officials.

<sup>494</sup> 42 U.S.C. § 1395oo(d); 42 C.F.R. § 405.1871(a)(2).

<sup>495</sup> The members of the Board “shall be persons knowledgeable in the field of payment of providers of services” and at least one of them shall be certified public accountant. Two Board members shall be “representative of providers of services.” Board members serve staggered three-year terms. 42 C.F.R. §405.1845(a), (b).

existing written record<sup>496</sup> or for an oral adversarial hearing including cross-examination<sup>497</sup> and oral argument.<sup>498</sup> Oral hearings are conducted by the full board. The ACUS website says that about 20% of cases are record hearings, 65% are resolved by an in-person oral hearing, and 10% by telephone.<sup>499</sup> Video-conference is available to present testimony of a witness who cannot be physically present. Electronic document filing is now permitted although not reflected in the Board's rules. PRRB does not employ AJs.

PRRB regulations provide for discovery that is controlled by Board members.<sup>500</sup> PRRB has subpoena power.<sup>501</sup> Parties may be represented by an attorney or by any other chosen representative.<sup>502</sup> The Federal Rules of Evidence do not apply.<sup>503</sup> The regulations require disqualification of biased board members.<sup>504</sup> The PRRB rules (though not the regulations) prohibit substantive ex parte communication with Board members or staff.<sup>505</sup> There is no provision for separation of functions or any restrictions on communication between the staff and Board members; separation of functions may be unnecessary, however, since PRRB is an adjudicating tribunal without a prosecuting or investigating function.<sup>506</sup> PRRB hearings are not open to the public.<sup>507</sup>

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<sup>496</sup> Record hearings are appropriate if the case involves only legal interpretation or very limited fact disputes and the parties agree that the case is appropriate for a record hearing. PRRB Rule 32.3.

<sup>497</sup> 42 C.F.R. § 405.1859.

<sup>498</sup> Id. § 405.1861.

<sup>499</sup> Telephone hearings are appropriate in a case involving a strictly legal issue or one that has few factual issues. PRRB Rule 32.2. The statistics provided on the website do not add up to 100%.

<sup>500</sup> 42 C.F.R. § 405.1853(e); PRRB Rule 26. "The Board may permit discovery of a matter that is relevant to the specific subject matter of the Board hearing, provided the matter is not privileged or otherwise protected from disclosure and the discovery request is not unreasonable, unduly burdensome, or expensive, or otherwise inappropriate." *Id.* § 405.1853(e)(1)(ii).

<sup>501</sup> 42 C.F.R. § 405.1857.

<sup>502</sup> Id. 405.1881

<sup>503</sup> § 1395oo(c), 42 C.F.R. § 405.1855.

<sup>504</sup> 42 C.F.R. § 405.1847 provides: "No Board member shall join in the conduct of a hearing in a case in which he is prejudiced or partial with respect to any party or in which he has any interest in the matter pending for decision before him." Under the PRRB Rules, a Board member "may recuse him or herself if there are reasons that might give the appearance of an inability to render a fair and impartial decision." A party may request recusal prior to the hearing date. PRRB Rule 45.1, 45.2.

<sup>505</sup> PRRB Rule 40.2. Ex parte communication with staff regarding procedural matters are not prohibited. The regulations prohibit ex parte communication during the CMS appeal process but not the PRRB hearing process. 42 C.F.R. § 405.1875(d).

<sup>506</sup> See Phyllis E. Bernard, *Social Security and Medicare Adjudications at HHS: Two Approaches to Administrative Justice in an Ever-Expanding Bureaucracy*, 3 Health Matrix 339, 410-12 (1993) (discussing importance of the PRRB's Board Advisors in the processing and decision of cases).

<sup>507</sup> Hearings are open to the parties, to CMS representatives and to "such other persons as the Board deems necessary and proper." 42 C.F.R. § 405.1951. Presumably this provision is justified since the hearings concern private financial information of service providers.

The regulations encourage negotiation between providers and contractors to resolve disputed issues.<sup>508</sup> Mediation is provided by PRRB staff members. About 2/3 of the Board's cases are settled through negotiation or mediation. The regulations provide for an initial status conference conducted by one or more members of the Board (in person or by telephone) which includes discussion of potential settlement; the Board may conduct further status conferences where it is necessary and appropriate to do so.<sup>509</sup>

The Board is able to reduce its caseload by deciding many cases on an aggregate basis.<sup>510</sup> Providers subject to common control must aggregate their cases. The Board also aggregates cases (sometimes involving hundreds of providers) if their claims present a common issue. This class action technique seems very desirable.

The Board's written decision must include findings of fact and conclusions of law, specifically explaining whether the provider carried its burden of proof to establish entitlement of relief by a preponderance of the evidence, and containing appropriate citations. The Board must give "great weight" to CMS interpretive rules or policy statements.<sup>511</sup>

According to the ACUS database, 3,907 PRRB cases were filed in FY 2013 and 1,833 were decided. This figure for decided cases includes the many cases settled by negotiation or mediation.

The PRRB's website listing its substantive decisions<sup>512</sup> provides information on only 25 decisions in 2012, 42 in 2013, 30 in 2014, and 30 in 2015. We understand that this is the full number of cases decided on the merits. 7,124 cases were pending at the end of FY 2013.<sup>513</sup> PRRB issues a much larger number of jurisdictional determinations which concern various procedural issues arising in its cases. It publishes about 300 jurisdictional decisions that present important issues, but decides many more than that without publishing the decisions. Many of the Board's decisions give permission to the claimant to secure expedited judicial review of issues of law (such as the validity of regulations) that are outside the Board's jurisdiction.

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<sup>508</sup> 42 C.F.R. § 405.1853(a).

<sup>509</sup> Id. § 405.1853(c), (d).

<sup>510</sup> See ACUS Rec. 2016-2 for discussion of aggregate agency adjudication.

<sup>511</sup> Id. § 405.1871.

<sup>512</sup> <https://www.cms.gov/Regulations-and-Guidance/Review-Boards/PRRBReview/List-of-PRRB-Decisions.html#>

<sup>513</sup> The Frye and Limon studies (see note 13, *supra*) give no information about PRRB's caseload during 1992 and 2002.

## APP. A-10: BOARD OF VETERANS' APPEALS<sup>514</sup>

The system of hearings for resolution of disputes about veterans' benefits is DOVABENE0001 in the ACUS website. It lists 34 case types. This memo focuses on the Board of Veterans Appeals (BVA), which conducts Type B adjudication.<sup>515</sup>

### A. VA claims adjudication—introduction

The Department of Veterans Affairs (VA) decides a vast number of benefit claims.<sup>516</sup> The caseload is rising steadily. The number of new claims currently exceeds one million per year, but this figure understates the caseload because many such claims seek several different benefits.<sup>517</sup> As of the end of 2015, there were about 368,000 pending claims before VA Regional Offices (VAROs), which make the initial decision in claims cases. Of this number, about 78,000 had been pending more than 125 days.<sup>518</sup> There have been many criticisms of the VA's claims process and numerous proposals for improving it,<sup>519</sup> but these are beyond the scope of this memorandum.

Assessing claims for service-connected disability (by far the most common type of claim) require complex medical judgments. The claimant must suffer from a current disability that is connected to a disease or injury received during service (the "nexus" requirement). VA assigns a rating (from 0% to 100%) to the disability. It is estimated that around 88% of claims for disability compensation are granted, at least in part.<sup>520</sup>

Claimants who disagree with a VARO decision can seek relief before the BVA. A veteran who loses before the BVA can obtain judicial review from the Court of Appeals for Veterans Claims (CAVC). The Court of Appeals for the Federal Circuit (CAFC) reviews CAVC

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<sup>514</sup> Thanks to James Ridgway, Stacey-Rae Simcox, and Ron Smith for assistance with this memo.

<sup>515</sup> By statute the BVA shall "conduct hearings and dispose of appeals properly before the Board." 38 U.S.C. § 7101.

<sup>516</sup> Over 4,000,000 veterans receive pensions or benefits and about 940,000 were added during the last 4 years. The annual outlay to pay these benefits is about \$54 billion. [http://www.benefits.va.gov/reports/detailed\\_claims\\_data.asp](http://www.benefits.va.gov/reports/detailed_claims_data.asp) (as of Dec. 5, 2015).

<sup>517</sup> See James D. Ridgway, "Why So Many Remands? A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims," 1 VET. L. REV. 113, 145-50 (2009). Each unrelated benefit in a claim is referred to as an "issue." Ridgway observes that 22% of disability claims had at least eight issues. *Id.* at 146. He estimates that the number of different benefits sought is at least double and probably more than triple the number of claims that VA receives each year.

<sup>518</sup> These figures are a remarkable improvement from the situation a few years ago, apparently achieved by a lot of overtime and possibly an increase in mistakes. Email from Stacey-Rae Simcox to Michael Asimow, 1/5/16. In 2012, there were 883,930 cases pending and 611,073 pending more than 125 days. As discussed below, however, there are much longer delays at the BVA level. It takes more than 3 years on average from the time of an unfavorable VARO decision to a BVA decision.

<sup>519</sup> See, e.g., James D. Ridgway, *A Benefits System for the Information Age*, 7 VET. L. REV. 36 (2015). s

<sup>520</sup> James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later*, NYU ANN. SURVEY OF AMER. LAW 116 (2010) (hereinafter *NYU*).



decisions on questions of statutory or regulatory interpretation. Discussion of the judicial review phase is beyond the scope of this memorandum.

## B. The VA claims process is inquisitorial and paternalistic

The adjudicatory process for resolving VA claim disputes is uniquely inquisitorial and paternalistic. Thus there is no statute of limitations on making a claim. VAROs are subject to elaborate notice requirements. It must notify the claimant of any information or evidence that is necessary to substantiate the claim and furnish all necessary assistance to the claimant in obtaining evidence and obtaining medical opinions.<sup>521</sup> The various procedural rules are heavily slanted in the direction of assisting veterans and requiring the VA to develop all issues raised in any documents or testimony. No government official appears during VARO consideration or BVA hearings to oppose the granting of benefits. At all levels, the VA must give the veteran the benefit of the doubt if the positive and negative evidence is approximately balanced.<sup>522</sup> A veteran may “reopen” a rejected application by presenting “new and material evidence” and some cases are reopened on multiple occasions (in fact about three-quarters of the claims filed with the VA are actually reopened claims rather than new ones). A decision by the VARO or BVA can be administratively set aside at any time if based on a “clear and unmistakable error.”

The VA’s inquisitorial system of fact determination and decisionmaking is rooted in the long and convoluted history of veterans’ benefits.<sup>523</sup> In the past, these benefits were regarded as gratuities, not entitlements, and the bureaucratic structure that delivered the benefits was wholly paternalistic. In a paternalistic system, there was no place for lawyers or for adversarial procedures like administrative trials.<sup>524</sup> Today, veterans’ benefits are an entitlement, not a gratuity, but the older paternalistic and inquisitorial decisionmaking process has survived.<sup>525</sup>

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<sup>521</sup> See 38 U.S.C. §§ 5102(b) and 5103(a) (imposing obligations to notify claimant of any information needed to complete the application or to substantiate the claim); 5103A (imposing on the VA an obligation to exercise reasonable efforts to assist the claimant in obtaining evidence and records and in providing medical examinations and opinions). See *Shinseki v. Sanders*, 556 U.S. 396, 406-11(2009) (simplifying rules of prejudicial error when VA fails to follow the notice requirements in the statute and regulations).

<sup>522</sup> 38 U.S.C. § 5107(b).

<sup>523</sup> For a detailed account of the history of veterans’ benefits, see James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans Benefits Before Judicial Review*, 3 VET. L. REV. 135 (2011).

<sup>524</sup> See Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefit System*, 13 KANSAS J. OF L. & PUB. POL. 303, 304-15 (2003) (distinguishing the paternalistic model from the social insurance model applicable to more modern benefit programs).

<sup>525</sup> Even the judicial review system has paternalistic elements. By statute a claimant must file an appeal with CAVC within 120 days after mailing of the BVA’s decision. This deadline is not “jurisdictional,” so it is subject to equitable tolling. The paternalistic nature of VA benefits was an important factor in the Supreme Court’s decision on this point. “What is most telling [of Congress’ intent in imposing the 120-day rule] are the singular characteristics of the review scheme that Congress created for the adjudication of veterans’ benefit claims. The solicitude of Congress for veterans is of long standing. . . And that solicitude is plainly reflected in the VJRA, as well as in subsequent laws that place a thumb on the scale in the veteran’s favor in the course of administrative and judicial review of VA decisions. . .” *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (internal citations and quotation marks deleted).

However, the judicial review system is adversarial, not inquisitorial, and has compelled the VA to move in the direction of more adversarial claims procedures.<sup>526</sup>

### C. The VA claims process—VARO level<sup>527</sup>

A claim is processed by various teams at the VAROs, but the decision is the responsibility of a single lay adjudicator (referred to herein as a “ratings specialist”).<sup>528</sup> The file includes the detailed medical opinions submitted by the claimant (such as reports of personal physicians) and by the VA medical staff as well as by independent physicians consulted by the VA. For the most part, the VARO process operates on a documents-only basis without a personal appearance by the veteran.

Claimants dissatisfied with the VARO decision file a Notice of Disagreement (NOD). The claimant can obtain a review of the case by a Decision Review Officer (DRO), a senior VARO adjudicator who has not previously been involved in investigation of the case.<sup>529</sup> The DRO may seek additional evidence. At the veterans’ request, the DRO will provide an informal hearing. If the claimant remains dissatisfied with the VARO decision after DRO review, the VARO prepares a Statement of the Case (SOC) which contains detailed findings and an explanation of the decision. Within 60 days from the mailing of the SOC, the veteran must file Form VA-9 to perfect the right of appeal to the BVA.

### D. The Board of Veterans Appeals

The BVA’s decision is de novo but is based primarily on the written record made at the VARO level.<sup>530</sup> Claimants frequently seek to introduce new evidence at the BVA level. If the claimant waives remand to the VARO to evaluate the new evidence, the BVA judge considers this evidence and decides the case accordingly.<sup>531</sup> In many cases, BVA has no organized written record from which to decide the case, only a disorganized case file that may run to hundreds or thousands of pages.<sup>532</sup> It is required to consider and decide every possible issue or claim raised by the appellant’s appeal documents as well as the documents and oral testimony submitted prior to the Board’s decision.<sup>533</sup>

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<sup>526</sup> See Ridgway, 7 VET. L. REV. at 45-47; Charles L. Cragin, *The Impact of Judicial Review on the Department of Veterans Affairs’ Claim Adjudication Process*, 46 MAINE L. REV. 23 (1994).

<sup>527</sup> For an outline of the claims process, see <http://www.benefits.va.gov/compensation/process.asp>

<sup>528</sup> 38 CFR § 3.103(c)(1).

<sup>529</sup> 38 C.F.R. § 3.2600.

<sup>530</sup> 38 U.S.C. § 7104(a). 38 C.F.R. § 19.4.

<sup>531</sup> 38 C.F.R. §§ 19.9(b)(3), 20.1304(c) (new evidence can be introduced before BVA if appellant waives the right to have it considered by the regional office or if the Board believes that the new evidence will enable it to award benefits).

<sup>532</sup> The VA is in the process of converting its paper-based system to an electronic data system, but the conversion process is costly and far from completed. About 30% of the BVA’s inventory of appeals in 2014 were paperless. See BVA 2014 Annual Report, p. 16. [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2014AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2014AR.pdf).

<sup>533</sup> *Percy v. Shinseki*, 23 Vet. App. 37, 47 (2009) (citing numerous cases).

The BVA has about 64 Veterans Law Judges (VLJs) and about 400 staff counsel. BVA has a total of 614 employees.<sup>534</sup> In addition, there were 45 acting judges in FY 2014 (about 12 FTEs), so there are about 76 VLJs. The BVA decided about 56,000 cases in FY 2014 (about 736 for each judge). This was a considerable increase over the 42,000 cases decided in FY 2013.

During FY 2014, BVA provided about 11,000 informal hearings. Requesting a hearing considerably prolongs the BVA decisional process, so the great majority of the claimants waive the hearing; their cases are decided on the written record. BVA hearings are conducted by single VLJs either in person or by video-conference. The proceedings are quite informal.<sup>535</sup> The Board handled about 54% of its hearings by video-conference in FY 2014 and hopes to increase this percentage.<sup>536</sup>

During 2014, the Board received about 47,000 cases. It expects to receive 74,000 cases in FY 2015 and 81,000 cases in FY 2017. At the end of FY 2014, the Board's backlog was about 67,000. The waiting time between the filing of a NOD and a BVA decision averaged 1038 days in FY 2014; the period between the time an appeal was received by BVA and the time of decision was about 357 days. If the BVA remands the case, the remand proceedings averaged 311 days.

Of the approximately 56,000 decisions in FY 2014, the Board allowed 29.2% of the appeals, remanded 45.5%, and denied 21.5%. 64% of the remanded cases were not the result of mistakes on the part of VARO; usually they were the result of the veteran's request to introduce additional evidence at the BVA level which necessitated remand to the VARO.

The regulations do not prohibit ex parte communications with BVA judges, either by VA personnel or by outsiders and it is unknown whether such communications occur. The regulations do not provide for any ADR in BVA cases nor does the BVA employ prehearing conferences or other case management procedures.

#### E. Representation in the VA claims process

VA practice at the VARO level is mostly de-lawyered. Veterans are usually represented at both the VARO and BVA levels by lay representatives supplied free by veteran service organizations (VSOs) such as the American Legion.<sup>537</sup> Veterans are seldom represented by

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<sup>534</sup> See BVA 2014 annual report, p. 3. The statistics in the next three paragraphs are taken from this report.

<sup>535</sup> See the BVA's pamphlet "How Do I Appeal?" <http://www.bva.va.gov/docs/Pamphlets/How-Do-I-Appeal-Booklet--508Compliance.pdf>.

<sup>536</sup> At present, the video-conference system is not very convenient because the terminals are often located far from veterans and their representatives. However, BVA is working to improve access to terminals. Email from Stacey-Rae Simcox to Michael Asimow, 1/5/16.

<sup>537</sup> See 38 C.F.R. §§ 14.628, 14.629(a). All representatives (including those employed by the VSOs) are subject to a code of conduct and to suspension from practice for violations. 38 U.S.C. § 5904(a); 38 C.F.R. § 14.632. In 2014,

lawyers during the VARO process because the statute prohibits compensation of lawyers before the filing of a NOD.<sup>538</sup> The regulations permit representation by non-lawyer “agents” (who must pass an examination and take CLE courses) and by other lay representatives on a one-time only basis.<sup>539</sup> The success rate of lawyers and non-lawyer representatives before BVA is similar, but attorneys had a clear edge in denied cases.<sup>540</sup>

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VSOs represented 76.8% of veterans before the BVA. Of the remainder, attorneys represented veterans in 10.9% of BVA cases, agents by 1.1%, “other” 1.8%, no representation 9.4%.

<sup>538</sup> 38 U.S.C. § 5904(c)(1). This statute formerly prohibited compensation of attorneys at any stage of the VA claims process in excess of \$10. The Supreme Court upheld the constitutionality of the \$10 fee limit on compensation of attorneys in *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 3045 (1985). The Court believed that the presence of attorneys would be detrimental to the paternalistic and inquisitorial VA adjudication system. It also believed that the free VSO representatives probably did about as good a job as attorneys. For criticism of the assumptions in *Walters* in light of present day realities at the VA, see Stacey Rae-Simcox, *Thirty Years After Walters*, SSRN 2650434 (2015). After *Walters*, Congress permitted compensation of attorneys after the veteran files a NOD.

<sup>539</sup> 38 CFR § 14.630.

<sup>540</sup> Attorneys were successful in 35.5% of their cases, agents 30.3%, others 28.1%, and no representation 22%. The various VSOs fell within a range of 28.1% (American Legion) to 35.7% (Military Order of the Purple Heart). In the defeat column, lawyers lost 13.7% of their cases while the VSO’s were in a range of 18.7% (Paralyzed Veterans of America) to 23.6% (State Service Organizations). BVA 2014 Annual Report p 27. These statistics do not cover success rates at the VARO level, only the BVA level. There is no empirical evidence about whether the VSO representatives or the agents perform as well as lawyers.