DRAFT REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

PUBLIC AVAILABILITY OF INFORMATION ABOUT AGENCY ADJUDICATORS

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I. INTRODUCTION

Federal adjudicators have long played a critical role throughout the federal government. Adjudicators preside over proceedings subject to the formal adjudication provisions of the Administrative Procedure Act (APA), other legally required evidentiary hearings, and more informal proceedings in which a hearing may not take place at all. Taken together, adjudicators make an incredible number of determinations that affect the public.[1] One recent count suggests that in addition to the approximately two thousand administrative law judges (ALJs), many more adjudicators who are not ALJs, referred to as administrative judges (AJs) in this report, preside over hearings or decide appeals following a hearing.[2]

Yet, aside from ALJs, the amount of easily accessible, public information we have about these positions is largely limited. In 2018, as part of an effort to update the information available about AJs, Kent Barnett, Malia Reddick, Logan Cornett, and Russell Wheeler surveyed sixty-four federal agencies about their adjudicators and compiled that research into a report for ACUS.[3] Professor Barnett and Dr. Wheeler later published a law review article based on the content of that report.[4] The report and article both incorporated a call for greater transparency around AJs and suggested that agencies should use procedural regulations to institute strong policies regarding AJ independence and impartiality, and websites to provide greater transparency and improve public faith in the agency's adjudicative process.[5] Barnett later expanded on those transparency recommendations by suggesting what kinds of information agencies should disclose, including policies about hiring, separation of functions, supervision, ex parte communications, physical separation, performance appraisals, compensation, and removal protections, and how they should disclose that information, including by providing it to litigants and disclosing it on websites.[6]

This report complements that scholarship by assessing which disclosures agencies are already making about their adjudicators and the ease with which the public can access those disclosures, with the goal of identifying best practices for improving public access to relevant information about agency adjudicators. This report also considers which kinds of information agencies should make available, including what disclosures are necessary for the public to understand the constitutional status and relative impartiality of adjudicators other than agency heads.

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[1] *See* Jonah B. Gelbach and David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 Tex. L. Rev. 1097, 1098–99 (2018) (describing the number of cases decided annually by immigration judges, veterans law judges, ALJs at the Office of Medicare Hearings and Appeals, and ALJs at the Social Security Administration).

[2] Kent Barnett et al., Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 1–2 (February 14, 2018) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal-1.

[3] *Id.* at 2.

[4] Kent Barnett and Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1 (2018)

[5] *Id.* at 100-01; Barnett et al., *supra* note 2, at 71–72;

[6] Kent H. Barnett, *Some Kind of Hearing Officer*, 94 Wash L. Rev. 515, 563–82 (2019).

To answer those questions, I conducted searches to determine what, where, and how disclosures are made about a sample of adjudicator positions. Section II provides some background for the project. Section III describes the methodology of the research, and Section IV discusses the research summary and findings. Section V presents a set of best practices agencies should consider when making disclosures about their adjudicators and Section VI offers some conclusions. Finally, the report contains appendices with a template for agency disclosures, examples of current agency disclosure practices, a table summarizing the information agencies currently make available regarding adjudicators surveyed in this report, and excerpts from the report and law review articles by Kent Barnett and his coauthors suggesting how agencies can improve their transparency around agency adjudicators and why disclosures about adjudicators are important.

II. BACKGROUND

Several years ago, ACUS began a well-received initiative to encourage agencies to disclose on their websites important information relating to different aspects of their regulatory programs. In particular, ACUS has recommended that agencies disclose information about high-level officials leading federal agencies, as well as two categories of information related to adjudications: (1) adjudication materials, including decisions and supporting materials and (2) adjudication rules, including regulations and public-facing explanatory materials.[7] This report addresses a third category of important information about agency adjudications: policies related to adjudicators, particularly those regarding their appointment, supervision, evaluation, discipline, and removal.

The public and agencies benefit from the disclosure of information about agency adjudicators. Agencies benefit from disclosures because greater transparency allows them to compare practices across agencies. Practices that have worked at one agency may provide an important learning opportunity for other agencies looking to improve their adjudicative process. Proactive disclosures by agencies may also be more cost-effective, because agencies will not need to respond to individual requests for information about their adjudicators.

Information about agency adjudicators also helps the public because when agencies disclose information about their adjudicators and the policies that help ensure decisional independence, such as limitations on ex parte communications, separation of adjudicative and enforcement functions, and recusal requirements, it encourages public faith in the administrative process. Additionally, disclosures about agency adjudicators play an important role in ensuring due process in adjudications because participants need an impartial adjudicator to receive due process, and need to perceive that their case is handled fairly.[8] Congress enacted the APA, particularly provisions relating to merit-based hiring, separation of functions, limitations on ex parte communications, and removal protections, partly to ensure that ALJs had the necessary

[7] Admin. Conf. of the U.S., Recommendation 2019-8, *Public Identification of Agency Officials*, 84 Fed. Reg. 71,354 (Dec. 27, 2019); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).
[8] Barnett et al., *supra* note 2, at 6.

independence and impartiality after receiving complaints about unfair agency hearings.[9] AJ positions have become significantly more common since then, and many of the same concerns over fairness exist in hearings conducted by that group of adjudicators. Agencies vary in how they regulate their adjudicators, and there may be good reasons for those differences, but the public needs information about adjudicators to be able to understand the purpose of those differences.

Furthermore, these kinds of information help the public understand the constitutional status of adjudicators under the Appointments Clause. The Constitution requires that the President appoint all "Officers of the United States," although Congress may also by law vest the appointment of "inferior Officers" in the heads of departments and courts.[10] The Supreme Court has addressed this issue in a number of cases and has concluded that officers, as opposed to employees, are individuals "exercising significant authority pursuant to the laws of the United States."[11] In determining whether an officer is inferior or principal, the Court has focused on whether the officer has cabined power and duties, and has cited as important indicia of the constitutional status of appointed positions such criteria as job duties, level of authority, and whether a higher-level official has authority to supervise, remove, and review decisions rendered by the officer.[12]

Applying these principles to adjudicators, the Court held in *Lucia v. Securities and Exchange Commission* that ALJs at the Securities and Exchange Commission are officers of the United States and must be appointed in accordance with the Appointments Clause.[13] Because of that case, many agency heads chose to ratify the appointment of ALJs and many AJs who might qualify as inferior officers.[14] Less than a month after the Court issued the decision, President Trump issued Executive Order 13,843, which allows agencies to hire new ALJs directly—that is, without the Office of Personnel Management's (OPM's) involvement—generally using whatever selection criteria and procedures they deem appropriate.[15] OPM recently proposed a rule implementing the Executive Order.[16]

Agencies have been working to reconfigure their process for appointing ALJs and many AJs to conform to both Supreme Court precedent and the Executive Order.[17] In light of all these changes, ACUS took up a project on agency recruitment and selection of ALJs, and ACUS

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[9] *Id.* at 1.
[10] U.S. CONST. art. II, § 2, cl. 2.
[11] Buckley v. Valeo, 424 U.S. 1, 126 (1976).
[12] Edmond v. United States, 520 U.S. 651, 661–66 (1997); Morrison v. Olson, 487 U.S. 654, 671–73 (1988).
[13] Lucia v. Sec. and Exch. Comm'n, 138 S.Ct. 2044, 2049 (2018)
[14] *See, e.g., SEC Ratifies Appointment of Administrative Law Judges*, U.S. SEC. & EXCH. COMM'N (Nov. 30, 2017), https://www.sec.gov/news/press-release/2017-215 (last visited Oct. 8, 2020); *Proactive Disclosures – Appointments Clause*; U.S. Dep't of Labor, https://www.dol.gov/agencies/oalj/topics/information/Proactive_disclosures_ALJ_appointments (last visited Oct. 8, 2020).
[15] Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018).
[16] Administrative Law Judges, 85 Fed. Reg. 59,207 (Sept. 21, 2020).
[17] *See, e.g., Proactive Disclosures*, U.S. DEP'T OF LABOR, *supra* note 14; DEP'T OF HEALTH & HUMAN SERVICES, ADMINISTRATIVE LAW JUDGE APPOINTMENT PROCESS UNDER THE EXCEPTED SERVICE (2018), https://www.hhs.gov/sites/default/files/alj-appointment-process.pdf (last visited Oct. 8, 2020).

adopted a recommendation as part of that project that called for agencies to "formulate and publish minimum qualifications and selection criteria for ALJ hiring."[18]

However, questions about the constitutional status of adjudicators remain. The APA specifies that presidentially appointed agency heads, some of whom are removable only for cause, can remove ALJs from office only upon a finding of "good cause" by the Merit Systems Protection Board.[19] The President can only remove Board members for "inefficiency, neglect of duty, or malfeasance in office."[20] In finding that dual for-cause limitations on the removal of members of the Public Company Accounting Oversight Board violated the Constitution's separation of powers, the Court left unanswered whether the same principles should apply to the APA's removal protections for ALJs.[21] Similar questions may arise with respect to other administrative adjudicators who are removable only for cause.

More recently, the Federal Circuit held that administrative patent judges (APJs) as created in the America Invents Act were principal officers because, under that statutory scheme, no presidentially-appointed officer has independent authority to review an APJ's decision and APJs can only be removed for cause.[22] That case is now pending before the Supreme Court.

This project on public availability of information about agency adjudicators grew out of Barnett, Reddick, Cornett, and Wheeler's 2018 report and ACUS's recommendation on recruitment and selection of ALJs, and responds to questions raised about the constitutional status of adjudicators after *Lucia* and subsequent cases, as well as Executive Order 13,843. It builds on the 2018 report by looking at not just what agency policies exist regarding adjudicators, but which of those policies have been made available to the public and how. The purpose of the project is to promote transparency, which benefits agencies by allowing the comparison of best practices and allowing for efficient information disclosure, as well as the public, so that they may understand the impartiality and constitutional status of adjudicators.

III. METHODOLOGY

The research for this report was conducted by selecting sixteen adjudicator positions across multiple agencies and combing through a variety of sources for any disclosures by agencies regarding those adjudicators.

The positions were selected in an attempt to survey a wide range of positions. They include both ALJs and AJs who conduct some sort of hearing or review appeals following a hearing.[23]

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[18] Admin. Conf. of the U.S., Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*, ¶ 2, 84 Fed. Reg. 38,930, 38,931 (Aug. 8, 2019).
[19] 5 U.S.C. § 7521(a).
[20] 5 U.S.C. § 1202(d).
[21] *See*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 507 n. 10 (2010); Fleming v. U.S. Dep't of Agric., No. 17-1246 (D.C. Cir.).
[22] Arthrex v. Smith & Nephew, 941 F.3d 1320, *reh'g en banc denied* (Fed. Cir. 2020), 953 F.3d 760, *cert. granted* 592 U.S. __ (2020).
[23] These adjudicators imperfectly map onto the division of adjudicators into "Type A," "Type B," and "Type C" adjudicators, but likely incorporate all Type A and B adjudicators and some Type C adjudicators. *See* Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

Hearings conducted by adjudicators surveyed for this report include those conducted subject to the APA, other legally required evidentiary hearings, and certain proceedings which involve a hearing that does not necessarily require decision making based on an exclusive record.

The positions are located in agencies with both higher- and lower-volume caseloads. They include both hearing-level and appellate adjudicators, as well as adjudicators who preside over trial-like and relatively informal proceedings. Occupants of each position preside, in at least some cases, over some kind of oral hearing or decide appeals following an oral hearing. The positions do not necessarily capture each of these variables in proportion to their presence in the federal government. The positions selected do not include agency heads because a significant amount of information is already available about them.

Table 1. Positions Selected for Review

Agency	Component	Position Title
Department of Agriculture	National Appeals Division	Administrative Judge
Department of Commerce/Patent and Trademark Office	Patent Trial and Appeal Board	Administrative Patent Judge
Department of Health and Human Services	Office of Medicare Hearings and Appeals	Administrative Law Judge
Department of Homeland Security/U.S. Citizenship and Immigration Services	Administrative Appeals Office	Administrative Appeals Officers
Department of Justice	Executive Office for Immigration Review	Immigration Judge
Department of Labor	Administrative Review Board	Administrative Appeals Judge
Department of Labor	Benefits Review Board	Administrative Appeals Judges
Department of Labor	Office of Administrative Law Judges	Administrative Law Judge
Department of Veterans Affairs	Board of Veterans' Appeals	Veterans Law Judge
Environmental Protection Agency	Environmental Appeals Board	Environmental Appeals Board Judge
Department of the Treasury/Internal Revenue Service	Independent Office of Appeals	Appeals Officer
Merit Systems Protection Board	Office of Regional Operations	Administrative Judge
National Labor Relations Board	Division of Judges	Administrative Law Judge
Occupational Safety and Health Review Commission	Office of the Chief Administrative Law Judge	Administrative Law Judge
Social Security Administration	Office of Appellate Operations	Administrative Appeals Judge
Social Security Administration	Office of Hearings Operations	Administrative Law Judge

For each of these positions, I searched the United States Code (USC), the Code of Federal Regulations (CFR), *Federal Register* materials that are not codified in the CFR (including notices and preambles to proposed and final rules), relatively formal publications available online (e.g., memoranda, reports, case-processing and organizational manuals, and guides), and informal website content (e.g., FAQ pages and descriptions of agency organization) to determine what information about the terms and conditions applicable to the selected positions is already publicly available. Other sources of publicly available information certainly do exist, such as uncodified public laws, reports, and congressional testimony. Presumably relevant information

also resides in undisclosed or difficult-to-locate sources, such as job postings, position descriptions, internal personnel manuals, and labor agreements. I restricted my search to sources to which the public is likely to look for information and disclosures about adjudicators, because readily available public information matters most for transparency purposes.

I classified the information I located into eleven categories.

Table 2. Categories of Disclosures

Category	Information Included in Category
Job Duties	Descriptions of adjudicators' responsibilities, including tasks other than adjudication that occupants of the position perform or are not allowed to do
Review of Adjudications	Descriptions of agency officials, if any, who have the authority to review decisions rendered by occupants of the position on appeal, on their own motion, or when requested by the adjudicator
Appointment and Qualifications	Information about hiring qualifications, hiring procedures, term limits, and who has appointment authority
Compensation	Pay scales, bonuses, and performance incentives
Ex Parte Communications and Separation of Functions	Prohibitions and limitations on ex parte communications and any requirements for independence from other components of the agency, especially investigation and prosecution units
Organization	The organizational placement of occupants of the position, especially information regarding who has authority to supervise adjudicators or who adjudicators have the authority to supervise, as well as information about the number of adjudicators and the physical location of their offices
Evaluation	Information about case processing goals, performance evaluations, and methods for obtaining feedback about adjudicators
Discipline and Removal	Information about discipline procedures, methods for reporting complaints about adjudicators, and when adjudicators may be removed
Supervision and Assignment of Work	Information about training available to adjudicators, who assigns work to adjudicators, and quality review
Recusal/Disqualification	Descriptions of standards for recusal or disqualification and whether parties can request recusal
Miscellaneous	Descriptions of what policies and regulations are binding on adjudicators, deadlines for decision making, restrictions on conduct outside of work, and case prioritization policies

The categories are admittedly imperfect because they overlap, and a single piece of information could arguably be placed into two or more categories, but they were created to more easily assess the public availability of information across agencies and positions.

For obvious reasons, this research is not exhaustive, and, undoubtedly, some pieces of information that are available could not be easily located. The fact that some information may have escaped ready identification is itself indicative that relevant information concerning adjudicators is not easily accessible to the public. This research should be viewed as identifying what a member of the public could find with dedicated research rather than a perfect encapsulation of every disclosure these agencies have ever made about their adjudicators.

Appendix C identifies each publicly available provision I was able to locate, provides its location, provides a short summary of its content, and categorizes it according to the taxonomy above. I have noted which provisions are unusually extensive.

IV. RESEARCH SUMMARIES AND FINDINGS

a. Kinds of Information Made Publicly Available

For both ALJs and AJs, there are ample disclosures regarding administrative review and few disclosures regarding job duties, compensation, and discipline and removal.

Across all the categories of disclosures covered by the research, information about review of adjudications is the most widely available. Almost all surveyed agencies make at least one disclosure about who has the authority to formally review adjudicator decisions as the next step in an appeals process, whether that is a federal court or another individual or body inside the agency. This information is usually available in multiple places, and for many agencies it is built into a statutory scheme and is published on the agency website to help individuals navigating the appeals process. The Office of Medicare Hearings and Appeals, for instance, has its review process written into its authorizing statute, but it also put a description of that process into its regulations and on its website (see Appendix B).[24]

Information regarding the appointment and qualifications of adjudicators is also regularly available. The *Federal Register* contains many of these disclosures because some agencies, such as the Department of Labor, post vacancies for several positions in the *Federal Register*, which usually include descriptions of qualifications.[25] These job postings, however, are not easy to locate. One thing to note in this category is that I located publicly available information on new procedures for hiring ALJs, since Executive Order 13,843, for only two of the five ALJ positions examined.[26]

The most important categories with the fewest disclosures are compensation policies and discipline and removal procedures. For compensation, very few policies regarding pay were located, and most of them are statutory. This means that in order to determine how adjudicators are paid, members of the public would most likely have to dig through the USC or OPM regulations, which are not particularly easy sources for most non-lawyers to use. Additionally, there are almost no disclosures about bonuses or performance incentives, even though the 2018 report found that seventy-one percent of AJ positions were eligible for bonuses.[27] In fact, at least three of the positions for which this report failed to find disclosures about bonuses were included in the 2018 report as stating that their adjudicators did receive bonuses.[28]

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[24] 42 U.S.C. § 1395ff; 42 C.F.R. § 405.904; *Level 4 Appeals*, U.S. DEP'T OF HEALTH & HUMAN SERVS., https://www.hhs.gov/about/agencies/omha/the-appeals-process/level-4/index.html (last visited Oct. 9, 2020).
[25] *See, e.g.*, Vacancy Posting for a District Chief Administrative Law Judge, 84 Fed. Reg. 16,885 (Apr. 23, 2019).
[26] Procedures for Appointment of Administrative Law Judges for the Department of Labor, 83 Fed. Reg. 44,307 (Aug. 30, 2018); DEP'T OF HEALTH AND HUMAN SERVICES, *supra* note 17.
[27] Barnett et al., *supra* note 2, at 4.
[28] *Id.* at 56 (mentioning that AJs at the Benefit Review Board, U.S. Merit Systems Protection Board, and the Patent Trial and Appeal Board received bonuses in 2016).

Similarly, the discipline and review category has very few disclosures, most of which are not very detailed. In fact, I found information about discipline or removal for only six of the positions, not including the APA provisions that govern all ALJs, and only two of those detailed who has the authority to remove an adjudicator.[29] Immigration judges at the Executive Office of Immigration Review are the only adjudicators with a somewhat detailed explanation of a discipline process, which lays out how the agency handles complaints about immigration judges.[30] It seems likely that for both compensation policies and discipline and removal practices, agencies have some kinds of policies internal to the agency that are not currently available, or at least are not easily located.

The categories of job duties and miscellaneous, which includes descriptions of what policies and regulations are binding on adjudicators, deadlines for decision making, restrictions on conduct outside of work, and case prioritization policies, also have very few disclosures, but for those categories it seems more likely that policies do not exist rather than that agencies are not disclosing them. For job duties, most of the occupants of positions in this report serve purely as adjudicators without participating in investigatory or prosecutorial activities, and so agencies probably do not feel compelled to disclose that adjudicators adjudicate. The few disclosures in job duties pertain to specific limitations on which kinds of cases adjudicators may adjudicate and which tasks other than adjudication they may be assigned. The miscellaneous category, by its nature, only includes disclosures that do not fit in any of the other primary categories; if there were enough miscellaneous disclosures on any topics, they would have formed a new category.

For all the other categories, there is a moderate amount of disclosure. Most positions have information available on agency websites about the organizational structure of the agency and the adjudicators' position within it. Many positions also have disclosures pertaining to ex parte communications and recusal requirements (often in their regulations), but few have broader disclosures regarding independence from other functions of the agency, such as prosecution or enforcement units. One agency that handles the explanation of its adjudicators' independence especially well is the Internal Revenue Service Independent Office of Appeals (see Appendix B), which Congress statutorily required to remain independent of the examination and collection

[29] *See*, 37 C.F.R. § 11.803 (citing a process for practitioners to report misconduct by an administrative patent judge at the Patent Trial and Appeal Board); Order Contingently Delegating Authority to the Chairman, the General Counsel, and the Chief Administrative Law Judge, 76 Fed. Reg. 73,719, 73,720 (Nov. 29, 2011) (delegating to the Chief Administrative Law Judge the authority to demote or discharge any ALJ if the National Labor Relations Board has fewer than three Members); Social Security Ruling SSR 13-1p; Titles II and XVI, 78 Fed. Reg. 6,168 (Jan. 29, 2013) (describing the process for addressing allegations of unfairness, prejudice, partiality, bias, misconduct, or discrimination by ALJs); Secretary's Order 01-2020-Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 85 Fed. Reg. 13,186, 13,188 (March 6, 2020) (noting that the Secretary may remove members of the Administrative Review Board at any time); U.S. DEP'T OF JUSTICE, SUMMARY OF OCIJ PROCEDURE FOR HANDLING COMPLAINTS CONCERNING IMMIGRATION JUDGES, https://www.justice.gov/eoir/page/file/1039481/download (last visited Oct. 2, 2020) (describing the process for handling complaints about immigration judges); *Inspector General*, U.S. MERIT SYS. PROT. BD., https://www.mspb.gov/contact/ig.htm (last visited Oct. 2, 2020) (describing how to contact the MSPB Office of the General Counsel to report misconduct by a member of the Merit Systems Protection Board).

[30] U.S. DEP'T OF JUSTICE, SUMMARY OF OCIJ PROCEDURE *supra* note 29.

functions of the agency, and which also repeatedly emphasizes that independence and its impartiality on its website.[31]

Agencies also have a number of disclosures about who assigns work to adjudicators, most often in the CFR or in other formal documents, like case-processing manuals, but they do not have many disclosures about other kinds of supervision. Descriptions of quality review are occasionally somewhat detailed, as in the case of the Merit Systems Protection Board, which describes which administrative judges receive pre-issuance quality review and which receive post-issuance quality review in its procedures in the Judges' Handbook.[32] The Patent Trial and Appeal Board also handles this area of disclosures well because, although its authorizing statute includes a provision about how work is assigned to judges, the agency also provides an extensive description of the process and provides additional information about supervision and training in a series of videos designed to attract administrative patent judges.[33]

Information about evaluations is sparse. References to kinds of evaluations can be found fairly often, but the process is rarely described in any depth. Agencies sometimes make a fleeting reference to case-processing goals in a strategic plan or on a website, but that is the majority of information available.[34] Additionally, although there is little information about how ALJs are evaluated, this is likely because the APA exempts ALJs from performance evaluations.

b. Disclosure Location

The most common source for information about adjudicators is the CFR. Almost all agencies use the CFR to inform the public about review of adjudications, and most also include information on ex parte contacts and recusal procedures there as well.[35] The CFR is not, however, a common place for the agencies surveyed to place information about organization, evaluation, or discipline. Additionally, agencies differ widely in the usability of their CFR provisions. Some regulations are organized intuitively and all the information regarding a particular adjudicator position is located under one sub-heading for the office in which they work. A good example of this kind of organization is the Board of Veterans' Appeals.[36] For other agencies, regulations are scattered across an enormous number of provisions and can only be found by keyword searches, rather than by looking for intuitively named section headings. For a

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[31] 26 U.S.C. § 7803; *Appeals – An Independent Organization*, INTERNAL REVENUE SERV., https://www.irs.gov/appeals/appeals-an-independent-organization (last visited Oct. 8, 2020).
[32] MERIT SYS. PROTS. BD., JUDGES' HANDBOOK 75 (2019).
[33] 35 U.S.C. § 6; *Training and Resources for Administrative Patent Judges at the Patent Trial and Appeal Board (PTAB)*, YOUTUBE, https://www.youtube.com/watch?v=I_BD-Hl12tQ&feature=youtu.be (last visited Oct. 8, 2020); *Standard Operating Procedure 1 (Revision 15) – Assignment of Judges to Panels*, PATENT TRIAL & APPEAL BD., https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf (last visited Oct. 8, 2020).
[34] U.S. DEP'T OF AGRIC., USDA OFFICE OF HEARINGS AND APPEALS STRATEGIC PLAN 2018-2022 5; *About the Office*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/about-office (last visited Oct. 8, 2020).
[35] *See, e.g.*, 29 C.F.R. § 2200.92 (stating that ALJ decisions at the Occupational Safety and Health Review Commission are reviewed by the Commission if appealed); 37 C.F.R. § 41.11 (prohibiting ex parte communications with the Patent Trial and Appeal Board about inter partes reexaminations); 40 C.F.R. § 22.4(d) (stating when members of the Environmental Appeals Board must disqualify themselves from a proceeding).
[36] *See, e.g.*, 38 C.F.R. §§ 20.1–20.1499 (covering almost all the regulations pertaining to the Board of Veterans' Appeals in a section titled "Board of Veterans' Appeals: Rules of Practice").

member of the public unfamiliar with the CFR, combing through the regulations could be an extremely daunting process for finding any useful information about adjudicators.

A significant amount of information about adjudicators is also located in the USC. The USC contained the most information about who had the authority to review adjudicator decisions and the appointment process.[37] It also held the most information about compensation.[38]

Agencies also often use other kinds of formal documents to make disclosures. Many of these agencies maintain extensive case processing manuals, bench books for judges, or practice guides.[39] These manuals often describe policies useful to the adjudicators themselves, such as evaluation, assignment of work, and recusal policies. The National Labor Relations Board's Bench Book, for instance, contains information about the assignment of cases to ALJs, prohibitions on ex parte communications, and disqualification of ALJs.[40]

Agencies also often make disclosures on their websites, especially with regard to their policies on organization and structure.[41] This includes organizational charts and descriptions of office locations. Agencies also often use websites to explain the appeals process, so websites contain a number of disclosures regarding review of adjudications. Some agencies, like the Office of Medicare Hearings and Appeals, organize this information very well by providing separate information about each level of the appellate process, including who hears the appeal and how to file an appeal.[42] I identified almost no agencies that explain in website text adjudicators' compensation or recusal requirements.

Finally, the *Federal Register* has the fewest disclosures. As stated in the methodology section, the only documents considered disclosures in the *Federal Register* were the ones made exclusively there, rather than the text of all the final rules that are available there and in the CFR. This limited the number of *Federal Register* documents that I considered, and those that I did consider were often the most difficult documents to locate. Of the various categories of information, the ones most likely to appear in the *Federal Register* were those pertaining to the appointment process and qualifications for adjudicator positions.[43]

Some adjudicative bodies or specific adjudicator positions were created by statute, and others were created by administrative action. The method of creating the adjudicative body or position influences where agencies make disclosures. Policies regarding ALJs, for example, are amply

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[37] *See, e.g.*, 42 U.S.C. § 1395ff(d)(2) (stating that if a beneficiary is dissatisfied with an ALJ decision, that decision may be appealed to the Departmental Appeals Board of the Department of Health and Human Services).
[38] *See, e.g.*, 38 U.S.C. § 7101a (stating that Veterans Law Judges must be paid basic pay equivalent to that of ALJs).
[39] *See, e.g.*, SOC. SEC. ADMIN., HEARINGS, APPEALS, AND LITIGATION LAW MANUAL (2020); NAT'L LABOR RELATIONS BD., BENCH BOOK: AN NLRB TRIAL MANUAL (2020).
[40] NATIONAL LABOR RELATIONS BOARD, BENCH BOOK *supra* note 39, at 5–7, 9–12.
[41] *See, e.g.*, *Executive Office for Immigration Review Organization Chart*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/eoir-organization-chart/chart (last visited Oct. 2, 2020); *Organization*, NAT'L APPEALS DIV., https://www.nad.usda.gov/content/organization (last visited Oct. 2, 2020).
[42] *See, e.g.*, *The Appeals Process*, U.S. DEP'T OF HEALTH & HUMAN SERVS., https://www.hhs.gov/about/agencies/omha/the-appeals-process/index.html (last visited Oct. 2, 2020).
[43] *See, e.g.*, Vacancy Posting for a Member of the Benefits Review Board, 84 Fed. Reg. 18,871, 18,871–72 (May 2, 2019) (including a description of the qualifications for the position).

described in the APA.[44] Thus, individual agencies with ALJs may feel less compelled to disclose information on those topics. Similarly, because Congress included detailed information about the Board of Veterans' Appeals in its authorizing statute, the majority of information about Veterans Law Judges is in the USC.[45] However, policies regarding the Environmental Appeals Board, created by regulation, are found primarily in the CFR.[46] One agency, the Administrative Review Board, was created in a document styled as a Secretary's Order, which is only available in the *Federal Register*.[47]

c. How Disclosures are Made

The public would struggle to find many of the disclosures located for the purpose of this project and, even they did locate them, would find them difficult to understand. As noted earlier, the most frequent source for information relevant to this report is the CFR, and a lot of information about adjudicators can be found in the USC. Yet, these sources are often very inefficient and difficult to use, particularly for the public. Depending on the agency, they can be full of technical terms and laid out in nonintuitive ways.

The *Federal Register*, too, is not an ideal location to provide disclosures, partly because searching within it can be difficult and can bring up an enormous number of results. Many *Federal Register* notices are also very complicated, and some of the disclosures relating to adjudicators are in nonintuitive locations, like the preamble or in responses to comments.

Although agencies routinely provide access on their websites to manuals and guides, some are not easily discoverable and require searching in the search bar of the website because no intuitive webpage appears to link to them. Agencies usually make these guides extremely lengthy, however, and they often amass over a hundred pages of guidance full of agency-specific terms that a member of the public would struggle to understand. Some of the manuals are also difficult to use because they do not include a way to easily search the entire manual or may not have a useful table of contents. The better kinds of these guides and manuals, like the Merit Systems Protection Board's Judges' Handbook, The Environmental Appeals Board's Practice Manual, and the National Labor Relations Board's Bench Book, can be searched all at once and have detailed tables of contents that link to pages in the manual.[48]

Agency websites are the most transparent location for disclosures because the public can easily find them, and agencies usually write them in more comprehensible and less technical ways. Many agencies, however, seem to have unnecessarily restricted their website's value by using it almost entirely for information about organizational structure or the appeals process, at least as far as pertains to adjudicators. Although agencies disclose much more information in other locations, they have not made some of that information available in ways that are truly

[44] 5 U.S.C. §§ 554(d), 557(d), 3105, 4301, 5372, and 7521.
[45] 38 U.S.C. §§ 7101–7104.
[46] *See, e.g.*, 40 C.F.R. § 1.25(e)(1) (creating the Environmental Appeals Board).
[47] *See* Secretary's Order 01-2020, *supra* note 29 (updating and amending the notice creating the Administrative Review Board).
[48] THE ENVIRONMENTAL APPEALS BOARD, PRACTICE MANUAL (2013); NAT'L LABOR RELATIONS BD, BENCH BOOK *supra* note 39; U.S. MERIT SYSTEMS PROTECTION BOARD, HANDBOOK *supra* note 32.

accessible for the public. Many agencies could better organize their websites, too. Agencies that have easily findable, centralized locations on their websites for information about their adjudicators, like the Department of Labor (see Appendix B), provide the most transparent disclosures.[49]

V. BEST PRACTICES

Agencies should consider drafting short, plain language descriptions of the relevant policies concerning their adjudicators and posting it on an intuitively located webpage, such as a page that provides an overview of the adjudicative body. This description would not need to be exhaustive, because the agency should also provide citations and links to other key legal documents on the webpage so that individuals who are interested in more information can find more comprehensive disclosures.

If, in the process of creating such a disclosure page, agencies discover that some of their relevant policies are a matter of custom, they should consider documenting those policies so they may be more effectively disclosed. Agencies could incorporate the creation of this disclosure page into their next periodic modification of their website.

This approach balances the need for an easily located, plain language disclosure so that members of the public can easily find information with the need for more thorough disclosures for practitioners or members of the public who may be interested in a specific facet. It also minimizes the burden on agencies because so many of these disclosures already exist, and agencies would primarily link to already-documented policies.

A template of how agencies might structure this disclosure is located in Appendix A. Examples of how agencies are currently structuring their website to provide some of these disclosures are located in Appendix B. The template and examples are provided to give agencies a place to start when considering how to restructure website disclosures about adjudicators. Certainly, agencies have a wide variety of websites with layouts specific to their agency structure, so these will need to be adapted.

Additionally, in the vast majority of cases, neither ALJ nor AJ positions will require every sentence in the template provided, and the content included should be tailored to the specific adjudicator position. Some agencies may have fewer disclosures to make; others may have even more policies to disclose. Finally, each agency would need to determine whether any information should be withheld under the Freedom of Information Act or another source of law or policy, such as the Privacy Act.

VI. CONCLUSION

Agencies do make a wide variety of public disclosures about their adjudicators already, although information is less available for some categories such as adjudicator compensation, bonuses, discipline procedures, and requirements for removal. But these disclosures are scattered and difficult for the public to understand. Ultimately, placing information in a notice in the

[49] *Proactive Disclosures*, U.S. DEP'T OF LABOR, *supra* note 14.

Federal Register or deep in an obscure portion of the CFR does little to inform the public about adjudicator impartiality or the constitutional status of adjudicators. Agencies also already utilize their websites well for some kinds of disclosures. In what is perhaps a perfectly reasonable approach to limiting costs and organizing information, agencies have used their websites primarily to give the public a broad overview of their agency and provide tools that allow the public to effectively engage with the agency, either through policy-making or adjudications. Agency websites can be put to better use, however, if agencies create a short webpage that provides a central location for the public to find already-existing disclosures.

Both agencies and the public would benefit from this format of disclosure. Such a webpage would enable the public to quickly find information about adjudicators that would increase their trust in the agency's adjudicative process. For agencies, it would facilitate comparing practices and learning from each other's experiences. It may also prove more cost-effective for agencies since, in the wake of *Lucia*, *Arthrex*, and other cases, many agencies are likely already facing increased requests for information regarding their adjudicators. The attention of the administrative law community has turned to these kinds of positions, and it may turn out to be extremely beneficial for agencies with adjudicators to disclose the kinds of information discussed in this report. Transparency is a key aspect of good governance, and particularly when it may also prove to be cost-effective, agencies should undertake efforts to proactively disclose information when possible.

APPENDICES

Appendix A – Template Website Text for ALJs

About Our Administrative Law Judges

Administrative Law Judges (ALJs) at [agency name] conduct hearings and decide cases under [insert name of authorizing act]. They are part of the [agency component in which ALJs are located], which is directed by [title of office head] and has offices in [cities]. Visit [link to agency organization chart] to see how [office] relates to other offices at [agency].

ALJs provide a neutral forum to resolve cases involving [kinds of cases ALJs hear] in a fair, transparent, and accessible manner. Our ALJs are highly trained, impartial judges, appointed by [agency official], who [describe qualifications]. ALJs are paid according to the [pay scale for ALJs with link to the scale] scale set by another agency (with cost-of-living adjustments for ALJs' locations), the Office of Personnel Management.

Cases are assigned to ALJs [in each geographic office] in rotation so far as practicable. The ALJ assigned to your case is responsible for [job duties, like taking evidence, hearing objections, issuing decisions]. ALJs are required by statute to perform their functions impartially. 5 U.S.C. § 556(b). To ensure impartiality, he or she does not take part in investigative or enforcement activities, nor does he or she report to officials in the [agency]'s investigative or enforcement components, including [list investigative/enforcement component(s)]. 5 U.S.C. §§ 554(d), 3105. The ALJ assigned to your case may not communicate privately about the facts of your case with other agency officials[, and more details on [agency name]'s rules about communicating with ALJs are available at [location of stronger ex parte prohibitions]].

By law, [agency] does not reward or discipline ALJs for their decisions. [Agency] does not evaluate ALJs' performance and can only discipline or remove an ALJ from office if another agency, the Merit Systems Protection Board, decides after a hearing that good cause supports doing so. 5 U.S.C. §§ 4301, 7521.

The agency has adopted rules of recusal [link] that allow a participant to request that the ALJ in charge his or her case be disqualified if the participant believes the ALJ cannot fairly and impartially decide the cases.

If you are dissatisfied with an ALJ's decision, you can appeal that decision to [agency office/official]. Visit [link] for information on appealing an ALJ decision. [Agency office/official] may also review your case on [its/his or her] own initiative if there is an issue with the ALJ's decision.

For Further Information:

- Hiring Process: [link]
- Pay rates: [link]
- How cases are assigned to ALJs: [link]
- Communicating with administrative law judges (ex parte communications): [link]

- How to handle a judge with a conflict of interest (recusal and disqualification procedures): [link]
- How to appeal an administrative law judge decision: [link]
- Case processing goals: [link]
- How to report misbehavior by an administrative law judge and how your complaint will be handled: [link]

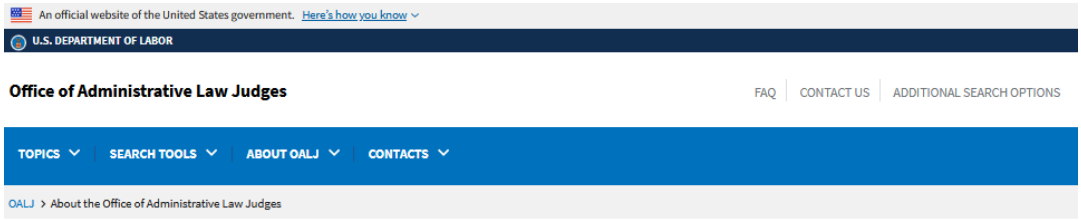
See also:

- Congress's rules governing ALJs: 5 U.S.C. §§ 554, 557, 3105, 4301, 5372, 7521
- OPM's regulations governing ALJs: 5 C.F.R. §§ 930.205, 930.206, 930.207, 930.211.
- EO 13,843 (giving agencies control over the hiring process of ALJs)

Appendix B – Examples of Current Agency Practices

Figure 1 – Department of Labor's Office of Administrative Law Judges

The Office of Administrative Law Judge's website provides an example of how to include some of the relevant information about adjudicators in plain-language text with citations.



About the Office of Administrative Law Judges

The Office of Administrative Law Judges (OALJ) is the administrative trial court for the United States Department of Labor. OALJ conducts hearings nationwide. The Department of Labor has the third largest administrative law judge (ALJ) office in the Federal government. OALJ is headquartered in Washington, DC, and has judges and staff located in eight district offices. ALJs are appointed under the U.S. Const. art. II, § 2, cl. 2 and the Administrative Procedure Act, 5 U.S.C. § 3105.

Mission

OALJ's mission is to provide a neutral forum to resolve labor-related administrative disputes before the Department of Labor in a fair, transparent and accessible manner, and to promptly issue sound decisions correct in law and fact.

Department of Labor ALJs adjudicate complaints and claims in a wide variety of cases. Cases where individuals seek benefits under the Black Lung Benefits Act, the Longshore and Harbor Workers' Compensation Act and the Defense Base Act constitute the largest part of the office's workload. ALJs also hear and decide cases arising from over 80 other labor-related statutes, Executive Orders, and regulations, including such diverse subjects as: whistleblower complaints involving corporate fraud and violations of transportation, environmental and food safety statutes; alien labor certifications; actions involving the working conditions of migrant farm laborers; grants administration relating to preparation of workers and job seekers to attain needed skills and training; prohibition of workplace discrimination by government contractors; minimum wage disputes; child labor violations; mine safety variances; OSHA formal rulemaking proceedings; federal contract disputes; civil fraud in federal programs; certain recordkeeping required by ERISA; and standards of conduct in union elections.

Values

- Respect – We treat everyone with dignity and respect.
- Expertise – Our decisions are based upon the competent application of the law to the facts of the case.
- The Rule of Law – We administer equal justice under the law and do equal right to the poor and to the rich by consistent and even application of the law to all.
- Integrity – We hold ourselves to the highest level of ethical standards.

Figure 2 – Department of Health and Human Service's Office of Medicare Hearings and Appeals

The Office of Medicare Hearings and Appeals' website shows a clear and intuitive way to organize information about adjudicators.

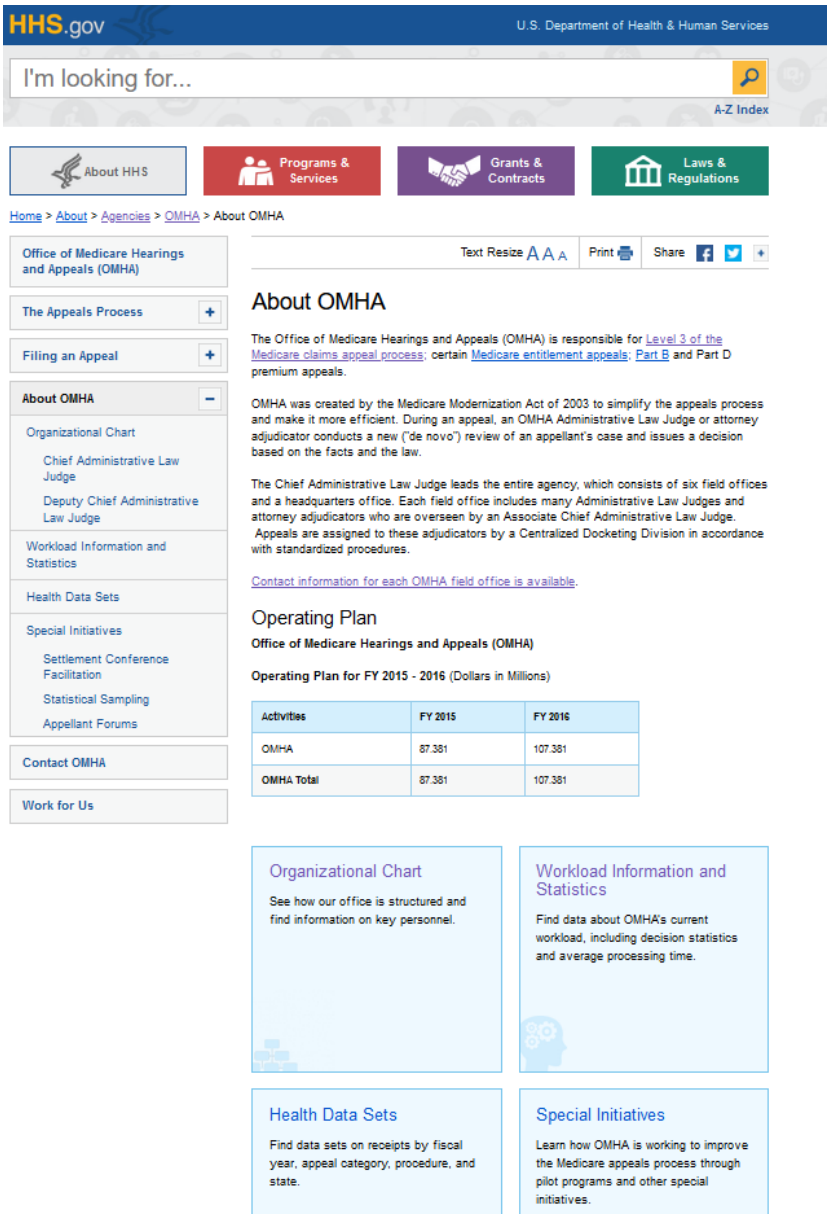
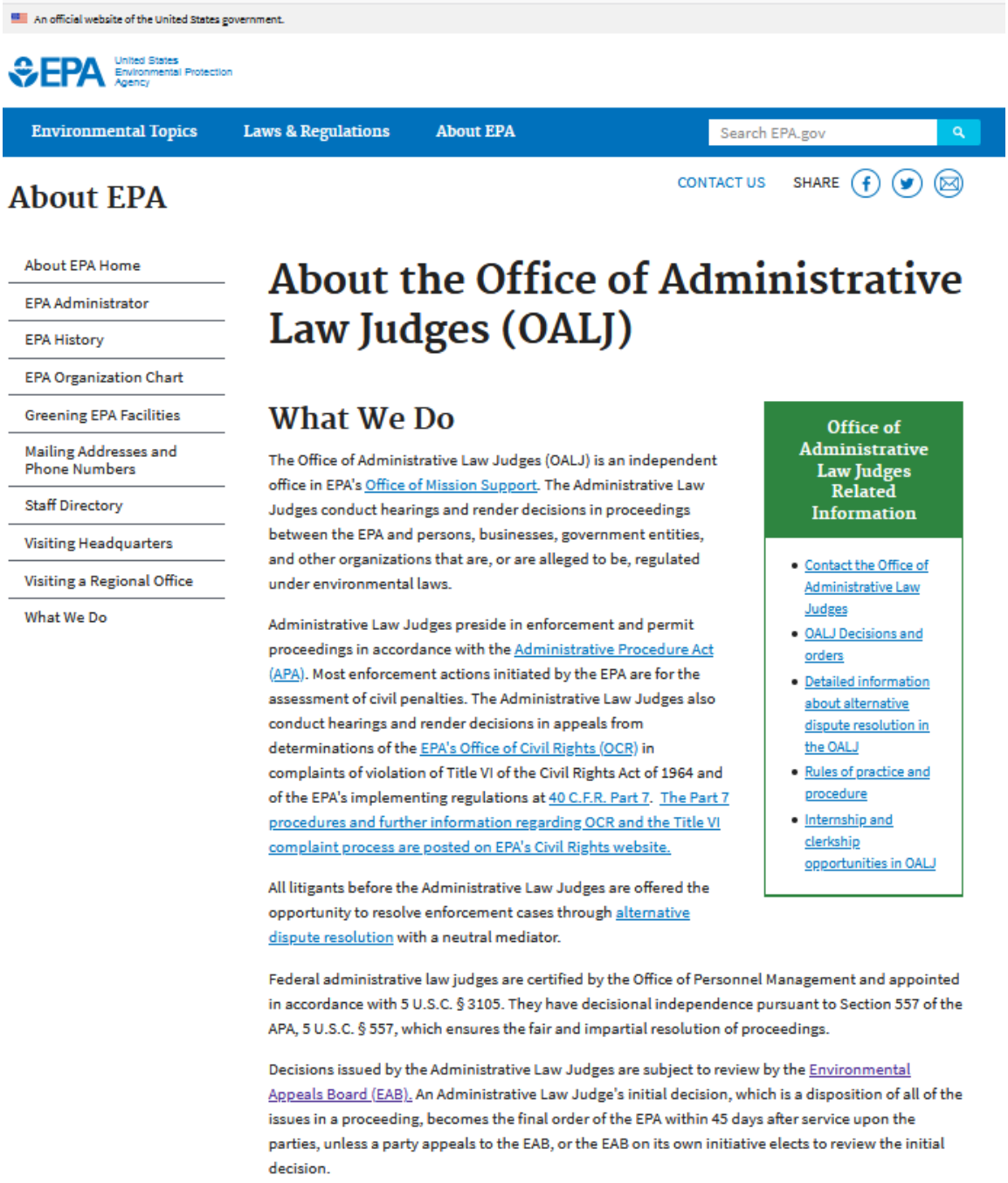


Figure 3 – Internal Revenue Service's Independent Office of Appeals

The Independent Office of Appeal's website presents an example of how agencies can use website text reassure the public about their independence and impartiality in plain language.

Figure 4 – Environmental Protection Agency's Office of Administrative Law Judges

The Office of Administrative Law Judges provides a good example of how an agency can synthesize a variety of disclosures about administrative adjudicators into a short, plain-language description.



Appendix C – Agency Disclosures Located For This Report

Key for Kinds of Disclosures:

JD = Job Duties
RA = Review of Adjudications
A&Q = Appointment and Qualifications
C = Compensation
E&S = Ex Parte Communications and Separation of Functions
O = Organizational
E = Evaluation
D&R = Discipline and Removal
M = Miscellaneous
S&A = Supervision and Assignment of Work
R/D = Recusal/Disqualification

Adjudicator	Information Available	Location of Information	Alternative Location of Info	Kind of Disclosure
ALJs				
All ALJs	Limited ex parte communications	5 U.S.C. § 554(d); 557(d)		E&S
	No one who has a role in investigation or enforcement can supervise an ALJ	5 U.S.C. § 554(d)		E&S
	ALJs cannot be involved in the investigative or prosecuting functions for an agency	5 U.S.C. § 554(d)		JD
	Cannot perform duties inconsistent with responsibilities as ALJs	5 U.S.C. § 3105	5 CFR § 930.207	JD
	ALJs assigned cases in rotation so far as is practicable	5 U.S.C. § 3105		S&A
	ALJs excepted from performance appraisals	5 USC § 4301	5 CFR § 930.206	E
	OPM controls pay	5 U.S.C. § 5372	5 CFR § 930.205	C
	Only removable for good cause	5 U.S.C. § 7521	5 CFR § 930.211	D&R
	EO 13843 - exempting ALJs from the competitive service and taking authority away from OPM to run their selection	https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service/	https://www.federalregister.gov/documents/2020/09/21/2020-17684/administrative-law-judges; https://chcoc.gov/content/executive-order-%E2%80%93-excepting-administrative-law-judges-competitive-	A&Q

			service; https://www.opm.gov/services-for-agencies/administrative-law-judges/opm-guidance-alj-loan-program-dated-august-1-2018.pdf	
	Senior administrative law judges pay	5 CFR § 930.209		C
	Senior administrative law judge appointments and terms	5 CFR § 930.209		A&Q
	Division of supervisory authority between OPM and agencies	5 CFR § 930.201		S&A
Social Security Administration - ALJ	Disqualification/Recusal	20 C.F.R. § 404.940; 20 C.F.R. § 416.1440	https://www.ssa.gov/OP_Home/hallex/I-02/I-2-1-60.html	R/D
	A prohibition on the representative, not the ALJ, communicating outside the normal course of business in a way that attempts to inappropriately influence the processing or outcome of claims	20 C.F.R. § 404.1740; 20 C.F.R. §416.1540		E&S
	Deputy Commissioner for Hearings Operations or his delegate chooses ALJS to conduct hearings	20 C.F.R. § 404.929; 20 C.F.R. § 416.1429		S&A
	ALJ can't serve on Appeals Council for a case where they have already been previously involved	20 C.F.R. § 422.205		R/D
	No ex parte contacts with ALJ for civil monetary penalties cases	20 C.F.R. § 498.205		E&S
	ALJ decisions are reviewed by the Appeals Council	20 CFR § 404.970; 20 CFR § 416.1470	https://secure.ssa.gov/apps10/poms.nsf/lnx/0203101001;	RA

	before the administrative process ends and the appeal proceeds to federal court		https://www.federalregister.gov/documents/2019/03/15/2019-04817/social-security-ruling-19-1p-titles-ii-and-xvi-effect-of-the-decision-in-lucia-v-securities-and; https://www.ssa.gov/OP_Home/rulings/oasi/33/SSR82-13-oasi-33.html	
	Description of how SSA deals with complaints about ALJ behavior	https://www.federalregister.gov/documents/2013/01/29/2013-01833/social-security-ruling-ssr-13-1p-titles-ii-and-xvi-agency-processes-for-addressing-allegations-of		D&R
	Division of Quality Service - receives/reviews/investigates allegations of ALJ misconduct	https://www.ssa.gov/OP_Home/hallex/I-01/I-1-8.html	https://secure.ssa.gov/apps10/poms.nsf/lnx/0203103300	D&R
	Division of Quality Review - pre-effectuation reviews of hearing level decisions and post-effectuation focused reviews	https://www.ssa.gov/OP_Home/hallex/I-03/I-3-0-20.html	https://secure.ssa.gov/apps10/poms.nsf/subchapterlist!openview&restricttocategory=02044	S&A
	Division of Quality Service can require mentoring, training, counseling, or disciplinary action for ALJs	https://www.federalregister.gov/documents/2013/01/29/2013-01833/social-security-ruling-ssr-13-1p-titles-ii-and-xvi-agency-processes-for-addressing-allegations-of		D&R
Office of Medicare Hearings and Appeals (HHS) - ALJ	Organizational Chart	https://www.hhs.gov/about/agencies/omha/about/organizational-chart/index.html		O
	Process for hiring ALJs post-new EO	https://www.hhs.gov/sites/default/files/alj-		A&Q

		appointment-process.pdf		
	Secretary provides ALJs with continuing education training	42 USC § 1395ff		S&A
	ALJs not allowed to review a national coverage determination	42 USC § 1395ff		JD
	In certain kinds of cases, the commissoner of social security assigns cases to ALJs	42 USC § 406		S&A
	ALJ decisions are reviewable by the Medicare Appeals Council, which is in the Departmental Appeals Board of HHS	42 USC § 1395ff	42 CFR § 405.904; https://www.hhs.gov/about/agencies/omha/the-appeals-process/level-4/index.html; https://www.federalregister.gov/documents/2020/09/17/2020-20550/medicare-program-administrative-law-judge-hearing-program-for-medicare-claim-and-entitlement-appeals	RA
	In civil monetary cases, chair of the departmental appeals board designates which ALJ conducts hearing	42 CFR § 422.1024		S&A
	Recusal standards	42 CFR §§ 405.1026; 422.1026; 423.2026; 423.1026; 498.45		R/D
	Rules and regs binding on ALJs	42 CFR § 423.2063		M
	In LCD review, no ex parte contacts allowed	42 CFR § 426.406		E&S
	Adjudication time frames	42 CFR § 1016; 42 CFR § 2016	https://www.hhs.gov/sites/default/files/ocpm-adjudication-time-frames-case-prioritization-and-	M

			escalations-07-12-2019.pdf	
	How OMHA prioritizes cases	https://www.hhs.gov/sites/default/files/ocpm-adjudication-time-frames-case-prioritization-and-escalations-07-12-2019.pdf		M
	Job descriptions for everyone in OMHA including ALJs and who they supervise	https://www.federalregister.gov/documents/2005/06/23/05-12468/office-of-medicare-hearings-and-appeals-statement-of-organization-functions-and-delegations-of	https://www.federalregister.gov/documents/2011/04/11/2011-8356/statement-of-organization-functions-and-delegations-of-authority	O
Department of Labor - ALJ	Whole website page on ALJs post-Lucia and how the agency is dealing with it; also posted resumes of a bunch of ALJs appointed after 2018's EO	https://www.dol.gov/agencies/oalj/topics/information/Proactive_disclosures_ALJ_appointments		A&Q
	Notice on procedures for appointing ALJs post-EO	https://www.federalregister.gov/documents/2018/08/30/2018-18924/procedures-for-appointment-of-administrative-law-judges-for-the-department-of-labor		A&Q
	Organizational Chart	https://www.dol.gov/sites/dolgov/files/OALJ/OALJ_OrgChart.pdf		O
	Prohibition on ex parte communications	29 CFR § 18.14	https://www.dol.gov/agencies/oalj/contacts/ADDRESS	E&S
	Every judge working in each office	https://www.dol.gov/agencies/oalj/contacts/ADDRESS		O
	Chief judge assigns ALJs to cases	29 CFR § 18.12		S&A
	Disqualification/Recusal	29 CFR § 18.16	https://www.dol.gov/agencies/oalj/about/FAQ15	R/D

	Some ALJ decisions can be reviewed by the Secretary (ALJs review cases under over 80 statutes and each statute determines the process for review of ALJ decisions but I have included a few examples); ARB also has authority to review	29 CFR § 18.95	29 USC § 1813; 29 USC § 3246; https://www.federalregister.gov/documents/2020/03/06/2020-04019/secretarys-order-01-2020-delegation-of-authority-and-assignment-of-responsibility-to-the	RA
	Postings of ALJ positions including qualifications	https://www.federalregister.gov/documents/2019/04/23/2019-08092/vacancy-posting-for-a-district-chief-administrative-law-judge		A&Q
National Labor Relations Board - ALJ	Organizational Chart	https://www.nlrb.gov/about-nlrb/who-we-are/organization-chart		O
	Listing of every ALJ and in which office they work and their backgrounds	https://www.nlrb.gov/about-nlrb/who-we-are/division-judges/division-judges-directory		O
	Their target metric for ALJ improvement is speed of deciding cases in their Performance and Accountability report	https://www.nlrb.gov/sites/default/files/attachments/pages/node-130/nlrb-par-2019-design-508.pdf		E
	Trial ALJ is not allowed to be selected by the chief ALJ as a settlement judge for the same case	https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/ulp-manual-september-2020.pdf		R/D
	ALJ assigned to each case by Chief Judge or Deputy or Associate Chief Judge	29 CFR § 102.34	https://www.nlrb.gov/sites/default/files/attachments/pages/node-82/alj-bench-book-2020.pdf	S&A
	Rules for ex parte communications	29 CFR §§102.126-102.134	https://www.nlrb.gov/sites/default/files/attachments/pages/node-82/alj-bench-book-2020.pdf	E&S

	Disqualification/Recusal	29 CFR § 102.36	https://www.nlrb.gov/sites/default/files/attachments/pages/node-82/alj-bench-book-2020.pdf	R/D
	ALJ can't advise or consult with the Board on certain subjects	29 USC § 154		JD
	ALJ decisions on unfair labor practice cases are reviewed by the Board members and can't be reviewed by anyone else	29 USC § 154; 29 CFR § 101.12	https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/guide-to-board-procedures-2020-august-2020-final.pdf	RA
	If Board has fewer than three members, Chief ALJ has authority over appointment or transfer	https://www.federalregister.gov/documents/2011/11/29/2011-30699/order-contingently-delegating-authority-to-the-chairman-the-general-counsel-and-the-chief		A&Q
	If Board has fewer than three members, Chief ALJ has authority over demotion or discharge of any ALJ	https://www.federalregister.gov/documents/2011/11/29/2011-30699/order-contingently-delegating-authority-to-the-chairman-the-general-counsel-and-the-chief		D&R
Occupational Safety and Health Review Commission - ALJ	List of ALJs, where they work, and their backgrounds	https://www.oshrc.gov/about/administrative-law-judges/		O
	Organizational Chart	https://www.oshrc.gov/assets/1/6/Org_Chart_Aug_10,_2020.pdf		O
	Tracking ALJ rates of processing cases and trying to speed them up (not clear that this has any impact on individual ALJ's employment outcomes)	https://www.oshrc.gov/assets/1/6/2018-2022_Strategic_Plan_February_12_2018.pdf		E

	ALJs are provided with training	https://www.oshrc.gov/assets/1/6/2018-2022_Strategic_Plan_February_12_2018.pdf		S&A
	No ex parte communications	29 CFR § 2200.105	https://www.oshrc.gov/assets/1/6/Commission_Rules_with_TOC_for_website%5Eupdated_100419.pdf; https://www.oshrc.gov/guide-simplified-proceedings/	E&S
	Chief ALJ assigns cases to ALJ	https://www.oshrc.gov/assets/1/6/Guide_to_Review_Commission_Procedures_-_October_2019.pdf		S&A
	ALJ decisions are reviewed by the Commission if appealed	29 USC § 661	29 CFR § 2200.92; https://www.oshrc.gov/about/how-oshrc-works/	RA
	Disqualification/Recusal	29 CFR § 2200.68	https://www.oshrc.gov/assets/1/6/Commission_Rules_with_TOC_for_website%5Eupdated_100419.pdf	R/D
	ALJs have to be paid at least GS-16	29 USC § 661		C
	Chairman is in charge of appointing ALJs	29 USC § 661		A&Q
AJs				
Board of Veterans' Appeals - Veterans Law Judge	Organizational Chart (shows that there is quality review in there)	https://www.bva.va.gov/docs/Board_of_Veterans_Appeals_Organizational_Chart.pdf		O
	Description of hiring process for judges	https://www.blogs.va.gov/VAntage/53175/president-trump-approves-appointment-four-additional-judges-vas-board-veterans-appeals/		A&Q
	Performance incentives can be awarded to judges by reason of that member's service if	38 USC § 7101		C

	the Chairman determines they deserve it			
	Appointment	38 USC § 7101A		A&Q
	Pay	38 USC § 7101A		C
	Performance Reviews	38 USC § 7101A	https://www.federalregister.gov/documents/2003/02/10/03-3040/appeals-regulations-title-for-members-of-the-board-of-veterans-appeals	E
	Judge who made the original decision cannot participate in reconsideration	38 USC § 7103		R/D
	Bound by regulations of the Department, instructions of the Secretary, and precedent opinions of the chief legal officer of the Department	38 USC § 7104		M
	Board is the final appellate body in the Department and decisions can be appealed to federal court (Chairman can order a reconsideration, but Board still does the reconsideration)	38 USC § 7103	38 CFR § 20.1100; https://www.bva.va.gov/docs/Decision_Review_Process_Slides.pdf	RA
	Chairman assigns proceedings to judges	38 CFR § 20.106	38 CFR § 20.604	S&A
	Disqualification/Recusal	38 CFR § 20.107		R/D
	Appellants fill out a form at the end of their hearing to help assess effectiveness of current hearing procedures; agency also solicits information from veterans through calls	https://www.federalregister.gov/documents/2014/12/29/2014-30347/agency-information-collection-board-of-veterans-appeals-customer-satisfaction-with-hearing-survey	https://www.federalregister.gov/documents/2014/01/17/2014-00895/agency-information-collection-board-of-veterans-appeals-voice-of-the-veteran-appellant-surveys	E
	Description of qualifications	https://www.federalregister.gov/documents/		A&Q

		2003/02/10/03-3040/appeals-regulations-title-for-members-of-the-board-of-veterans-appeals		
Executive Office for Immigration Review - Immigration Judge	Suggests there are case processing goals	https://www.justice.gov/eoir/about-office		E
	Pay rates table	https://www.justice.gov/eoir/page/file/1236526/download		C
	Names and bios on a number of judges (not all)	https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios		O
	Locations of all the immigration judge offices and which judges work at each	https://www.justice.gov/eoir/eoir-immigration-court-listing		O
	Organizational Chart	https://www.justice.gov/eoir/eoir-organization-chart/chart		O
	Board of Immigration Appeals hears appeals from Immigration Judges	8 CFR § 1003.10	https://www.justice.gov/eoir/page/file/1258536/download; https://www.federalregister.gov/documents/2019/07/23/2019-15553/agency-information-collection-activities-proposed-collection-comments-requested-notice-of-appeal	RA
	Describes some ways the EOIR is separate from other agencies	https://www.justice.gov/eoir/page/file/1258536/download		E&S
	How to raise a concern regarding conduct of Immigration Judge	https://www.justice.gov/eoir/page/file/1258536/download		D&R
	No ex parte contacts	https://www.justice.gov/eoir/page/file/1258536/download	https://www.justice.gov/eoir/page/file/1196341/download; https://www.justice.go	E&S

			v/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf	
	Discipline process for improper conduct	https://www.justice.gov/eoir/page/file/1039481/download	https://www.justice.gov/eoir/page/file/1100951/download	D&R
	Rules for conduct including not practicing law in front of federal agencies, not participating in matters where they have a financial interest, not accepting compensation from other sources, etc.	https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf		M
	Statistics about complaints about IJs	https://www.justice.gov/eoir/page/file/1100976/download		D&R
	Performance evaluations exist	8 CFR § 1003.0	https://www.justice.gov/sites/default/files/eoir/legacy/2009/06/04/EOIRs22ImprovementsProgress060509FINAL.pdf	E
	To work at EOIR you have to be a US citizen	8 CFR § 1003.0		A&Q
	Chief Immigration Judge assigns work/cases to IJs	8 CFR § 1003.9		S&A
	Attorney General appoints IJs	8 CFR § 1003.10		A&Q
	Some discussion of the qualifications for being an IJ	https://www.federalregister.gov/documents/2014/07/11/2014-16279/designation-of-temporary-immigration-judges		A&Q
Patent Trial and Appeal Board - Administrative Patent Judge	Ex parte communications not allowed, with exceptions	37 CFR § 41.11	37 CFR § 42.5	E&S
	Extensive description of the process for	https://www.uspto.gov/sites/default/files/doc	35 USC § 6	S&A

	assigning cases to judges	uments/SOP%201%20R15%20FINAL.pdf		
	Judges provide list of conflicts to person assigning cases and judge is ultimately responsible for avoiding a conflict	https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf		R/D
	There is judicial review of decisions from inter partes reexamination proceedings and decisions arising out of interferences	35 USC § 141	37 CFR § 41.81; 37 CFR § 90.1; https://www.uspto.gov/web/offices/pac/mpep/mpep-1200.pdf	RA
	APJs appointed by Secretary of Commerce, have to have extensive patent legal experience before appointment	35 USC § 6	https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/ptab-inventors; https://www.youtube.com/watch?v=uJ_3Gx8hegU&feature=youtu.be	A&Q
	Description of hiring process	https://www.uspto.gov/sites/default/files/documents/ptab_brochure_v2_4_10_14.pdf		A&Q
	Training offered on teleworking/technology; discuss ongoing training on areas of patent law	https://www.youtube.com/watch?v=I_BD-Hl12tQ&feature=youtu.be		S&A
	There is a way for practitioners to report misconduct by a judge	37 CFR § 11.803		D&R
Environmental Protection Agency - Environmental Appeals Board Judge	There are only three of them currently, and their bios are posted	https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Frequently+Asked+Questions?OpenDocument#1		O
	No ex parte contact with parties including agency officials involved in prosecuting	40 CFR § 22.8		E&S
	EAB judges are appointed by the	40 CFR § 1.25	https://www.federalregister.gov/documents/	A&Q

	Administrator, have 12 year terms, and are eligible for re-appointment (also they are SES employees)		2020/08/21/2020-16257/streamlining-procedures-for-permit-appeals	
	Disqualification/recusal	40 CFR § 22.4		R/D
	Qualifications to be EAB judge	40 CFR § 1.25		A&Q
	Administrator can limit EAB's authority to interpret statutes or regulations through issuing his or her own binding legal interpretation	40 CFR § 1.25		M
	Most Board decisions are final, except for cases invovling penalty assessments against other federal agencies which can be appealed to the Administrator; can also appeal to federal court; however, EAB can refer any case to the Administrator that it deems appropriate to on civil penalties cases	40 CFR § 22.4	https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Frequently+Asked+Questions?OpenDocument#17	RA
	Normally there are four judges and cases are assigned to a random panel of three; they rotate which one of them serves as the lead judge for administrative matters, but no chief judge	https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/889f7aab01cf481c85257afd0054d515/$FILE/Practice%20Manual%20August%202013.pdf		S&A
Social Security Administration - Administrative Appeals Judge	Disqualification/Recusal	https://www.ssa.gov/OP_Home/hallex/I-03/I-3-1-40.html		R/D

	No ex parte contacts between Appeals Council and office of Inspector General in cases involving fraud	https://www.ssa.gov/OP_Home/hallex/I-03/I-3-10-1.html		E&S
	Appeals Council review is the end of the administrative review process, so their decisions are reviewed by federal courts	20 CFR § 404.981; 20 CFR § 416.1481	https://secure.ssa.gov/apps10/poms.nsf/lnx/0203101001; https://www.federalregister.gov/documents/2016/03/14/2016-05663/social-security-acquiescence-ruling-ar-16-17-boley-v-colvin-judicial-review-of-an-administrative-law	RA
	Case Assignment	https://www.ssa.gov/OP_Home/hallex/I-03/I-3-0-7.html		S&A
	Organizational chart	https://www.ssa.gov/org/ssachart.pdf		O
	Compensation	5 USC § 5372b		C
	Descriptions of all the roles in the Office of Appellate Operations	https://www.ssa.gov/org/orgOARO.htm#oao1		O
	Judges do work other than adjudicate: quality review, policy interpretations, and court-related functions	https://www.ssa.gov/appeals/about_ac.html		JD
Department of Labor - Administrative Appeals Judge at Administrative Review Board (ARB) and Benefits Review Board (BRB)	For Benefits Review Board, Secretary appoints the AAJs and designates one as chairman	33 USC § 921	https://www.dol.gov/agencies/brb/mission; 20 CFR § 801.201	A&Q
	BRB decisions are appealed to federal court	33 USC § 921	20 CFR § 802.410; https://www.dol.gov/agencies/brb/mission; https://www.federalregister.gov/documents/	RA

			2006/01/25/06-696/delegation-of-authority-and-assignment-of-responsibility-to-the-benefits-review-board	
	Secretary of Labor promulgates rules that govern BRB	20 CFR § 801.104		M
	Disqualification of AAJs at BRB	20 CFR § 801.203		R/D
	ARB reports to the Secretary of Labor	https://www.federalregister.gov/documents/2020/03/06/2020-04019/secretarys-order-01-2020-delegation-of-authority-and-assignment-of-responsibility-to-the		O
	ARB consists of five members, one of whom is Chair and another is Vice Chair	https://www.federalregister.gov/documents/2020/03/06/2020-04019/secretarys-order-01-2020-delegation-of-authority-and-assignment-of-responsibility-to-the		O
	Secretary has the authority to remove any ARB member at any time	https://www.federalregister.gov/documents/2020/03/06/2020-04019/secretarys-order-01-2020-delegation-of-authority-and-assignment-of-responsibility-to-the		D&R
	ARB members have terms of four years or less but can be extended by the Secretary	https://www.federalregister.gov/documents/2020/03/06/2020-04019/secretarys-order-01-2020-delegation-of-authority-and-assignment-of-responsibility-to-the		A&Q
	Secretary has discretion to review ARB decisions and	https://www.federalregister.gov/documents/2020/03/06/2020-		RA

	ARB may refer cases to the Secretary	04019/secretarys-order-01-2020-delegation-of-authority-and-assignment-of-responsibility-to-the		
	Qualifications for ARB Members	https://www.federalregister.gov/documents/2019/10/03/2019-21487/vacancy-posting-for-a-member-of-the-administrative-review-board	https://www.federalregister.gov/documents/2020/03/19/2020-05698/vacancy-posting-chair-of-the-administrative-review-board	A&Q
	Recently removed the formal, multi-step process for making appointments to BRB and ARB	https://www.federalregister.gov/documents/2020/03/06/2020-04020/secretarys-order-02-2020-procedures-for-appointment-of-individuals-to-department-of-labor-appellate	old system: https://www.federalregister.gov/documents/2018/07/27/2018-16127/secretarys-order-05-2018	A&Q
	Both agencies are excepted from competitive service	https://www.federalregister.gov/documents/2020/03/06/2020-04274/excepted-service-consolidated-listing-of-schedules-a-b-and-c-exceptions		A&Q
	BRB members have indefinite terms subject to the discretion of the Secretary	https://www.federalregister.gov/documents/2006/01/25/06-696/delegation-of-authority-and-assignment-of-responsibility-to-the-benefits-review-board		A&Q
	BRB qualifications	https://www.federalregister.gov/documents/2019/05/02/2019-08900/vacancy-posting-for-a-member-of-the-benefits-review-board		A&Q
Department of Agriculture - National Appeals Division	Organizational chart and locations	https://www.nad.usda.gov/content/organization		O

Administrative Judge				
	AJs appointed by Office of Hearings and Appeals Director	https://www.nad.usda.gov/content/organization	7 USC § 6992; 7 CFR § 2.34	A&Q
	Suggests that quality control exists but provides no detail	https://www.nad.usda.gov/content/organization		E
	Case processing goals exist	https://www.nad.usda.gov/sites/default/files/pictures/oha_strategic_plan_8-28-18_final.pdf		E
	No ex parte contacts	7 USC § 6997	7 CFR § 11.7; https://www.nad.usda.gov/content/common-appeal-related-questions	E&S
	Director assigns AJs to cases	7 CFR § 11.8	https://www.nad.usda.gov/content/common-appeal-related-questions	S&A
	Statute mandates independence of NAD from the rest of DOA except for the Secretary and Deputy Secretary	7 USC § 6992		E&S
	No members of the division may be political appointees	7 USC § 6992		A&Q
	Director reviews decisions by AJs	7 USC § 6998	7 CFR § 11.9; https://www.nad.usda.gov/sites/default/files/pictures/nad-guide-oct-2008.pdf	RA
	Description of positions that supervise AJs	7 CFR § 11.22		O
	NAD collects customer survey info on the quality of AJs	https://www.federalregister.gov/documents/2013/09/25/2013-23305/submission-for-omb-review-comment-request		E
U.S. Citizenship and Immigration Services - Administrative	Case processing goals and whether they were met	https://www.uscis.gov/administrative-appeals/aao-processing-times		E

Appeals Officer				
	Not independent of parent agency and applies agency policies and legal interpretations	https://www.uscis.gov/tools/aao-practice-manual/chapter-1-the-administrative-appeals-office		E&S
	Cannot discuss the merits of a case	https://www.uscis.gov/administrative-appeals/aao-practice-manual/chapter-6-contacting-the-administrative-appeals-office#6.1c		E&S
Internal Revenue Service - Appeals Officer	Organizational chart	https://www.irs.gov/pub/irs-utl/appeals-org-structure.pdf		O
	Appeals team manager assigns case to appropriate appeals officer	https://www.irs.gov/pub/irs-utl/welcome_to_appeals_final_script.pdf		S&A
	Ex parte communications prohibition (extensive)	https://www.irs.gov/irm/part8/irm_08-001-010		E&S
	Restrictions on outside speeches and articles for publication	https://www.irs.gov/irm/part8/irm_08-001-001		M
	Description of Appeals Quality Measurement System	https://www.irs.gov/irm/part8/irm_08-001-007		E
	Appeals Office decision is generally reviewable in federal court	26 CFR § 301.7430-1	https://www.irs.gov/pub/irs-pdf/p1.pdf	RA
	Appeals Office is designed to be independent and report only to Commissioner of Internal Revenue	26 USC § 7803	https://www.irs.gov/appeals/appeals-an-independent-organization	E&S
	Appeals Officers report to Chief of Appeals	26 USC § 7803		O
Merit Systems Protection Board -	Office of Regional Operations reviews AJ decisions for	https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber		E

Administrative Judge	quality, timeliness, consistency with law, regulations, and policy	=1279407&version=1284518&application=ACROBAT		
	Fraud/waste/abuse/mismanagement, etc. of MSPB employees are reported to the Inspector General	https://www.mspb.gov/contact/ig.htm		D&R
	Organizational chart	https://www.mspb.gov/About/organization.htm		O
	They're starting to track reversals and remands caused by AJ error or oversight	https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1699796&version=1705740&application=ACROBAT		E
	Case processing goal: try to adjudicate all appeals in 120 days of receipt	https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=241913&version=242182&application=ACROBAT		E
	Chief AJ assigns cases to AJs	https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=241913&version=242182&application=ACROBAT		S&A
	Disqualification/recusal	5 CFR § 1201.42	https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=241913&version=242182&application=ACROBAT	R/D
	Quality review: every decision written by an AJ at GS-14 or lower must be reviewed prior to issuance by CAJ; complex cases by GS-15s are reviewed pre-issuance but less complex cases reviewed post-issuance	https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=241913&version=242182&application=ACROBAT		S&A
	AJs are paid on the GS scale	https://www.mspb.gov/mspbsearch/viewdocs		C

		.aspx?docnumber=241913&version=242182&application=ACROBAT		
	Ex parte communications are prohibited if they involve the merits of the case or if a written submission is required (extensive discussion)	5 CFR § 1201.102	https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=241913&version=242182&application=ACROBAT	E&S
	MSPB decisions are reviewed in federal court	5 USC § 7703	5 CFR § 1201.127; https://www.mspb.gov/appeals/appeals.htm#jr; https://www.federalregister.gov/documents/2000/03/10/00-5903/opportunity-to-file-amicus-briefs-in-jerry-c-sturdy-v-department-of-the-army-mspb-docket-no	RA
	Appointment of personnel for the Board are not subject to approval or supervision of OPM or the Executive Office of the President	5 USC § 1204		A&Q

Appendix D – Excerpts of ACUS Report and Law Review Articles

Administrative Conference of the United States

NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL

Final Report, Updated: September 24, 2018

This updated version of the report includes a note at page 18 from the Office of the Chairman identifying a correction recommended by an agency official.

Kent Barnett*

Malia Reddick**

Logan Cornett***

Russell Wheeler****

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

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Aside from defining the standard for removal, the regulation can clarify, to the extent permitted by law,[194] how the agency will decide whether to remove non-ALJs. Questions to consider include who should make the removal decision, such as other non-ALJs within the agency, non-ALJ supervisors, the head of the agency, a panel of individuals outside of the agency (such as judges from other agencies, regulated parties, and agency officials), or some combination of these possibilities. A panel format requires agreement from a majority of participants who have different interests in administrative adjudication, such as a mix of non-ALJs, regulated parties, and supervisors.[195] But different agencies have different resources, needs, and forms of adjudication that may make other options more suitable. Even a panel of the agencies' non-ALJs alone can provide internal monitoring and is common in other adjudicatory contexts.[196] Agencies will also want to consider how the non-ALJ can respond to the threatened removal and the benefits of requiring specific findings and reasons for removal to guard against impermissible factors affecting the removal decision.[197]

Agencies will want to consider how to protect non-ALJs who perform duties other than adjudication. The types of other duties vary and thus present different concerns, but it may behoove agencies to consider consolidating adjudication functions into as few agency officials as possible to limit the reach of for-cause protections and, as discussed earlier, to limit the duties that non-ALJs may perform. Agencies should also consider how to account for the non-ALJs' other duties when defining which actions provide grounds for removal or other adverse action.

Because of the OPM's regulations and the MSPB's significant role in disciplinary actions, we encourage agencies to work with OPM and MSPB officials for advice and to consult their guidance materials to ensure that any action that agencies take to promote their non-ALJs' impartiality does not inadvertently conflict with other statutory or regulatory law.

D. Agency Transparency and Assessment

To further transparency, salience, and efficacy, agencies should consider using notice-and-comment rulemaking when promulgating provisions that concern non-ALJ independence.

Promulgating notice-and-comment rules that concern non-ALJ hiring, oversight, and discipline and removal can encourage transparency and binding effect for non-ALJs' protections. Of course, agency rules concerning personnel policies are not subject to notice-

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[194] *See, e.g.*, 5 U.S.C. §§ 7513(b) & (c), 4303(b)–(d), 7701(a). For guidance on the removal and discipline process, see *Adverse Actions*, *supra* note 7, which describes the full process in detail with references to legal authority.

[195] To further separation of functions, we do not recommend including agency officials that prosecute or investigate on behalf of the agency.

[196] As ACUS has recognized, multi-judge peer-review panels, despite inherent concerns over self-interest or peer-protection, are common for judicial discipline or removal in state judicial settings. *See* VERKUIL ET AL., *supra* note 27, at 1027. In state settings, disciplinary panels typically include both attorneys and nonattorneys as well.

[197] *See, e.g.*, 28 C.F.R. § 600.7(d) ("The Attorney General shall inform the Special Counsel in writing of the specific reason for his or her removal.").

and-comment requirements under the APA,[198] and thus agency personnel matters, like the DOJ regulation concerning special counsel, are usually addressed in interpretative rules or other less formal formats. In many instances, notice-and-comment would be of little value because the public would have little information or expertise to provide thorough comments and the personnel policies are not especially useful or important to those outside the agency. But because non-ALJs' independence may affect the public, voluntarily using notice-and-comment rulemaking—as agencies do in other contexts[199]—makes sense for personnel matters related to non-ALJs' independence. To be sure, the use of notice-and-comment rulemaking has costs (both as to time and money), but it provides numerous benefits. Rulemaking provides more awareness of non-ALJs' status than less formal action. Relatedly, because an agency must use notice-and-comment procedures to amend or repeal a rule, notice-and-comment rulemaking facilitates public awareness of any amendment or repeal. The public, including regulated parties who are directly affected by Non-ALJ Hearings, may also be able to provide useful comments as part of the rulemaking process and thereby improve the agency's internal governance in the sensitive area of agency adjudication, where agencies must balance fairness concerns with the agency's ability to achieve its statutory mission. The comment period may also give other agencies the opportunity to share insights as to how it promotes non-ALJ impartiality, providing the agency the chance to learn from other agencies. Finally, the rulemaking process requires agencies to produce a concise explanation of the agency's rules, providing transparency as to the agency's reasoning.

All this said, ACUS has previously recommended that agencies use procedural regulations that are published in the Federal Register and the Code of Federal Regulations but exempt from notice and comment.[200] Procedural regulations may be most appropriate when agencies grant non-ALJs strong forms of independence, as we discuss here. The public is likely to agree with the agency's action, thereby diminishing the value of soliciting comments.

As a final matter, transparency and certainty over non-ALJs' independence matters not only to those outside the agency. The agency and the non-ALJs, too, can benefit from having concrete protections, prohibitions, and guidance in place

Agencies' posting their rules with their other adjudication materials on their websites can provide additional and continuous transparency and awareness.[201] Agencies, too, might clearly title their rules or the website links to help the public review provisions designed to protect non-ALJs' independence. Moreover, providing a concise, easy-to-read summary of the relevant provisions to parties early in the litigation can promote nonagency parties' confidence in the Non-ALJ Hearings.

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[198] *See, e.g.*, 5 U.S.C. § 553(a)(2), (b)(3)(A) (exempting "a matter relating to agency management or personnel" from § 553).

[199] *See* 1 RICHARD PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.10, p. 669 (5th ed. 2010) (noting that agencies have often accepted ACUS recommendations to waive APA § 553(a)(2)'s exemption from notice-and-comment rulemaking).

[200] Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30102 (July 8, 1992).

[201] *See* ADMIN. CONFERENCE OF THE U.S., ADJUDICATION MATERIALS ON AGENCY WEBSITES, RECOMMENDATION 2017–1 (2017).

1-1-2018

Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal

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University of Georgia School of Law
Research Paper Series
Paper No. 2019-07

NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL†

Kent Barnett and Russell Wheeler***

This article republishes—in substantively similar form—our 2018 report to the Administrative Conference of the United States (ACUS) concerning federal agencies' adjudicators who are not administrative law judges (ALJs). (We refer to these adjudicators as "non-ALJ Adjudicators" or "non-ALJs.") As our data indicate, non-ALJs significantly outnumber ALJs. Yet non-ALJs are often overlooked and difficult to discuss as a class because of their disparate titles and characteristics. To obtain more information on non-ALJs, we surveyed agencies on non-ALJs' hearings and, among other things, the characteristics concerning non-ALJs' salaries, selection, oversight, and removal. We first present our reported data on these matters, which are the most comprehensive data to date on the non-ALJs' indicia of impartiality. We then provide suggested practices for agencies to promote non-ALJs' actual and apparent impartiality in presiding over agency hearings.

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† The report that we, along with assistance from Malia Reddick, Ph.D. and Logan Cornett of the Institute for the Advancement of the American Legal System, initially prepared for the Administrative Conference of the United States can be found at https://www.acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal-1. We deeply appreciate the efforts of the *Georgia Law Review* editors in assisting us in revising the article with a law-review audience in mind and helping our data reach a larger audience.

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** Visiting Fellow at The Brookings Institution and the President of The Governance Institute.

D. AGENCY TRANSPARENCY AND ASSESSMENT

1. To further transparency, salience, and efficacy, agencies might consider using notice-and-comment rulemaking when promulgating provisions that concern non-ALJ independence.

Promulgating notice-and-comment rules that concern non-ALJ hiring, oversight, and discipline and removal can encourage transparency and binding effect for non-ALJs' protections. Of course, agency rules concerning personnel policies are not subject to notice-and-comment requirements under the APA,[304] and thus agency personnel matters, like the DOJ regulation concerning special counsel, are usually addressed in interpretative rules or other less formal formats. In many instances, notice-and-comment would be of little value because the public would have little information or expertise to provide thorough comments and the personnel policies would not be especially useful or important to those outside the agency. But because non-ALJs' independence may affect the public, agencies voluntarily using notice-and-comment rulemaking—as agencies do in other contexts[305]—makes sense for personnel matters related to non-ALJs' independence. The use of notice-and-comment rulemaking has costs (both as to time and money), but it provides numerous benefits. Rulemaking provides more awareness of non-ALJs' status than less formal action.

Relatedly, because an agency must use notice-and-comment procedures to amend or repeal a rule, notice-and-comment rulemaking facilitates public awareness of any amendment or repeal. The public, including regulated parties who are directly affected by Non-ALJ Hearings, may also provide useful comments as part of the rulemaking process and thereby improve the agency's internal governance in the sensitive area of agency adjudication, where agencies must balance fairness concerns with the agency's ability to achieve its statutory mission. The comment period may give other agencies the opportunity to share insights as to how it promotes non-ALJ impartiality, providing the agency the chance to learn from other agencies. Finally, the rulemaking process requires

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[304] *See, e.g.*, §§ 553(a)(2), (b)(3)(A) (exempting "a matter relating to agency management or personnel" from § 553).

[305] *See* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.10, 669 (5th ed. 2010) (noting that some agencies have often accepted ACUS recommendations to waive APA § 553(a)(2)'s exemption from notice-and-comment rulemaking).

agencies to produce a concise explanation of the agency's rules, providing transparency as to the agency's reasoning.

All this said, ACUS has previously recommended that agencies use procedural regulations that are published in the Federal Register and the Code of Federal Regulations but exempt from notice and comment.[306] Procedural regulations may be most appropriate when agencies grant non-ALJs strong forms of independence, as we recommend above. The public is likely to agree with the agency's action, thereby diminishing the value of soliciting comments.

As a final matter, transparency and certainty over non-ALJs' independence matters not only to those outside the agency. The agency and the non-ALJs, too, can benefit from having concrete protections, prohibitions, and guidance in place.

Agencies' posting their rules with their other adjudication materials on their websites can provide additional and continuous transparency and awareness.[307] Agencies may clearly title their rules or the website links to help the public review provisions designed to protect non-ALJs' independence. Moreover, providing a concise, easy-to-read summary of the relevant provisions to parties early in the litigation can promote non-agency parties' confidence in the Non-ALJ Hearings.

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[306] *See* Recommendation 92-1: The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements, 57 Fed. Reg. 30101, 30102 (July 8, 1992) (explaining that procedural rules should be exempt from notice-and-comment rulemaking if they meet certain requirements).

[307] *See* Recommendation 2017-1: Adjudication Materials on Agency Websites, 82 Fed. Reg. 31039, 31039 (July 5, 2017) (explaining the factors agencies should consider when publishing material on their websites and emphasizing the benefits of public awareness and transparency).

2019

Some Kind of Hearing Officer

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SOME KIND OF HEARING OFFICER

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Abstract: In his prominent 1975 law-review article, "Some Kind of Hearing," Second Circuit Judge Henry Friendly explored how courts and agencies should respond when the Due Process Clause required—in the U.S. Supreme Court's exceedingly vague words—"some kind of hearing." That phrase led to the familiar *Mathews v. Eldridge* balancing test, under which courts weigh three factors to determine how much process or formality is due. But the U.S. Supreme Court has never applied *Mathews* to another, often ignored, facet of due process: the requirement for impartial adjudicators. As it turns out, Congress and agencies have broad discretion to fashion not only "some kind of hearing" but also some kind of hearing officer.

Scholars, Congress, and even federal agencies have largely ignored so-called "informal" agency hearings and the hearing officers who preside over them, despite their large number and significance. Unlike well-known administrative law judges, the lack of uniform treatment of and data on these federal hearing officers renders it difficult to monitor, compare, and improve the systemic design and fairness of informal hearings. To better understand this "hidden judiciary," this Article first reports, based on rare access to agencies, the most comprehensive empirical data assembled on those adjudicators' independence. The data confirm the significant variety of federal hearing officers and the lack of uniform impartiality protections. To improve data collection, transparency, and salience of these hearing officers, this Article proposes a disclosure framework—appropriated from consumer contexts—to detect, compare, and improve prophylaxes to protect hearing officers from improper agency influence.

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III. IMPARTIALITY DISCLOSURES

Federal hearing officers' impartiality protections are far from uniform or optimal, as measured against ALJs' impartiality protections. Because of the problems in gathering information on them, it is difficult to discuss their status and, if necessary, ensure optimal impartiality. As a remedy, this Part proposes that agencies should use uniform disclosures like those primarily used in consumer-commercial contexts. Disclosure regimes provide a mechanism for improving hearing officers' salience and indicia of impartiality. With improved salience, Congress will be in a better position as principal to determine whether government-wide legislation—perhaps via an "impartiality code"—is suitable.

To be sure, Congress has used various reporting requirements to oversee agencies, and some literature discusses the history and concerns over the utility and costs of those reports.[192] But the literature on consumer disclosure is a better guide for three reasons. First, the consumer-based literature is extremely well-developed theoretically and practically,[193] while the congressional-reporting literature tends to concentrate on congressional reporting within a specific subject-matter area or statutory scheme,[194] or, as especially true in the political-science literature, as part of a mix of congressional-oversight mechanisms.[195] Second, the impartiality disclosures are not only for Congress. Instead, they are for Congress, agencies, litigants, and scholars; in fact, my proposal does not call for direct reporting to Congress. Finally, unlike annual reports to Congress, which are often criticized for their cost and ineffectiveness, the proposed disclosure is an extremely concise document that does not require annual filing.

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192. *See, e.g.*, Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 66–67, 106 (2006) (discussing congressional reporting requirements). *See generally* Jonathan G. Pray, Comment, *Congressional Reporting Requirements: Testing the Limits of the Oversight Power*, 76 U. COLO. L. REV. 297 (2005) (discussing history and criticism of congressional reporting requirements).

193. *See infra* Section III.A.

194. *See generally* Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355 (1991); Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311 (1991); Joseph Carlton Elliott, Comment, *Sleeping with One Eye Open: The Result of Non-Transparent Oversight by the Office of Refugee Resettlement on Facilities Sheltering Unaccompanied Alien Children*, 68 ADMIN. L. REV. 153 (2016).

195. *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 128 (1999) (discussing broader relationship between Congress and Executive in policymaking); Beermann, *supra* note 192, at 66–67 (citing and discussing the political science literature on congressional monitoring).

A. Purposes of Impartiality Disclosures

Consumer law has long relied upon disclosure models to further various related objectives in numerous areas, including rent-to-own,[196] credit,[197] automobile-sales[198] and automobile-lease,[199] door-to-door,[200] securities,[201] and banking transactions.[202] Disclosures also have a prominent place in consumer privacy as to internet,[203] financial,[204] and health matters.[205] The same objectives in the commercial context can, as discussed in this Section, also apply to the impartiality context.

Consumer disclosure in a commercial context may not come to mind as a useful tool for improving adjudicatory procedure because consumer disclosure has a different primary purpose. In the consumer context, disclosure primarily promotes comparison shopping.[206] Or, in the absence of comparison shopping, disclosure can serve a market function, providing information to a sufficient number of well-informed consumers to lead the market, through competing suppliers, to offer consumers better terms.[207] These interrelated objectives are a primary animating feature of, among others, Truth in Lending (TILA)

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196. *See, e.g.*, N.Y. PERS. PROP. LAW § 501 (McKinney 2018) (requiring specific notice and particular terms of rental agreement).

197. Truth in Lending Act, 15 U.S.C. §§ 1601–1602 (2018) (requiring specific disclosures for credit transactions).

198. *See, e.g.*, Motor Vehicle Information & Cost Savings Act, 49 U.S.C. §§ 32701–32705 (2018) (requiring disclosure of odometer readings); 16 C.F.R. § 455 (2018) (requiring disclosures on window of cars for used-car sales); *id.* § 600 (requiring disclosures concerning fuel economy for new cars).

199. Consumer Leasing Act, 15 U.S.C. § 1667(a)–(f).

200. *See, e.g.*, 16 C.F.R. § 429.1 (requiring disclosure of consumer rights in a door-to-door sale, including right to cancel).

201. *See, e.g.*, Securities Exchange Act of 1934, 15 U.S.C. § 78l(b)(1) (requiring disclosure of numerous corporate details for securities registered on a national stock exchange for secondary trading); Securities Act of 1933, 15 U.S.C. §§ 77g, 77j (requiring disclosures for initial registration with the SEC).

202. *See, e.g.*, Truth in Savings Act, 12 U.S.C. §§ 4301–4303 (2018); Electric Fund Transfers, 12 C.F.R. § 1005.7 (2018) (disclosures related to debit transactions).

203. *See, e.g.*, CAL. BUS. & PROF. CODE § 22575 (West 2018) (requiring disclosure of online privacy policies).

204. *See, e.g.*, Graham-Leach-Bliley Act, 15 U.S.C. §§ 6801–6802 (requiring disclosures concerning financial privacy by financial institutions).

205. *See, e.g.*, 45 C.F.R. § 164.520 (2018) (requiring privacy notices to patients concerning health information).

206. *See* Jonathan M. Landers & Ralph Rohner, *A Functional Analysis of Truth in Lending*, 26 UCLA L. REV. 711, 713 (1979).

207. *See* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 668–69 (1979).

disclosures, which apply to numerous credit transactions.[208] Importantly for my purposes, this comparison-shopping purpose has only a tangential role for impartiality disclosure because agencies or Article I courts rarely compete with other tribunals for cases.[209]

But subsidiary purposes for consumer disclosure can be key for impartiality disclosure. First, disclosure can provide a synopsis of critical contractual provisions.[210] Indeed, this is one function of rent-to-own disclosures, which must set out monthly payments, purchase price, various fees, and additional information on the nature of the rental transaction.[211] For adjudicatory procedure, a disclosure regime can help assemble relevant terms and provide a synopsis of impartiality provisions. As indicated in Part II, the various indicia are not often transparently available, collected in one spot, or based on more than custom. The disclosures seek to cull the relevant criteria and provide a transparent mechanism for agencies, parties, interest groups, and Congress to understand and, if necessary, improve the protections for various kinds of hearing officers. For instance, just as securities disclosures can expose largely hidden underwriter or executive compensation,[212] impartiality disclosure can bring, say, problematic ex parte practices to light.

Second, consumer disclosures can provide a warning function to consumers that a particular term is far from ordinary. For instance, if a consumer determines that most credit for a particular purpose has an Annual Percentage Rate (APR) of 8%, a disclosed APR of 88% by one competitor will alert the consumer that something is amiss with the transaction.[213] Similarly, disclosure can reveal (to lawyers, if not parties) outlier adjudications that, say, do not have limitations on ex parte

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208. *See* 15 U.S.C. § 1601(a) ("It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . ."). Nonetheless, many argue that disclosure largely fails at achieving these purposes because of consumers' inability or disinterest in using disclosed information. *See, e.g.*, OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 183–84 (2014).

209. The most prominent exceptions are certain commodities-related disputes at issue in *CFTC v. Schor*, 478 U.S. 833, 836–37 (1986), or certain tax disputes. *See* David F. Shores, *Deferential Review of Tax Court Decisions:* Dobson *Revisited*, 49 TAX LAW. 629, 629 (1996) (discussing competition between the Tax Court, federal district courts, and the U.S. Court of Federal Claims).

210. *See* JOHN A. SPANOGLE ET AL., CONSUMER LAW: CASES AND MATERIALS 266 (4th ed. 2013).

211. *See, e.g.*, CAL. CIV. CODE § 1812.621 (West 2018) (describing purpose of disclosures and other provisions as "ensuring that consumers are adequately informed of all relevant terms" and "protected from misrepresentations and unfair dealings").

212. *See* Dalley, *supra* note 43, at 1096.

213. *See* Landers & Rohner, *supra* note 206, at 737.

communications or recusal requirements. It may be that a critical characteristic of independence is justifiably absent for a set of hearing officers. But the disclosures can ensure that the indicium's absence is not merely the result of agency or congressional carelessness. To further this warning function, the disclosures must be relatively uniform to permit comparison of similar transactions or forms of agency action, and they must present important information in a salient way.[214]

Relatedly, if concerns arise over particular adjudications, the disclosures can help identify missing impartiality protections that may help mitigate those concerns. This divergence between optimal impartiality protections and those that the adjudicator has can reveal an "impartiality gap." Recall, for instance, two of our introductory examples.

The SEC ALJs have APA impartiality protections, and thus they have optimal impartiality protections as measured against the APA's provisions. But concerns over internal pressure at the SEC to rule for the agency suggests that the APA's provisions do not guarantee impartiality or freedom from agency pressure. To mitigate concerns over interagency pressure, the SEC could provide additional physical separation for its ALJs from the rest of the agency.

Immigration judges, as a second example, have many of the recommended protections including hiring qualifications, prohibitions on other functions and ex parte communications, physical separation, and the lack of eligibility for bonuses. But they are subject to performance reviews, and they lack special protection from removal.[215] The current concern is that these performance reviews are not crafted to divorce substantive outcomes in decided cases from the performance review and any discipline that may follow.[216]

Impartiality gaps may seem obvious for high-profile adjudications like those for the SEC or for immigration matters. But even with high-profile examples, the identification of impartiality gaps can help focus attention on the specific nature of the problem, such as the nature of performance appraisals and the lack of defined protection from at-will removal, within the larger context of administrative adjudication. For less salient adjudications, these disclosures may be the only way in which the absence of impartiality protections comes to light. For instance, the 535 Decision Review Officers for the VA have no

214. *See id.* at 738.

215. ACUS Response Spreadsheet, Types of Non-ALJs (on file with author).

216. *See id.*

prohibitions on ex parte communications, no separations of functions, no physical separation, performance appraisals, and no especial protection from at-will removal.[217] These missing protections suggest a significant impartiality gap that may otherwise go unnoticed.

Third, consumer disclosure creates trust between parties to an agreement. This practice furthers dignitary interests by allowing consumers the opportunity to read and understand the nature of the transactions.[218] This value may be more pronounced in the impartiality context.[219] With process, the regulated individuals may have no choice about the process or tribunal. But disclosure can ensure that the government recognizes the individual's interest in understanding the nature of the adjudication, and it can improve the individual's and public's trust in agency action by removing concern over inadvertently or purposefully opaque procedure. The clarity that disclosure provides may be especially useful in a context in which the hearing officers often have the title "judge" but lack protections that laypeople and even lawyers would presuppose. That said, as discussed in Section III.C, disclosure will improve litigants' satisfaction with negative outcomes and thereby create public trust only if a disclosure reveals well-conceived impartiality protections or if disclosure of lackluster impartiality provisions nudges the agency towards adopting them.

Fourth, consumer disclosure can guide consumers towards certain normative preferences. For instance, Congress determined that its longstanding required word-based warnings on tobacco products were not effectively countering consumers' biases or miscalculation of tobacco's health risks.[220] To account for consumers' insufficient appreciation of health risks, Congress replaced those warnings with graphic pictures of lung disease to invoke an emotional response in potential tobacco users.[221] In the procedural context, the agency may not

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217. *Id.*

218. *See, e.g.*, Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 734–35 (2011) (discussing asserted dignitary value to disclosure and related authorities); *cf.* Richard W. Bourne, *Medical Malpractice: Should Courts Force Doctors to Confess Their Own Negligence to Their Patients*, 61 ARK. L. REV. 621, 623 (2009) (considering the disclosure of professional errors to affected patients).

219. *See* David Aaron, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor's Duty to Disclose Nonevidentiary Information*, 67 FORDHAM L. REV. 3005, 3015 (1999) (noting government's responsibility to protect dignitary interests in criminal law because of the government's role as representing society).

220. *Id.*

221. Ryan Bubb, *TMI? Why the Optimal Architecture of Disclosure Remains TBD*, 113 MICH. L. REV. 1021, 1028–36 (2015) (discussing the Family Smoking Prevention and Tobacco Control Act of 2009, 21 U.S.C. § 387 (2018)).

need to ascertain risks in the same ways as a potential smoker might. But the APA and the Court's due process jurisprudence suggest that agencies provide optimal independence for hearing officers when they address hearing officers' hiring, pay, removal, and decisionmaking process. Disclosures can encourage agencies to adopt optimal process by creating a mechanism for public shame if their hearing officers' structured independence deviates from optimal and—if the disclosure is effective—more standardized design. Even without shame, disclosure can help channel "herd behavior"—getting agencies to follow what they perceive others to be doing.[222] This herding can mitigate some concerns over agencies lacking expertise in designing impartiality protections without significant guidance.

Fifth, impartiality disclosures can reduce principal-agency costs, a purpose that is less often germane to consumer transactions.[223] By having agencies disclose key procedural provisions in a transparent and understandable fashion, Congress can better monitor agencies to ascertain how agencies are using their delegated authority. A meaningful disclosure regime that creates a synopsis of important terms and permits easy comparison of similar agency action is much more useful to a principal than a disclosure regime in which the information is found in numerous materials and requires the principal to synthesize and analyze the information. Indeed, Congress requires something similar in other spheres. For instance, it requires agencies to file impact statements for government actions with major environmental effects. Congress also requires under the Community Reinvestment Act[224] that banks (with all of the benefits that national banking laws provide them[225]) disclose their outreach to various disadvantaged communities when seeking regulators' approval of pending mergers.[226] In both of these examples,

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222. Dalley, *supra* note 43, at 1115.

223. *See* Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1048 (1995) ("[T]he principal purpose of mandatory disclosure [in securities markets, as opposed to other consumer transactions] is to address certain agency problems that arise between corporate promoters and investors, and between corporate managers and shareholders. Disclosure can help reduce the cost of monitoring promoters' and managers' use of corporate assets for self-interested purposes.").

224. 12 U.S.C. §§ 2901–2908 (2018).

225. *See generally* Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283 (2014) (describing how banking charters are intended to inure to the public's benefit).

226. *See, e.g.*, Dalley, *supra* note 43, at 1122–23 (noting that Community Reinvestment Act disclosure, as part of banking mergers, has led to changes in lending practices); Cheryl Lee, *Amalgamation of the Southern California Banking Industry: San Diego a Microcosm*, 35 CAL. W. L. REV. 41, 116 (1998) ("Along with federal and state antitrust laws that apply to interstate banking,

Congress uses disclosure regimes to influence agent actors or regulated parties' behavior and to render their action more salient to interested parties, which, in turn, can alert congressional monitors.

Finally, consumer disclosures can also have a law-reform function by revealing what were once unfair, hidden terms.[227] Disclosure may be a tool for centering public attention on a particular issue.[228] For instance, the complexity and incomprehensibility of disclosed provisions led to a movement in the states for "simple English forms"[229] in consumer contracts and in certain federal privacy disclosures.[230] In the impartiality context, disclosure can help reveal problematic non-ALJ regimes in one adjudication, in one agency, or across the administrative state.[231] A disclosure would become a tool of numerous constituencies—agencies themselves, Congress, and interest groups—to improve the status quo.[232] Importantly, disclosure in general is useful for reform objectives even if some constituencies or litigants ignore the disclosures. As in the consumer context, only some actors need to understand and use disclosures for them to have a meaningful impact on a disclosing party's practice.[233]

B. Key Considerations for Impartiality Disclosure

Despite disclosure's utility, it can prove unhelpful or even backfire. As Professor Daniel E. Ho has demonstrated, unthoughtful disclosures can fail to further their underlying goals. For instance, he notes that disclosures can be too complicated for consumers' use, as with Safe Drinking Water Act disclosures[234] or credit disclosures.[235] Or disclosures

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the Federal Reserve Board must also consider Community Reinvestment Act compliance in connection with any merger or acquisition application.").

227. *See* Landers & Rohner, *supra* note 206, at 741.

228. *See* Dalley, *supra* note 43, at 1112.

229. *See* Landers & Rohner, *supra* note 206, at 741 n.101.

230. 16 C.F.R. § 313.3 (2018) (requiring that the certain privacy notices under the Gramm-Leach-Bliley Act be "reasonably understandable" and defining the concept in great detail).

231. *See* Dalley, *supra* note 43, at 1110–11 (noting that disclosure of securities information can be useful to the government itself in determining how to better regulate).

232. *See* Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1379 (2015) (noting how disclosure that consumers understand can lead consumers to think more deeply about the matter at issue and create a bridge to substantive regulation).

233. *See, e.g.*, SPANOGLE ET AL., *supra* note 210, at 266 (discussing the market-function of consumer disclosure and the need for some consumers to pay attention to the disclosures).

234. *See* Daniel E. Ho, *Designing Information Disclosure*, 38 ADMIN. & REG. L. NEWS 13, 13 (2012).

235. The comprehensibility problem with TILA disclosures is a longstanding one. *See* Jeffrey Davis, *Revamping Consumer-Credit Contract Law*, 68 VA. L. REV. 1333, 1345–46 (1982) (pointing

can be so inaccessible—such as privacy disclosures in obscure locations[236] or provided with other abundant information[237]—that they are unlikely to prove effective.[238] Even restaurant health disclosures—"widely considered a paragon of disclosure regulation"[239] due to their easy-to-understand and prominent letter grades based on an inspector's underlying rubric—can do little to signal degrees of sanitation if the grading lacks consistency among inspectors, suffers from grade inflation, or has so many detailed grading objectives that they hinder reliability among different inspectors.[240] Perhaps even worse, disclosures can have unintended consequences that exacerbate harms that the disclosure seek to mitigate. For instance, calorie disclosures can lead restaurant patrons to increase their calorie consumption by purchasing several lower-calorie foods that in the aggregate have more calories than a single high-calorie item.[241]

This Section considers the main issues in the design of impartiality disclosures. After determining which values the disclosures seek to further, one must consider which criteria are germane to those underlying values, how to communicate the information in the disclosure, and how to distribute the disclosure to ensure that the relevant audiences can easily find the disclosed information. And, of course, the disclosure design must ensure that the costs of the disclosure are less than its benefits.

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to studies indicating that TILA has had no market impact and stating that "[t]he resulting [TILA] disclosure statement is nearly incomprehensible to the average consumer; the information essential to making good credit-use decisions lies buried under mounds of superfluous data").

236. Although California is one of the few states to require disclosure of privacy policies, *see* SPANOGLE ET AL., *supra* note 210, at 532, those policies need not be posted on the company's webpage; they may instead be posted as a hyperlink on the "first significant page after entering the Web site." *See* CAL. BUS. & PROF. CODE §§ 22575(a), 22577(b)(1) (West 2018).

237. Regulations to Gramm-Leach-Bliley financial disclosures permit sellers to "combine [the required disclosures] with other information," creating an incentive for sellers to bury the disclosures in other consumer correspondence. Regulation P, 12 C.F.R. § 1016.3(b)(2)(ii)(E) (2018).

238. *See* Dalley, *supra* note 43, at 1091. If consumers notice privacy-policy disclosures, they are likely to misunderstand their import. "[I]nstead of reading the policies, consumers assume that a firm with a 'privacy policy' has a policy of keeping consumer data private"—though a privacy policy may indicate that the firm will widely share the consumer's information. Willis, *supra* note 232, at 1326.

239. Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 582 (2012).

240. *See id.* at 611–14, 640–41.

241. *See* Ho, *supra* note 234, at 13.

1. Designing the Disclosure

Ascertaining the appropriate criteria concerning hearing-officer impartiality is the relatively easy part because the germane factors for optimal hearing-officer independence are the familiar ones from the APA, the Court's due process jurisprudence, and my recent survey:

- Hiring process (including who hires and established criteria, if any, for hiring);
- Separation of functions;
- Supervisory relationship within the agency;
- Ex parte communications;
- Physical separation;
- Performance appraisals;
- Eligibility for performance bonuses; and
- Protection from at-will removal

The more difficult questions concern the design of the disclosure.

The disclosure must also be a concise document. The longer the document, the less likely that it will be read and the more likely that the information will be obscured.[242] If it is not read, the document cannot prove a meaningful warning, shame sufficiently to push agencies in a better direction, or clearly identify concerns for congressional consideration. Relatedly, brevity permits the disclosure to provide a synopsis, as opposed to an exposition, of the hearing-officer's status. By limiting the disclosure to the eight criteria listed above with a limited agency response for each criterion, the disclosure will better achieve its purposes. Because comparison among agencies and adjudications is necessary to further nearly all of these goals, the disclosures must also be uniform.[243]

The concise disclosure must also be readable for lay litigants and attorneys who do not delve into adjudicatory structure frequently. The disclosure should be written in a readable font that seeks to ensure, in as

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242. *See* Bubb, *supra* note 221, at 1026; Dalley, *supra* note 43, at 1115. Moreover, firms are aware that psychological forces (such as a line of people waiting impatiently behind a customer with disclosures in hand at a car-rental counter) can dissuade consumers from reading disclosures. *See* Willis, *supra* note 232, at 1325.

243. The use of uniformity to permit comparison is a feature of numerous disclosure regimes. *See, e.g.*, 12 U.S.C. § 4301(a) (2018) (stating that Congress requires uniform disclosures to improve competition and consumer decisionmaking under the Truth in Savings Act); Rule Notice, Truth in Lending, 65 Fed. Reg. 17,129 (Sept. 27, 2000) (codified at 12 C.F.R. § 226 (2018)) (stating that "[u]niformity in creditors' disclosures [under the Truth in Lending Act] is intended to assist consumers in comparison shopping").

plain of language as possible, that the recipient can understand the nature and import of the terms.[244] For instance, the Consumer Financial Protection Bureau, when revising its disclosure forms for certain residential mortgages not only used statutorily-mandated terms, such as "finance charge" and "Annual Percentage Rate (APR)," but also explanations of what the terms meant (and did not mean).[245] As one example, with APR, the agency briefly defined it as "[y]our costs over the loan term expressed as a rate. This is not your interest rate."[246] The agency did so to mitigate consumer confusion, uncovered in its testing, between the APR (which includes interest, fees, and other costs of the loan) and interest rates.[247]

Disclosures often follow one of two models—what I refer to as either a "presentation model" or a "synthesis model." Under the former, the disclosure simply presents the required criteria without attempting to synthesize or analyze it for recipients. Forms for TILA, the Truth in Savings Act, and Rent-to-Own transactions, among others, follow this model by mandating the disclosure of information like costs and fees without assessing the desirability of the particular transaction. The synthesis model, in contrast, takes the applicable criteria and analyzes it to provide the recipient with a conclusion as to this subject of the disclosure. Perhaps the most well-known example of the synthesis model is the earlier mentioned letter-grade-based disclosure system for restaurants. Similarly, based on their algorithms, publications rank universities and colleges to help students and schools evaluate the "best" schools.

The benefit of the presentation model is that it does not require an intermediary to administer or a reliable rubric to ensure consistency among numerous intermediaries. But its downside is that it leaves the disclosure recipient to make sense of the presented information. The

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244. Matters like font and placement are ubiquitous factors in disclosure design. *See* Willis, *supra* note 232, at 1349–50. The FTC has indicated that these are "important considerations," but they are not sufficient to ensure effective disclosure. FTC, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING 1 (2013), https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf [http://perma.cc/N6BQ-JJTV].

245. CONSUMER FIN. PROT. BUREAU, TILA–RESPA INTEGRATED DISCLOSURE: GUIDE TO THE LOAN ESTIMATE AND CLOSING DISCLOSURE FORMS 108 (May 2018), https://files.consumerfinance.gov/f/documents/cfpb_kbyo_guide-loan-estimate-and-closing-disclosure-forms_v2.0.pdf [https://perma.cc/VSD2-9QGU].

246. *Id.*

247. Rule Notice, Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 79,730, 79,979 (Dec. 31, 2013) (codified at 12 C.F.R. §§ 1024, 1026 (2018)).

synthesis model's beneficial feature, in contrast, is that it can provide an understandable compilation of the tested variables in a format that is very familiar to those outside the targeted industry. The downside is that it requires an intermediary to provide the synthesis. The presence of more than an evaluator or grader requires checks for consistency and reliability in grading; the use of an algorithm requires validity testing and attention to whether subject parties can "game" the algorithm.[248] The simplicity of the letter grade or ranking also may obscure the complexity in the grading variables and application.

For impartiality disclosures, the presentation model is preferable. By limiting the disclosed criteria, the disclosure can effectively provide information that furthers the purposes of the disclosure (synopsis, warning, etc.), especially for lawyers, Congress, and the agencies themselves. To be sure, less sophisticated litigants may appreciate a synthesis model with, say, a letter grade that evaluates the hearing officer's independence. But that model would create significant costs: deciding who evaluates, assuring reliability in creating a grading rubric, determining how to ensure valid rubrics after accounting for legitimate reasons for certain hearing officers to deviate from the norm, and preventing the inadvertent masking of potential impartiality failings within the grading calculus. By calling for an explanation only when agencies answer a certain way, the presentation-model disclosure can subtly indicate when agencies are deviating from the optimal course.

Finally, the agencies must consider for which of their hearing officers they should provide a disclosure. Defining non-ALJ hearings is notoriously difficult because of their varied characteristics. The agencies could choose to use our definition (i.e., hearings in which the parties can seek an oral, evidentiary hearing).[249] Or they may choose to use a similar, although perhaps narrower definition from another ACUS project. In an earlier project, ACUS adopted a definition of "Type B" hearings: mandatory evidentiary hearings (whether written or oral) that have an exclusive record and are not heard by ALJs.[250] For ease of

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248. *See* Dalley, *supra* note 43, at 1128 (discussing "gaming" by law schools for the *U.S. News and World Report* survey and bypass-surgery report cards).

249. For the full definition, see *supra* note 141 and accompanying text.

250. *See* MICHAEL ASIMOW, ADMIN. CONFERENCE OF THE U.S., ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 5, 10 (2016) (defining "evidentiary hearing" and distinguishing "Type B" hearings from "Type C" hearings), https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-draft-report.pdf [https://perma.cc/D6H5-X8F6]; Adoption of Recommendations, 81 Fed. Reg. 94,314 (Dec. 13, 2016). The main difference between the definitions is that the one in our report only includes oral hearings, and it did not require an exclusive record or that the hearing be mandatory (as opposed to those that the agency had to hold upon a party's request).

categorization, agencies may prefer limiting the relevant non-ALJ hearings to those with exclusive records, those that permit oral proceedings, or those that are mandatory. Regardless of how different definitions alter the domain of the disclosures, the disclosures can prove useful for numerous agencies and proceedings.

Appendix A provides a model form based on these considerations.[251]

2. *Distribution*

A successful disclosure requires appropriate distribution to render it more likely that recipients will use disclosure to achieve its purposes. To that end, the agency should include it with other materials that it provides at the initiation of a hearing and in the same format as those other materials, whether as a separate document, conspicuous link, or conspicuous attachment.[252] By ensuring that the party receives it at the beginning of the hearing, it renders it more likely that the party can take any actions necessary to preserve issues concerning the hearing officer's independence.[253]

The agency should also place the disclosure with other materials (such as rules, docket pages, and other guidance) on its website. Not only are some regulated parties likely to find the disclosure online, conspicuous posting makes it easier for other agencies, congressional staffs, and other interested parties to find the document for particular proceedings. Indeed, ACUS has recently adopted a recommendation for agencies to make their adjudicatory materials more conspicuously available on their websites.[254]

Agencies should also send their disclosures to a clearinghouse only as they create or revise them. Collecting all disclosures will better enable scholars or government actors to synthesize government-wide practice and consider any appropriate uniform reforms. Annual disclosure to the clearinghouse would likely prove too burdensome and, if the impartiality

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251. *See infra* Appendix A.

252. If the agency chooses to provide paper copies, the costs of disclosure will increase. To mitigate these costs, the agency could choose to print the disclosure on the back of another document, as long as the front of the document clearly puts the recipient on notice of the disclosure's existence on the back of the page.

253. Some disclosure regimes require certain recurring disclosures. *See* DEE PRIDGEN & RICHARD ALDERMAN, CONSUMER CREDIT AND THE LAW § 8:4 (2018) (discussing timing of open-end-credit TILA disclosures); *id.* § 13:17 (discussing annual Gramm-Leach-Bliley financial-information disclosures). Disclosures concerning hearing officers do not need to occur more than once. It is difficult to see what benefit repeated disclosure would provide, especially if the disclosures are available online with the hearing's other materials.

254. *See* Adoption of Recommendations, 82 Fed. Reg. 31,039 (June 16, 2017).

provisions are static after their creation, unnecessary. But the downside is that agencies may simply not remember to submit revised disclosures, and they may largely forget, without the nudge of an annual reporting requirement, to think about whether to update their disclosures. On balance, other constituencies may be able to help nudge the agency into reconsidering the disclosures and impartiality protections if necessary, and an annual (or biannual) reminder by the clearinghouse may help assuage fears of agencies overlooking the disclosures once they have drafted them. Agencies should send the disclosures in a format to the clearinghouse that allows machine-based reading and analysis,[255] so that the clearinghouse can easily identify outliers and analyze trends or characteristics across all federal agency adjudication.

ACUS is one possible clearinghouse because its mission is "to promote improvements in the efficiency, adequacy, and fairness of the procedures by which federal agencies conduct regulatory programs . . . through scholarly research" and recommendations to Congress and agencies.[256] Indeed, ACUS not only commissioned the underlying empirical project discussed here on hearing officers' independence, but they have recently focused on agency adjudication and created an online database of information on agency adjudications of all stripes.[257] To be sure, serving as a clearinghouse would be a new duty for ACUS. Yet, unlike regimes with annual disclosures or disclosures that potentially apply to all recurring substantive agency decisions (such as certain rulemakings),[258] the impartiality disclosures would require only initial and revised disclosures for any relevant non-ALJ adjudication. Of course, to assess a suitable government clearinghouse (whether ACUS or another entity), one would have to consider the agency's budget, other duties, and staffing—considerations that are outside the scope of this Article.

Finally, if necessary, these disclosures should be mandatory. Based on agencies' high response rate to our survey, I am hopeful that agencies

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255. *See* Ho, *supra* note 234, at 580–81 (discussing guidance from the Obama Administration's Office of Information and Regulatory Affairs on machine-readable disclosures).

256. David M. Pritzker, *ACUS in a Nutshell*, ADMIN. CONF. U.S. (July 17, 2013), https://www.acus.gov/newsroom/administrative-fix-blog/acus-nutshell [https://perma.cc/C263-L5G8].

257. For a collection of ACUS reports concerning adjudication, see *Adjudication*, ADMIN. CONF. U.S., https://www.acus.gov/past-projects/adjudication [https://perma.cc/E9KY-SFJN]; *Ongoing Projects*, ADMIN. CONF. U.S., https://www.acus.gov/current-projects [https://perma.cc/9MFK-3A8T].

258. *See, e.g.*, Beermann, *supra* note 192, at 83–84 (discussing the Congressional Review Act); Doris S. Freedman et al., *The Regulatory Flexibility Act: Orienting Federal Regulation to Small Business*, 93 DICK. L. REV. 439, 442 (1989) (discussing annual reporting by the Small Business Administration under the Regulatory Flexibility Act).

will voluntarily disclose. Voluntary disclosure is a good starting point, and an agency's mere refusal to disclose voluntarily may provide sufficient signaling to Congress to inquire further. But given agencies' practice of turning away from ALJs and failing to provide non-ALJs similar protections, I am skeptical that a sufficient number of agencies will voluntarily disclose non-ALJ protections. After all, as I have argued elsewhere, agencies have largely (though wrongly) determined that the current system of using non-ALJs with lesser independence benefits them.[259] The mandate, if necessary, can come from two sources. As a helpful start, the White House (likely through OMB) could mandate disclosure for executive agencies in the manner proposed here. The downsides are that OMB's relationship with independent agencies is fraught and that OMB (through its Office of Information and Regulatory Affairs) focuses primarily on agency rulemaking, not adjudication.[260] The other option is for Congress to mandate the disclosures via statute. The benefit is that agencies will be required to comply. But, as proposed revisions to the APA have demonstrated over the decades,[261] statutory change to administrative process comes slowly, if at all. The lack of political valence as to impartial agency adjudicators gives one more hope for these disclosures, however. After all, progressives want impartial non-ALJs who preside over hearings with vulnerable populations (say, immigrants),[262] while conservatives seek to ensure a fair administrative process for corporate regulated entities.[263]

C. Possible Objections

Disclosure is no panacea. There are legitimate concerns about its use and effectiveness. But these objections do not undermine disclosure's utility in the impartiality context.

First, congressional action, especially if providing uniform treatment to hearing officers, would be a more efficient and effective way of regulating impartiality. Moreover, the concerns over substantive

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259. *See generally* Barnett, *supra* note 33, at 1670–1708.

260. *See* KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW 101–09 (2d ed. 2014).

261. *See generally* Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629 (2017) (discussing earlier attempted reforms of the APA and current pending ones).

262. *See generally* Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99 (2017).

263. *See generally* Jean Eaglesham, *U.S. Chamber of Commerce Criticizes SEC's In-House Court*, WALL ST. J. (July 15, 2015), https://www.wsj.com/articles/u-s-chamber-of-commerce-criticizes-secs-in-house-court-1436932861 [https://perma.cc/LCL3-Y49G] (discussing concern over the partiality of SEC ALJs by industry and its interest group, the U.S. Chamber of Commerce).

regulation in the consumer context—that it stifles innovation and can lead to inefficiencies in the market[264]—do not apply here assuming that the impartiality criteria are optimal and fixed for all hearing officers. But, as indicated earlier, the lack of information up to this point on hearing officers—both as to their significant place in the bureaucracy and their protections—has rendered substantive regulation by congressional oversight difficult. Of course, the data presented here, as well as from other sources, provide Congress a basis to begin its oversight. But agency-provided disclosures can provide updated data, citations, and explanations for all relevant non-ALJ hearings (not just the ones that voluntarily respond). In short, impartiality disclosure is a first step in helping bring about improvement—whether from agencies in the first instance or from congressional oversight.

Second, disclosure regimes have largely been deemed failures and thus their efficacy here may be in doubt.[265] But the aims of consumer disclosure and impartiality disclosure differ. The most trenchant criticism of disclosure regimes concerns their inability to alter consumer behavior.[266] Here, it is not the consumers' behavior that we seek to change. Instead, we seek to change the provider's behavior (the agency) or the overseer's (Congress).

But, relatedly, might the disclosures normalize lackluster impartiality protections if it turns out that most agencies have not sufficiently protected their adjudicators' impartiality? This is a possibility, but there are good reasons to think that result would not materialize. If an agency's more ample protections have worked well, the agency has little incentive to race to the bottom. Were an agency, however, to justify its minimal protections by pointing to other agencies' minimal practices, other constituencies—litigants, Congress, or interest groups—could pressure the agency to change. In short, once information permits numerous constituencies to identify problems, the chance for mitigation or resolution is higher than if the problem remains shrouded.

In fact, well-designed process can inure to an agency's benefit by increasing the chances that losing litigants accept the proceedings as

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264. *See* Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 715 (2006).

265. *See* Willis, *supra* note 232, at 1321–22.

266. *See* Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 148–49 (2006) (discussing the problems with disclosure-regimes as regulation). *See generally* BEN-SHAHAR & SCHNEIDER, *supra* note 208 (discussing the various ways in which consumer disclosure has failed to inform or alter consumer behavior).

generally fair. Social psychologists' work on procedural justice have demonstrated that procedural fairness affects how parties perceive the fairness of a decision's outcome.[267] Although they did not consider the effect of impartiality itself, some studies have demonstrated that effects of procedural fairness or the lack thereof are strongest when parties suffer a negative outcome under the process.[268] The wrinkle here is that impartiality disclosures may exacerbate losing parties' dissatisfaction with agency adjudications by calling litigants' attention to impartiality gaps. Yet, filling those gaps or disclosing well-designed impartiality provisions can improve losing litigants' satisfaction with agency adjudication. Impartiality disclosures, accordingly, may increase dissatisfaction in the short-term but serve as a catalyst for decreasing that dissatisfaction in the long run.

Third, it is unclear whether any of the relevant constituencies will use the disclosure.[269] Consumers, for instance, are overwhelmed with disclosed information, rendering it easy to tune out, click through, or use in incorrect ways.[270] In fact, regulated entities in the consumer context often intentionally present their disclosures in ways that ensure that they are not read.[271] Moreover, the cost of additional disclosure is often miniscule, or at least appears so, exacerbating hyper-disclosure and consumers' negative reactions to it.[272] In contrast, there is a dearth of impartiality disclosure, and the model form is intended to address the concern over hyper-disclosure by limiting the variables that are addressed on the one-page disclosure. Unlike consumer disclosures, which are often provided shortly before a transaction is consummated,[273] these impartiality disclosures are intended to be a starting point for agencies and Congress to focus their attention on important criteria as

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267. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 67 (1988).

268. *See id.* at 67–69.

269. *See* Bubb, *supra* note 221, at 1021.

270. *See id.* at 1026 (discussing phenomenon of "decision aversion" in which consumers invest as little time as possible in decisionmaking and thus ignore disclosures).

271. *See* Willis, *supra* note 232, at 1322–23.

272. *See* Bubb, *supra* note 221, at 1021; Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 434–47 (2003) (discussing problems with understanding and processing ever-increasing disclosure in securities markets).

273. *See, e.g.*, Nash v. First Fin. Sav. & Loan Ass'n, 703 F.2d 233, 238 (7th Cir. 1983) ("There is abundant authority for the proposition that a violation of [the Truth in Lending] Act occurs when the new credit transaction is 'consummated', or when credit is extended, without the requisite disclosure having been made.").

working groups, committees, and managers think about how to provide optimal impartiality. These groups can turn to ACUS recommendations and reports and scholarship that provide agencies' guidance on non-ALJ impartiality.[274] After using the disclosures to focus on problematic hearing-officer regimes, agencies and Congress can seek more information as necessary to address specific problems.

Fourth, agency disclosure is not costless. But the costs of disclosure—especially as minimal as this one-page disclosure is when compared to pages and pages of various consumer disclosures for one transaction or reports to Congress—are largely ones that Congress has accepted in numerous other areas. And the costs should be compared to the benefits, which, as discussed in Section III.A., are likely more significant in this context than in the consumer one. Moreover, the costs for impartiality disclosures are largely upfront costs, where the agency (re)considers its non-ALJ hearings and completes the disclosure. The transmission costs of posting to the internet and transmitting it to a clearinghouse are slight. More significant costs, however, arise from routine distribution to litigants (if the agency does not simply provide a website link to its disclosure), the clearinghouse's duties, and any agency's duties in enforcing a mandatory-disclosure regime. This Article is not the place to attempt to quantify those costs but, given the numerous other disclosure regimes that Congress requires, the costs here are likely similar in kind to, yet much smaller in degree than, those for other programs. Congressional budgeting professionals can very likely assess these costs in short order.

Finally, the use of disclosures would not encourage transparency for what Professor David Pozen has recently suggested are nefarious ends. Pozen contends that transparency suffers from ideological drift.[275] Transparency was originally a tool by progressives to further goals such as professionalizing government, fairness, and mitigating agency capture.[276] But transparency has morphed into a tool to obstruct government, whether by inundating agencies with requests under the Freedom of Information Act (FOIA); demanding open meetings that perversely push lobbyists into private meetings with regulators;

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274. *See* Barnett, *supra* note 33 (recommending that agencies use ALJs because of their statutory protections); Adoption of Recommendations, 81 Fed. Reg. 94,312 (Dec. 13, 2016) (recommending, among other things, the adoption of certain impartiality provisions). *See generally* Bremer, *supra* note 44; BARNETT ET AL., *supra* note 77, at 60–71 (recommending the adoption of numerous impartiality provisions).

275. David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100 (2018).

276. *Id.* at 113.

providing lobbyists with better oversight of legislators' behavior; or offering transparency as a sufficient, yet unobtrusive, regulatory device in the place of meaningful substantive regulation.[277] For my purposes here, I assume that Pozen is correct in categorizing the nature of transparency's drift and uses.

Impartiality disclosures, however, would further beneficial goals. Impartiality disclosures' raison d'être is to encourage a professional adjudicator corps and provide an impartial tribunal for all parties. The disclosures would not easily become tools to undermine agency action (except to the extent that a badly designed adjudicatory process should not function). Regulated parties would not be able to use numerous burdensome requests for disclosure to hamper an agency (as under FOIA) because the proposed impartiality disclosure only requires agencies to disclose the nature of their hearing officers initially and revise them if necessary. Finally, aside from policymaking that incidentally adheres in designing agency hearings, these disclosures do not concern the substance of any particular decision or seek to replace any kind of substantive regulatory policy. Accordingly, problems associated with legislator oversight, open meetings, and consumer disclosure regimes do not exist here as to specific, substantive regulation.

CONCLUSION

Impartiality disclosures are a relatively low-cost way of providing significant information to scholars, litigants, Congress, and agencies themselves about the current state of administrative adjudication. They provide a mechanism for obtaining complete and updated data for proceedings that are often forgotten or confused with others. As the findings reported here demonstrate, agency practice is extremely diverse and likely far from optimal. Disclosures may prove sufficient by themselves to alter agency behavior and bring us closer to optimal impartiality in administrative adjudication. Or they may serve as a tool for considering whether and to what extent Congress should promulgate government-wide impartiality protections for non-ALJs. After all, ACUS and scholars have already provided significant theoretical guidance on how agencies should think about adjudicatory impartiality.[278] What is needed now is action. The time has come to

277. *See id.* at 123–40.

278. *See supra* note 274.

move away from some kind of hearing officer and toward an optimal one, using impartiality disclosures as a first step.

Today's political climate presents a prime opportunity for using impartiality disclosures. The Trump Administration has begun altering ALJs' protections as to hiring and, if the courts agree, to removal. In short, ALJs are beginning to look more like non-ALJs. And the Administration has proposed altering the performance review of one group of non-ALJs—immigration judges—by permitting more agency oversight and rendering removal of those judges easier. As the Administration begins altering non-ALJ's impartiality protections, it is imperative that transparent, up-to-date information exist so that litigants in agency proceedings and Congress know of the changes and are able to place those changes in context. As administrative adjudication gains public attention, impartiality disclosures can, for once, help the public focus not only on its foibles—but also its ability to provide fair, efficient proceedings.

APPENDIX A

How independent is the official presiding over your hearing?

Agency: **Hearing Program(s):**

Title of Presiding Official:

This chart provides information on characteristics concerning the independence of officials who preside over agency hearings. Use this information to understand your proceeding and the presiding official's relationship to the agency.

	YES OR NO	DESCRIPTION (IF ANY)	SOURCE/CITATION	(IF NO) OPTIONAL AGENCY EXPLANATION
Do standard hiring qualifications exist for the presiding official?				
Is the official prohibited from performing agency duties other than presiding at hearings?				
Is the official prohibited from reporting to an official with enforcement duties?				
Is the official prohibited from discussing the case to people outside of the hearing or one party alone?				
Is the official (and the official's staff) physically separated from other agency officials?				
Does the agency prohibit annual performance reviews of the official?				
Does the agency prohibit paying the official performance bonuses?				
Does the agency prohibit removing the official for any reason?				