



Administrative Conference of the United States

**ADJUDICATION OUTSIDE THE
ADMINISTRATIVE PROCEDURE ACT**

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**Michael Asimow
Stanford Law School**

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By Michael Asimow¹

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¹ Visiting Professor of Law, Stanford Law School; Professor of Law Emeritus, UCLA School of Law. The author's email address is asimow@law.stanford.edu and he welcomes all comments or suggestions about this report. The author gratefully acknowledges the guidance and encouragement offered by the staff of ACUS, particularly former Chair Paul Verkuil and Amber Williams. In addition, he is extremely grateful for tremendous efforts of the ACUS staff (both permanent members and interns) in building the federal adjudication database which is discussed in the text.

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INTRODUCTION

This study concerns the world of federal administrative adjudication that consists of individualized decisionmaking through evidentiary hearings by administrative agencies that is *not* regulated by the adjudication provisions of the Administrative Procedure Act (APA). I refer to this as Type B adjudication. Type A adjudication is regulated by the APA, whereas Type C adjudication does not utilize evidentiary hearings to make adjudicatory decisions.

This is the fourth draft of a study that I hope will eventuate in a recommendation by the Administrative Conference of the United States (ACUS) stating best practices for Type B adjudication. It summarizes the work I have done to date and suggests what additional work needs to be done. This draft is prepared for consideration by the ACUS Adjudication Committee so that the Committee and ACUS staff can furnish me with guidance on where to go from here.

This study proceeds as follows: Part I contains definitions and discusses the scope of the study and the ACUS federal adjudication database. Part II discusses the problem of differentiating Types A, B, and C adjudication. Part III furnishes statistical data about the world of Type B adjudication. Part IV explores potential ACUS recommendations for best practices in Type B adjudication. The Appendix consists of eight “deep dive” memoranda on nine agencies and twelve schemes of Type B adjudication.² Before completing the study, I intend to make some additional deep dives (particularly into the Merit Systems Protection Board and federal health care adjudication).

The agencies and schemes studied so far are:

- Department of Agriculture (Perishable Agricultural Commodities Act and Food and Nutrition programs) (Appendix A-1) (USDA, PACA, FNS)
- Department of Energy (Personnel Security and Whistleblowing) (Appendix A-2) (DOE)
- Equal Employment Opportunity Commission (Appendix A-3) (EEOC)
- Environmental Protection Agency (Environmental Appeals Board and Army Corps of Engineers Enforcement) (Appendix A-4) (EPA & ACE)
- Executive Office for Immigration Review (Appendix A-5) (EOIR)
- Internal Revenue Service (Collection Due Process) (Appendix A-6) (IRS CDP)
- US Patent and Trademark Office (Patent Trial & Appeal Board; Trademark Trial & Appeal Board) (Appendix A-7) (USPTO, PTAB, CTAB)
- Board of Veterans’ Appeals (Appendix A-8) (BVA)

² In many cases, academics, practitioners, and agency personnel commented on my drafts and assisted me in formulating the memos. In the Appendices, I acknowledge this assistance (if I missed anyone, this footnote expresses appreciation). Of course, the government employees who assisted me spoke only for themselves and not for the agencies they work for.

I. DEFINITIONS, DATABASE, AND SCOPE OF STUDY

A. TYPE A, B, AND C ADJUDICATION

For purposes of this study, the term “Type A adjudication” refers to adjudicatory systems governed by the adjudication sections of the Administrative Procedure Act (APA).³ With a few exceptions, Type A hearings are presided over by administrative law judges (ALJs). The term “Type B adjudication” refers to adjudication by federal administrative agencies through evidentiary hearings required by statute, regulation, or other source of law, that are *not* governed by the adjudication provisions of the APA. Broadly speaking, the hearings in Type B adjudication are presided over by administrative judges (AJs), although these officials are known by many other titles. This study concerns Type B adjudication. The term “Type C adjudication” means adjudication by federal administrative agencies that does not occur through legally required evidentiary hearings. This study does not cover the vast world of Type C adjudication.

B. DATABASE

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

ACUS staff did enormous amounts of work gathering, inputting, and verifying⁴ information in the database, which I gratefully acknowledge here.⁵ The database information was my starting point in doing this study. Because Type A adjudication is relatively uniform and well-studied, I decided to focus on Type B adjudication which is vastly more diverse and less well studied. The database is now open to the public and can be accessed at <https://acus.law.stanford.edu>. The deep dive memos which form the basis of this study contain the identifying numbers of the adjudicatory schemes I discuss, which enables the reader to quickly access the relevant portions of the database.

C. FORMAL AND INFORMAL ADJUDICATION

In distinguishing Type A, B, and C adjudication, this study mostly avoids the terms “formal” and “informal” adjudication, although they are often used in practice and in scholarship. The reason to avoid these terms is that they create a false picture of Type B adjudication. The hearings in many schemes of Type B adjudication often contain the same formal elements and protections for private parties as Type A adjudication. Indeed, in some

³ 5 U.S.C. §551 et seq. The APA is referred to herein without the prefatory 5 U.S.C.

⁴ The database was constructed from publicly available information; ACUS attempted to obtain verification from agency officials of the information in the database but was not always successful in obtaining it. The database indicates what information has been verified.

⁵ I also express my gratitude to Stanford Law School Dean Elizabeth Magill for helping to fund the database and to professional database builders Irina Zachs and Alex Shor for their tremendous technical efforts in organizing it.

cases, Type B adjudication is even *more* formal than the familiar trial-type adjudication procedure prescribed by the APA, whereas some Type A adjudication (such as the inquisitorial Social Security disability program) is *less* formal than many Type B schemes. However, some Type B adjudication is relatively informal, as compared to Type A adjudication, and Type C adjudication is quite informal.

D. DEFINITIONS

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

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

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

The definition of adjudication excludes adjudication by state or local officials even though this adjudication arises under a federal program and is governed by federal regulations. As stated above, because of resource constraints, the study does not cover adjudication relating to military or foreign affairs functions.

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

The term “evidentiary hearing” means a hearing to which the exclusive record principle applies, meaning that the decisionmaker is confined to considering inputs from the parties (including matters officially noticed) when determining factual issues. Thus the term does not include “public hearings” at which the members of the public are invited to make statements (for example in response to an application for development) but which do not furnish the exclusive record for decision. Nor does it cover a legally required conference between a private party and the decisionmaker which is not intended to be the exclusive source of the information considered by the decisionmaker. Nor is the term intended to cover a so-called “front-line” decision by agency staff that constitutes the initial agency decision about whether to deny a benefit or issue a complaint or impose a regulatory sanction, when that initial decision is followed by an evidentiary hearing. The definition of “evidentiary hearing” is discussed further in Section II below.

This study also makes use of a distinction that was developed by the builders of the database between “major” and “minor” adjudication. Major and minor adjudication are defined based on the “office” that conducts the particular scheme or schemes of agency adjudication. If the primary function of the office is to conduct adjudication, then the adjudication is considered “major.” If the office that conducts the adjudication has many functions, and

adjudications are only a small portion of that office's responsibilities, then the adjudication is considered “minor.” Only major adjudication is considered in this report.

E. SCOPE OF THE STUDY

As most readers of this study are aware, the world of Type B adjudication is vast and formless. How to study and map it presents a methodological puzzle. My approach has been to write deep dive memoranda giving a detailed analysis (“deep dive”) of the most important schemes of Type B adjudication. I have now done eight such memos covering about twelve distinct schemes of Type B adjudication, including several of the most important ones (measured by caseload volume and by importance of the stakes being adjudicated). The deep dive memos are appendices to this study. The twelve schemes studied also are representative of the tremendous diversity of the Type B world. I intend to do more deep dives and seek the guidance of the Adjudication Committee on which ones should be included. The ultimate objective of this study is to formulate recommendations for best practices for Type B adjudication.

F. PRIOR RESEARCH

This study will often reference several earlier research works that address the issues discussed in this study. The epic 1992 ACUS study, “The Federal Administrative Judiciary,”⁶ described and analyzed several schemes of Type B adjudication and did extensive research into the status of the AJs who conduct it. The 1992 ACUS study sharply questioned the Type A/Type B distinction which is discussed in Part II of this study.⁷

In a classic article,⁸ former ACUS Chairman Paul Verkuil assessed the degree to which various schemes of Type B and C adjudication complied with the due process elements sketched by *Goldberg v. Kelly*.⁹ Chairman Verkuil assessed the appropriateness of various forms of procedural protection depending on the function of the particular adjudicatory scheme.

Two earlier landmark studies by John Frye and Ray Limon sought to map the world of Type B adjudication. These studies gathered statistical data on the caseload of the various Type B schemes and the judges who decided them. The studies take snapshots of Type B adjudication in 1992 and again in 2002.¹⁰

⁶ Paul R. Verkuil, Daniel J. Gifford, Charles H. Koch, Jr., Richard J. Pierce, Jr., & Jeffrey S. Lubbers, *The Federal Administrative Judiciary*, 1992 ACUS 779 (hereinafter “1992 ACUS Study”).

⁷ *Id.* at 843-873.

⁸ Paul R. Verkuil, *A Study of Informal Adjudication Procedure*, 43 U. CHI. L. REV. 739 (1976) (hereinafter “Verkuil”).

⁹ 397 U.S. 254 (1970).

¹⁰ John H. Frye, III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261 (1992) (“Frye”); Ray Limon, *The Federal Administrative Judiciary Then and Now: A Decade of Change 1992-2002* (Office of Personnel Management, Office of Administrative Law Judges) (“Limon”).

The American Bar Association's (ABA's) Section of Administrative Law and Regulatory Practice published a guide to APA adjudication which is frequently referenced in this study.¹¹ The Section also sponsored a resolution adopted by the ABA's House of Delegates that urged Congress to amend the APA to extend some (but not all) of the APA's Type A adjudication provisions to Type B adjudication.¹² Professor Asimow published a study supporting this resolution.¹³

Several works attempted to identify best practices for Type C adjudication¹⁴ or considered the criteria for the study of decisionmaking in Type C adjudicatory schemes.¹⁵ Another paper produced a comparative analysis of high-volume adjudicatory systems (both Types A and B).¹⁶

¹¹ Jeffrey B. Litwak, ed., *A GUIDE TO FEDERAL AGENCY ADJUDICATION* (2d ed. 2012) (hereinafter "ABA Guide").

¹² Resolution 114, Feb. 2005.

¹³ Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003 (2004).

¹⁴ Warner W. Gardner, *The Procedures By Which Informal Action is Taken*, 24 ADMIN. L. REV. 155 (1972).

¹⁵ William J. Lockhart, *The Origin and Use of "Guidelines" for the Study of Informal Action in Federal Agencies*, 24 ADMIN. L. REV. 167 (1972).

¹⁶ Daniel L. Skoler, *The Many Faces of High-Volume Administrative Adjudication: Structure, Organization, and Management*, 15 J. OF NAT. ASS'N OF ADMIN. LAW JUDGES 43 (1996).

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

This section discusses the problem of distinguishing Type B adjudication from Types A and C adjudication. As mentioned above, Type A is adjudication as governed by the APA. Type B adjudication calls for a decision following *an evidentiary hearing that is legally required by due process, or by a statute, regulation, or executive order, but to which the APA adjudication provisions do not apply*. In Type C adjudication, no evidentiary hearing is legally required.

A. THE BORDER BETWEEN TYPE A AND TYPE B ADJUDICATION

The “gateway provision” of the APA defines the type of adjudication that it regulates—what we call Type A adjudication.¹⁷ According to the gateway, the APA adjudication provisions cover “every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.”¹⁸ In many cases, statutes are not explicit about whether the APA applies to a particular adjudicatory scheme that calls for an evidentiary hearing. The prevailing view is that the APA applies only if the statute says it applies or the statute explicitly calls for a hearing “on the record.” However, this “magic words” approach is defective. The decisionmaker at most evidentiary hearings maintains a “record” of the proceedings in the sense that what is said is written down or recorded; and the normal assumption is that this record is “exclusive.” This means that the adjudicator is limited to that “record” (including material that is the subject of official notice) in deciding factual issues in the case. Thus the term “on the record” fails to distinguish Type A and Type B hearings.

Consequently, there is a gray area in application of statutes that call for evidentiary hearings but do not explicitly resolve the issue of whether the APA applies. One approach states that the issue of interpreting such statutes should be resolved through *Chevron* methodology. A statute calling for a “hearing” is “ambiguous,” so that a reviewing court must defer to the agency’s reasonable interpretation that the APA does not apply.¹⁹ As numerous authors have pointed out, this approach is questionable. *Chevron* presumes a congressional decision to delegate interpretive authority to an agency whenever it passes an ambiguous statute, but would Congress really have wanted agencies to make the final call on whether a fundamental and quasi-constitutional trans-substantive statute like the APA should apply to their adjudicatory activity?

Another approach to the question is that courts assume that Congress wanted the APA to apply to adjudicatory hearings involving serious issues of public policy. However, the leading authority to that effect has been overruled.²⁰

¹⁷ As has often been pointed out, the APA’s definitions of “adjudication” and “rulemaking” are flawed and do not reflect actual practice. See Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of “Rule,”* 56 ADMIN. L. REV. 1077 (2004). I ignore them here also, defining adjudication as agency action of individualized impact. See Part I.D. for a more detailed definition of adjudication.

¹⁸ APA §554(a). This section contains 6 exceptions.

¹⁹ *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006); *Chemical Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989).

²⁰ *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978), overruled by *Dominion Energy*, note xx.

Still another approach assumes that Congress does not want the APA to apply unless it explicitly says that it does or explicitly uses the magic words “on the record.”²¹

Finally, a fourth approach to the problem has emerged in recent years. Under this approach, the APA applies to statutes that call for evidentiary hearings that appear to assume record exclusivity but do not use the magic words “hearing on the record.” These cases all involve the question of whether the Equal Access to Justice Act (EAJA)²² applies to decisions by the National Appeals Division (NAD) of the Department of Agriculture (USDA). The Supreme Court has made it clear that EAJA is applicable only if the APA adjudicatory provisions apply.²³ NAD handles disputes arising under USDA’s numerous statutory provisions relating to agricultural grants, loans, or insurance. The statute calls for evidentiary hearings that are conducted by hearing officers appointed by the Secretary of Agriculture but does not use the magic words “on the record.” The decisions hold that the APA applies to NAD hearings because the statutory provisions contain most of the elements of Type A adjudication and therefore that NAD hearing officers are limited to the record in deciding factual issues.²⁴ After losing in three circuits, USDA has conceded the issue and now applies the APA and EAJA to NAD hearings.²⁵ However, because the statute explicitly states that decisions are made by NAD hearing officers, USDA has not been required to hire ALJs to decide these cases.²⁶

Still another unresolved issue about APA applicability arises when an evidentiary hearing is required by due process but not by a statute. In the famous *Wong Yang Sung* decision,²⁷ the Supreme Court ruled that the APA applies to a hearing required by due process unless Congress specifically says that it does not. The *Wong Yang Sung* decision has been studiously ignored in later cases, because of the development of due process balancing under *Mathews v. Eldridge*.²⁸ Under *Mathews*, the degree of procedural protections in a hearing required by due process depends on the specific context; the more formal provisions of the rigid APA adjudicatory procedures might be inappropriate. In particular, it is hard to imagine a decision that ALJs would have to preside in every federal government hearing required by due process.

There is a pressing need for Congress or the Supreme Court to resolve the question of whether the APA applies to gray area cases. This study is agnostic on the issue. If the agency conducts evidentiary hearings but does not presently apply the APA, this study assumes that its evidentiary hearings are Type B proceedings.

²¹ *City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983).

²² EAJA requires agencies to pay private party attorney fees (up to a rather low limit) when the government’s position was not “substantially justified.” 5 U.S.C. §504, 28 U.S.C. § 2412(d).

²³ *Ardestani v. INS*, 502 U.S. 129 (1991).

²⁴ *Lane v. USDA*, 120 F.3d 106, 108-110 (8th Cir. 1997); *Ageson Grain & Cattle v. USDA*, 500 F.3d 1038, 1043-46 (9th Cir. 2007); *Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1125-29 (7th Cir. 2008).

²⁵ 7 C.F.R. §11.4(a).

²⁶ The APA requires that ALJs preside in Type A hearings but permits statutes to designate other types of presiding officers. APA § 556(b).

²⁷ *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

²⁸ 424 U.S. 319 (1976).

The question of whether Congress should transfer Type B adjudicatory schemes to Type A is beyond the scope of this study.²⁹ The 1992 ACUS study recommended that some existing schemes of Type B adjudication that involve serious sanctions (such as deportation) be converted to Type A, because the use of ALJs instead of AJs would enhance the acceptability of the process.³⁰ However, Congress took no action in response to this recommendation. The ABA recommended that future statutes calling for a “hearing” should be governed by the APA unless Congress explicitly provides to the contrary.³¹ Again, this study does not take a position on that issue. Nor does this study consider whether an agency conducting Type B adjudication should, by regulation, convert its hearings into Type A rather than Type B. Such a decision (to turn AJs into self-created ALJs) would involve difficult legal and practical issues that I have not considered.

B. THE BORDER BETWEEN TYPE B AND TYPE C ADJUDICATION

A Type B adjudicatory proceeding arises when a source of law (constitutional, statutory, regulation,³² or executive order³³) calls for an adjudicatory decision made after an evidentiary hearing. In contrast, a Type C proceeding is one in which a legally binding adjudicatory decision need not be made after an evidentiary hearing. The definition of “evidentiary hearing” thus becomes critical, but it is not an easy term to define.

The term is not intended to apply to what I call “frontline decisions,” such as the initial proceedings an agency takes when deciding to reject a claim for benefits or a license or to launch a regulatory enforcement proceeding, even though the deciding official has a face-to-face or telephonic conference with the applicant for benefits or the regulatory target. Because an evidentiary hearing is normally provided at a later stage of adjudication that will make a de novo decision about entitlement to the benefit or whether regulatory enforcement will occur, the front line decision is not treated as an evidentiary hearing.

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

²⁹ See Kent Barnett, *Against Administrative Judges*, 49 UC DAVIS L. REV. – (forthcoming 2016) (urging conversion of AJs to ALJs).

³⁰ 1992 ACUS Study, *supra* note 6, at 779, 1046-1050. See also Admin. Conf. of the U.S., Recommendation 92-7, *The Federal Administrative Judiciary*, 57 Fed. Reg. 61,760 (Dec. 29, 1992), available at <https://www.acus.gov/recommendation/federal-administrative-judiciary>.

³¹ ABA Rec. & Rep. -- (2000).

³² The Appendices present several examples of evidentiary hearings required by procedural regulations but not by a statute. See DOE Whistleblowers (App. A-2), EEOC (App. A-3); EPA EAB (App. A-4), ACE (App. A-4).

³³ DOE Personnel Security hearings are required by an executive order. (See App. A-2)

The term evidentiary hearing means one to which the exclusive record principle applies. This means that the decisionmaker receives written or oral submissions of information from the parties *and* the decisionmaker is confined to those inputs (including matters officially noticed) when determining factual issues. Thus the term evidentiary hearing does not include “public hearings” at which the members of the public are invited to make statements in response to an application for development.³⁴ Nor does it involve a conference between the parties and the decisionmaker which is not intended to serve as the exclusive source of information for the decisionmaker.

In the end, a certain degree of judgment is called for in deciding whether a legally-required adjudicatory procedure is an evidentiary hearing. The oft-used example of a federal forest ranger who decides whether X or Y gets the last campsite at a national forest makes this point. If the ranger decides that X gets it, the decision is final; there is no appeal and thus the ranger’s decision has a definitive legal impact. Assume the regulations require the ranger to talk to X and Y before making a decision. It is unclear whether the ranger’s legally required meeting with X and Y is an evidentiary hearing, but I would not treat it as one. The regulation does not surround the meetings with the protections that are typical in evidentiary hearings to protect record exclusivity (such as a prohibition on *ex parte* communication) or a requirement that the conference be transcribed. Thus the implication is that the ranger is not limited to considering what is said at the meeting. He could, for example, investigate on his own whether X or Y arrived first.

Fortunately, this study is not intended to lead to recommendations for congressional action, in which case the muddiness of the borderline between Type B and Type C adjudication would be a problem. Instead, it is intended to lead to recommendations for a set of best practices for Type B adjudication. As a result, agencies would be encouraged to make common sense determinations as to whether their legally-required procedures are Type B rather than Type C. If Type C agencies decide to adopt some of these recommendations, so much the better.

The study does not recommend that agencies convert their Type C adjudication to Type B by adopting regulations that would require evidentiary hearings. This might well be a good idea, but the study does not attempt to evaluate the circumstances in which it should occur.³⁵

³⁴ For example, the hearings held by EPA when it finds a significant degree of public interest in a draft permit. See EPA (App.-A4), p.2.

³⁵ See Verkuil, *supra* note x, at 779-92 for tentative recommendations relating to Type C adjudication.

III THE WORLD OF TYPE B ADJUDICATION

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

For those schemes for which we have both current and 1992 or 2002 data (some denoted by question marks is still missing), the table shows a significant increase in workload. For example, the caseload of the Executive Office for Immigration Review (EOIR) increased from 152,372 (1992) and 254,000 (2002) to about 335,000, if Immigration Court (IC) and Board of Immigration Appeals (BIA) cases are combined. Board of Veterans' Appeal (BVA) cases increased from 31,000 (2002) to 47,000. Department of Energy (DOE) security clearance cases doubled from 65 to 121. Equal Employment Opportunity Commission (EEOC) cases rose from 6,227 (1992) to 8,086. Thus the workload of Type B adjudicating agencies is growing steadily.

TABLE 1: WORKLOAD OF TYPE B ADJUDICATING AGENCIES

Agency/scheme	Frey (1992 caseload) ³⁶	Limon (2002 caseload) ³⁷	Current caseload	Current backlog
USDA PACA	255			
USDA SNAP	6		1239	
DOE Security Clearance		65	121	
DOE Whistleblowers			31	
EEOC	6,227	21,734 ³⁸	8,086	10,363
EPA			EAB-about 60	
EOIR	152,372	IC 254,070	IC 306,000; BIA 29,723	IC 418,861; BIA 21,843
IRS CDP		60,000 ³⁹	40,355	
USPTO-PTAB	5,782 APJ	5319 APJ	2000 trials 10,000 appeals	25,000 appeals; 700 trials
USPTO-TTAB	3,503	754		
VA BVA	42,000	31,557	56,000	67,000

³⁶ See Frey, *supra* note xx.

³⁷ See Limon, *supra* note xx.

³⁸ Limon gives a figure of 21,734 for the EEOC workload. The figure does not seem comparable to current data. Limon may be counting non-government employees whose cases are investigated and mediated by the EEOC.

³⁹ Limon gives a figure of 60,000, but this figure may not be comparable to current data. He may be counting the tax cases negotiated by the IRS appeals officer that do not involve hearings (as the CDP scheme does).

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

TABLE 2—NUMBER OF AJS AND CASELOAD PER AJ

Agency/scheme	# AJs Frey Study (1992)	# AJs Limon Study (2002)	# AJs (Current)	Caseload per AJ per Year (Current)
USDA PACA	86			
USDA SNAP	16			
DOE (Security & Whistleblowers)		19	12 OHA	21 OHA
EEOC	79	X ⁴⁰	110	65
EPA EAB		4	4	45 (panels of 3)
EOIR IC & BIA	76	228	250 IJs; 17 BIA	>1800 IJs; 1750 BIA
IRS CDP		41	269	1500
USPTO PTAB APJs	58	62 ⁴²	225	53
USPTO TTAB ATJs	9	15	23	
VA BVA	44	56	76 (incl. temps)	737

⁴⁰ Figures not comparable.

⁴¹ Figures not comparable.

⁴² Limon figures not comparable to current because PTAB's jurisdiction greatly increased.

IV. BEST PRACTICES IN TYPE B ADJUDICATION

A. BEST PRACTICES AND CAUTION

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

Each of these best practices appears in the procedural regulations or manuals of some agencies I studied, but none of them appear in every set of regulations. In many cases, agencies follow these practices but have not codified them in regulations.

Many of the best practices are drawn from the adjudicatory provisions of the APA. After all, like Type A adjudication, Type B adjudication involves legally required evidentiary hearings. While the decisionmaker in Type B adjudication is an AJ, rather than an ALJ, the presumption is that Type B adjudication should resemble Type A.⁴³ The adjudicatory procedures for evidentiary hearings that have developed over generations, before and after enactment of the APA, should be generally applicable, whether the adjudication falls under Type A or B.

Here I suggest an obvious caution: the world of Type B adjudication is wildly diverse. The types of matters considered are all over the map—deportation, civil penalties, veterans' benefits, intellectual property disputes, federal government discrimination, security clearances, agriculture, government employment, tax collection, and environmental permitting, just to mention the ones I've already studied.

The Type B evidentiary hearings called for by statutes or regulations vary enormously. Some are trial-type hearings that are at least as formal and private-party protective as those called for by the APA (except that the presiding officer is not an ALJ). Others are quite informal and some are purely in writing. Some programs are in the mass justice category with heavy caseloads and rushed proceedings. Others have much lower caseloads and call for leisurely and thorough consideration. Some have huge backlogs and long delays; others seem current in their caseloads. Some proceedings are highly adversarial; others are inquisitorial. The structures for internal appeal also vary greatly. Thus the heterogeneity of Type B adjudication makes it challenging to prescribe a set of best practices that would fit all of it.

⁴³ The ABA resolution discussed in note xx called on Congress to apply the adjudication provisions of the APA to Type B adjudication required by statute--except for the requirement that ALJs preside. See Asimow, *supra* note xx. The best practices discussed here often follow that approach. However, the best practices suggested in this study cover Type B adjudication that is required by due process, procedural regulations and executive orders as well as by statute. This study includes some best practices that are not included in the APA's adjudication provisions.

I do not suggest that every best practice in the list that follows should be applicable to every Type B scheme. The presumption is rebuttable. If a persuasive case can be made that a particular practice is inappropriate for a particular scheme, then the agency should not be encouraged to adopt it. Whether a particular procedural device should be employed always requires a careful balance of the conflicting variables involved in choosing optimal procedures--accuracy, efficiency, and acceptability to the parties.⁴⁴

In 1993, an ACUS consultant and the Model Adjudication Rules Working Group proposed a set of model rules intended for both Type A and Type B adjudication.⁴⁵ ACUS did not adopt these model rules as a recommendation. The approach taken by these model rules makes sense for Type A adjudication, but I do not believe this approach is appropriate for the highly diverse world of Type B adjudication. I have not sought to draft precise language to be incorporated into procedural regulations implementing the best practices itemized below, given the diversity of the adjudicatory schemes to which they would apply. Still, drafters of procedural regulations implementing these best practice recommendations should consult the 1993 Model Rules and may well wish to borrow the language of those proposals.

Clearly these best practices cannot be applied to the even more wildly diverse world of Type C adjudication—individualized decisionmaking where no evidentiary hearing is legally required. This is true informal adjudication. Attempts to provide a procedural template for this vast universe of informal adjudication have failed to gain much traction.⁴⁶ Yet, the drafters of procedural regulations for Type C adjudication should consider whether some of these practices might work and improve the procedural protections for the parties without costing the agency too much in terms of staff, delay, or inflexibility.

B. BEST PRACTICES FOR TYPE B ADJUDICATION

The list of best practices that follows is broken into five larger categories—integrity of the decisionmaking process, prehearing practices, hearing practices, post hearing processes, and procedural regulations. I frequently give examples found in the statutes, regulations or manuals of the agencies studied in the deep-dive memos. It would be tedious to list each of the regulations that implement these best practices in particular Type B schemes, and I have not sought to do so.

1. Integrity of the decisionmaking process

a. Exclusivity of the record

⁴⁴ See Verkuil, *supra* note ____, at ____.

⁴⁵ Michael Cox, *The Model Adjudication Rules (MARS)*, 11 T.M. COOLEY L. REV. 75 (1994).

⁴⁶ See Gardner, *supra* note ____, at ____.

Type B evidentiary hearings entail an exclusive record requirement which should be explicitly spelled out in procedural regulations.⁴⁷ Indeed, the exclusive record concept is a necessary (though not sufficient) element of my definition of Type B hearings.⁴⁸ The APA imposes the exclusive record requirement for Type A hearings.⁴⁹

The exclusive record requirement means that a decisionmaker (either the AJ or reconsidering authority) is limited to considering factual information presented in testimony or documents received by the decisionmaker before, at, or after the hearing (and to matters officially noticed). The exclusive record concept means, for example, that the decisionmaker cannot receive *ex parte* submissions of factual information or rely on his or her personal knowledge of the facts (without giving the parties a chance to rebut it), or base a judgment on a personal inspection or test without the parties being allowed a rebuttal opportunity.

Of course, the decisionmaker does not violate the exclusive record requirement by making use of his or her experience and expertise in evaluating the information that was introduced into evidence (or officially noticed) or in making predictions and forecasts based on that information.

b. Bias

A Type B decisionmaker (either the AJ or the reconsidering authority) should not be biased for or against any party.⁵⁰ An impartial decisionmaker is an essential element of an evidentiary hearing and is required both by due process and by the APA⁵¹.

For this purpose, the term “bias” includes a financial interest in the decision, personal animus against the private party or the group to which that party belongs, or prejudgment of the adjudicative facts at issue in the proceeding. Procedural regulations and manuals should spell out this standard and explain how and when parties should raise bias claims. Most sets of Part B

⁴⁷ For example, the exclusive record principle is set forth in a statute relating to EOIR: “The determination of the immigration judge shall be based only on the evidence produced at the hearing.” 8 U.S.C. § 1229a(c)(1)(A). This statutory provision does not seem to be discussed and explained in the EOIR procedural regulations or its practice manual. However, the ethics code for Immigration Judges provides that IJs can consult with Immigration Court staff or officials whose function is to aid the IJs, provided that the IJ “makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility to personally decide the matter.” Ethics Rule XXXII, <http://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf>.

⁴⁸ See text at note.

⁴⁹ “The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title...” APA §557(e). See ABA Guide ¶ 7.08.

⁵⁰ See APA ¶ 556(b): “The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.” See also ABA Guide ¶ 7.02.

⁵¹ *Goldberg v. Kelly*, 370 U.S. 254 (1970); APA §556(b)

procedural regulations do not contain explicit provisions concerning bias or how bias claims should be raised.⁵² Agencies should consider giving parties the option of making one preemptory challenge against an AJ.

c. Outsider ex parte communications

Best practice includes a provision prohibiting ex parte communication by outsiders to or from the AJ or the agency reconsidering authority or the decisional advisers of either of them. Outsiders (whether they are private parties or government officials outside the agency) should make submissions (whether of fact, law, or discretion) to agency decisionmakers only on the record.

Prohibition of ex parte communication is essential to adjudication that is fair and perceived to be fair. Procedural regulations should spell out the ex parte concept⁵³ but most of them do not do so.⁵⁴

The APA prohibits outsider ex parte communications to or from decisionmakers or their advisers.⁵⁵ Type B agencies may wish to adopt these provisions which have worked well,

d. Separation of functions

Separation of functions means that the agency must internally separate its adversary and decisional personnel. For this purpose, an “adversary” is a staff member who took an active part

⁵² For example, I found no provisions concerning bias in the procedural regulations for EOIR, USPTO, or VA. The regulations relating to PACA contain a disqualification provision that covers only financial or family relationship and not other types of bias. It also spells out the procedure for requesting disqualification.

8 C.F.R. § 47.11(a), (b).

⁵³ The regulations of the Army Corps of Engineers relating to penalty enforcement contain an adequate statement of the rule against ex parte communications. “Ex parte communication means any communication, written or oral, relating to the merits of the proceeding, between the Presiding Officer and an interested person outside the Corps or the interested Corps staff, which was not originally filed or stated in the administrative record or in the hearing. Such communication is not an “ex parte communication” if all parties have received prior written notice of the proposed communication and have been given the opportunity to participate herein. 33 C.F.R. §326.6(a)(3)(vi).

No interested person outside the Corps or member of the interested Corps staff shall make, or knowingly cause to be made, any ex parte communication on the merits of the proceeding.

The Presiding Officer shall not make, or knowingly cause to be made, any ex parte communication on the proceeding to any interested person outside the Corps or to any member of the interested Corps staff. Id., §326.6(h)(i) and (ii). The regulations continue with a provision allowing disqualification of the presiding officer who received a prohibited communication and another calling for adverse consequences for the party responsible for making the communication.

⁵⁴ For example, there are no provisions precluding ex parte communication relating to the VA. In the case of PTAB, ex parte communications are prohibited in trial cases but not appeals. EOIR regulations contain no provisions relating to ex parte communication or separation of functions. Rule XXXII of the ethics rules for Immigration Judges prohibit ex parte communication (apparently with either outsiders or with enforcement officials) but these rules apparently do not apply to the Board of Immigration Appeals. Rule XXXII, <http://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf>. Rule XXXII replaced an earlier rule that explicitly *permitted* ex parte communication between Immigration Judges and Department of Justice employees. See Appendix A-5, text at notes 26-27.

⁵⁵ APA §557(d). See ABA Guide ¶ 7.04.

in investigating, prosecuting or advocating in the same case (but not in a different case). The separation of functions principle precludes an adversary from serving as a decisionmaker (either an AJ or member of reconsidering authority) or a decisional adviser in the same case. It also precludes the adversary from furnishing ex parte advice to a decisionmaker or decisional adviser in the same case. Best practices for Type B adjudication require adherence to the separation of functions concept. It is a fundamental of adjudication that is fair and perceived to be fair.

The APA contains provisions that secure the separation of functions concept⁵⁶ and also address the problem of command influence (in which an adversary supervises a decisionmaker).

Most of the regulations of Type B adjudicating agencies I studied contained no provision requiring separation of functions.⁵⁷ A minority of the Type B agencies do have separation of functions provisions.⁵⁸ The regulations and ethics guides of EOIR are particularly inadequate.⁵⁹

2. Pre-hearing practices

a. Notice

Procedural regulations relating to Type B adjudication should contain provisions relating to notice to the private party or parties who will (or may) participate in the evidentiary hearing. The APA requires that persons entitled to notice shall be timely informed of the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing is to be held; and the matters of fact and law asserted.⁶⁰ This provision might serve as the starting point for notice regulations relating to type B adjudication.

In his study of optimum informal adjudication procedures, Verkuil identified proper notice as one of the essential and irreducible elements of administrative procedure (along with the ability to make written or oral comments and a statement of reasons).⁶¹

⁵⁶ APA § 554(d) provides: “An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.” See ABA Guide ¶ 7.06. This rule does not apply to determining applications for initial licenses, to proceedings involving rates, facilities, or practices of public utilities or carriers, or to the agency or a member or member of the body comprising the agency. §§ 554 (d)(A), (B), and (C).

⁵⁷ For example, there are no provisions for separation of functions in the regulations relating to USDA PACA hearings, EEOC hearings, EAB hearings in Type B cases, PTAB appeals, or BVA cases.

⁵⁸ Thus the DOE whistleblower regulations provide: “The investigator may not participate or advise in the initial or final agency decision on your complaint.” Moreover, “The Administrative Judge may not be subject to the supervision or direction of the investigator.” 10 C.F.R. § 708.22(b). In DOE personnel hearings, ex parte contacts are prohibited (without making clear whether the provision applies to staff communications) and DOE counsel shall assist the AJ in establishing a complete hearing record. IRS CDP proceedings are subject to statutory separation of functions provisions.

⁵⁹ EOIR’s procedural regulations contain no provisions for separation of functions. An ethics guide for IJs prohibits ex parte contacts (unless authorized by law); it is unclear whether this refers both to outsider and to staff ex parte contacts. No such guidance applies to BIA judges. An earlier guide permitted both IJs and BIA members to engage in ex parte contacts with the DOJ. See text at notes xx for further discussion.

⁶⁰ APA § 554(b). See ABA Guide ¶ 4.02.

⁶¹ Verkuil, *supra* note 5, at 748-49.

Best practice is that notice should contain information about the time and place of the hearing. It should provide information about the agency's position as to facts, law, and discretion. This information should be specific enough to enable the party to prepare for the legally required evidentiary hearing. The regulations should require the notice to include information about the procedural choices open to the private party or parties (such as discovery or ADR) and the deadlines for filing pleadings and documents and for filing a request for a hearing. The notice should also contain information about administrative appeals beyond the hearing stage and about judicial review. Each of the administrative schemes I studied included notice provisions but they are too disparate to justify summarizing them here.

b. Lay representation

In many cases, private parties involved in agency adjudication cannot afford lawyers and have to represent themselves. Self-represented parties are often at a great disadvantage. Best practices should include the ability to be represented by a non-lawyer in agency proceedings, if private parties who appear before the agency are likely to have difficulty finding or paying for attorneys. Agencies should be permitted to license lay representatives (including requirements of an examination and experience), require them to be insured, and to enforce ethical conduct codes for such representatives. Obviously, lay representation may be inappropriate in cases in which the subject matter of the dispute is highly technical and requires specialized knowledge.⁶²

The procedural regulations of many agencies permit representation by authorized agents who are not lawyers, as well as by law students in supervised clinical programs.⁶³ The VA is notable for its heavy reliance on representation by employees of veterans' service organization at both the Veterans Affairs Regional Office (VARO) and BVA levels.⁶⁴

The APA authorizes all adjudicating agencies (not limited to Type A agencies) to permit lay representation but does not create a right to lay representation absent agency authorization.

c. Alternative dispute resolution

The Administrative Dispute Resolution Act (ADRA) applies to all federal adjudication, including both Type A and B. ADRA broadly validates and encourages adjudicating agencies to use all available ADR tools, including mediation and arbitration.⁶⁵ ACUS has consistently

⁶² PTAB and TTAB permit representation only by lawyers. PTAB but not TTAB allows representation by registered patent agents. See App. A-7, text at notes 9-12, 49-51.

⁶³ Thus EOIR allows representation by law students, law graduates not yet admitted to the Bar, reputable individuals with a pre-existing relationship to the person represented, accredited representatives, and accredited officials of a foreign government. However, it does not allow representation by non-lawyer immigration specialists, visa consultants, and notaries. See text at App. A-5, text at notes 16-23.

⁶⁴ See App. A-8, text at notes 23-26. The statute prohibits compensation of attorneys at the VARO level but permits it at the BVA level. See *id.*, note 24.

⁶⁵ 5 U.S.C. §§ 571 to 583.

sought to promote ADR by federal agencies.⁶⁶ Properly used, ADR techniques can make the adjudicatory process less adversarial and can facilitate settlements, thus avoiding contentious and costly hearings.

Thus best practices of Type B adjudication agencies should encourage and facilitate ADR, particularly mediation. The regulations should provide a system whereby neutral mediators can be selected by agreement of the parties and for confidentiality of communications occurring during the mediation process. With some exceptions,⁶⁷ the procedural regulations I studied did not contain adequate provisions encouraging ADR and creating mechanisms by which it can be carried out.

d. Pretrial conferences

Best practices should include the ability of an AJ to require the parties to participate in a pretrial conference, if the AJ believes that such a conference would simplify the hearing or promote settlement. Some agencies I studied include such provisions in procedural regulations.⁶⁸ The APA contains a similar provision.⁶⁹

e. Electronic document filing

Best practices should include provisions allowing parties to file documents with the agency and the AJ electronically, as is now broadly permitted in the court system.⁷⁰

f. Discovery

Best practice should include provisions allowing private parties to inspect the unprivileged materials in the government's case files. In addition, AJ's should be empowered to order discovery through depositions, interrogatories, and the other methods of discovery used in court, but only upon a showing that discovery is needed (such as the situation in which a witness will not be available to testify at the hearing).⁷¹ Requiring AJ permission should avoid the

⁶⁶ See ACUS Rec. 2014-1 and 95-1, relating to ADR and FOIA; 95-7, relating to ADR and the Americans with Disability Act.

⁶⁷ EEOC emphasizes ADR at all stages of its adjudicatory process relating to discrimination against federal employees. Complaining employees must first consult an EEO counselor within the employing agency. The counselors offer mediation as an option. ADR continues to be available during the time the employing agency considers the complaint. When the dispute comes before EEOC, the employing agency can make an offer of resolution and if the ultimate result is less favorable than the offer, the complainant can be denied attorney fees. See Appendix A-3.

⁶⁸ In DOE security clearance cases, "At least 7 calendar days prior to the date scheduled for the hearing, the Administrative Judge will convene a prehearing conference for the purpose of discussing stipulations and exhibits, identifying witnesses, and disposing of other appropriate matters. The conference will usually be conducted by telephone." 10 C.F.R. § 710.25(f).

⁶⁹ APA § 556(c)(6).

⁷⁰ Electronic filing is permitted by the EAB. 40 C.F.R. § 124.19(i).

⁷¹ Both EEOC and DOE allow discovery by agreement of the parties or in the AJ's discretion. 29 C.F.R. § 1614.109(d); 10 C.F.R. § 708.28(b)(1) and (2).

problem of costly unlimited discovery that plagues the court system. Discovery provisions are probably not appropriate in mass adjudication situations because of caseload pressures on AJs, but may have a useful role in Type B adjudication that involves larger disputes and lengthier hearings.

PTAB and TTAB conduct their trials (that is, disputes between private parties) entirely through discovery; evidence is taken in deposition form and the depositions are introduced at the hearing. This is an interesting model that may work for other agencies.⁷²

g. Subpoena power

Best practices for Type B adjudication includes subpoena power.⁷³ Subpoenas enable the agency and private parties to compel the production of documents and the appearance of witnesses at the hearing. Most Type B agencies have subpoena power.⁷⁴ However, the agency cannot give itself subpoena power; it must be provided by a statute.⁷⁵ Congress should grant subpoena power to all Type B adjudicating agencies, and agency procedural regulations should explain subpoena practice in detail.

h. Open hearings

Under best practices, a Type B adjudicating agency should open its hearings to the public.⁷⁶ Allowing members of the public (including the media) to be present is an important accountability mechanism and part of the American tradition of open trials.⁷⁷ However, agencies should have the ability to close a hearing in particular cases due to concerns about protection of law enforcement or national security⁷⁸ or to protect the privacy of parties to the hearing.⁷⁹

3. Hearing practices

a. Video conferencing and telephone hearings

Agencies can achieve substantial economies by making use of video conference technology in conducting adjudicatory hearings. Video allows the agency to avoid spending

⁷² See Appendix A-7, text at notes 26-29, 62-69.

⁷³ See ABA Guide ¶ 4.04.

⁷⁴ For example, the Army Corps of Engineers has subpoena power in civil penalty cases. 33 C.F.R. § 326.6(i)(2).

⁷⁵ APA § 555(c). Of the agencies surveyed for this study, IRS CDP lacks subpoena power as does the EEOC.

⁷⁶ See ABA Guide ¶ 5.03.

⁷⁷ See *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (First Amendment requires open deportation hearings involving persons suspected of terrorist involvement unless agency establishes compelling interest for closing the hearing.) *Contra*: *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002).

⁷⁸ EOIR provides for open hearings but hearings may be closed to protect witnesses, parties, or the public interest. EOIR hearings shall be closed in cases of spousal or child abuse and in national security cases. 8 C.F.R. § 1003.27(a). DOE closes its hearings in security clearance cases, which, by definition, involve security issues not appropriate for public hearings. 10 C.F.R. § 710.26(c).

⁷⁹ Thus the EEOC closes its hearings in employee discrimination cases in order to protect the privacy of the complainant. 29 C.F.R. § 1614.109(e).

time and money to bring AJs, witnesses, and other staff members to locations away from their office. It also promotes the convenience of parties and witnesses, especially those living in remote locations, who need not travel long distances to hearings; obviously, however, at least with existing technology, the parties and witnesses must still travel to an agency office that has video facilities. ACUS recently studied the video conference procedure and suggested best practices.⁸⁰

Nevertheless, video conference is controversial and it is not always appropriate.⁸¹ The efficiency savings possible through the use of video must be balanced against the dissatisfaction of private parties and their advocates. When video is used, the agency should make every effort to structure the experience to maximize participant satisfaction, as discussed in ACUS Rec. 2014-7.

Best practices for Type B adjudication include the ability to hold hearings through video conference. DOE,⁸² EOIR,⁸³ USDA-PACA,⁸⁴ and BVA⁸⁵ are among the agencies that hold a substantial portion of their Type B hearings through video conference.

Video conference is obviously superior to the use of the telephone, since video allows the AJ and the parties and their representatives to see as well as hear the witnesses and to see documents. Nevertheless, in cases involving smaller stakes or which do not present credibility issues, best practices include the ability to make use of telephone hearings. For example, the IRS CDP process involves extensive use of telephone hearings, which would seem appropriate given the informality of the CDP process and the large caseloads of the IRS appeals officers.⁸⁶

b. Written-only hearings

Best practices for Type B adjudication include the use of written-only hearings in appropriate cases. Most agencies confront budget and caseload pressures and the use of written hearings can yield substantial efficiencies. The APA provides for written-only hearings in a

⁸⁰ ACUS Recs. 2014-7, 2011-4.

⁸¹ Video is extensively used in EOIR proceedings. Many advocates for respondents are strongly opposed to the practice, believing that it disadvantages their clients. See text at notes xx.

⁸² See App. A-2, text preceding note 5 (about 60% of DOE hearings are conducted by video-conference).

⁸³ See App. A-5, text at notes 29-31. Video is heavily used for cases of respondents in detention since detention facilities are often located at remote locations.

⁸⁴ In cases of claimed damages in excess of \$30,000, USDA-PACA provides oral hearings. However, oral hearings are conducted by video-conference unless the examiner determines that an in-person hearing is necessary to prevent prejudice to a party, or is necessary because of a disability of an individual expected to participate in the hearing, or because an in-person hearing “would cost less than conducting the hearing by audio-visual communication.” 7 C.F.R. § 47.15(c)(3).

⁸⁵ See App. A-8, text at note 22. Most BVA cases are written only. In cases in which hearings occur, 54% are by video-conference.

⁸⁶ Treas. Reg. § 301.6320-1(d), A-D6.

number of case categories “when a party will not be prejudiced thereby.”⁸⁷ Normally, best practice is to allow oral argument in connection with a written-only hearing, but the agency should have discretion to dispense with oral argument if it appears to be of little utility in a given case.

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

Thus EPA permit cases are handled through a two-stage process that does not include an oral evidentiary hearing. The initial decision stage is a written notice and comment type proceeding, often with a public non-evidentiary hearing. The appellate stage before the EAB is written only with clearly-erroneous review of the fact findings made at the initial decision stage.⁸⁸

Moreover, in cases involving disputes of adjudicative fact but relatively small stakes, it is acceptable to substitute written for oral testimony, as in the case of USDA-PACA.⁸⁹ Even when the stakes are large, some agencies offer a quicker decision if the parties agree to a written-only consideration of their case.⁹⁰ USDA-SNAP offers only written procedures without an oral argument, apparently on the ground that the issues are subject to *de novo* redetermination in court.⁹¹ PTAB and TTAB use an innovative approach in which oral testimony or parties and experts is taken exclusively through depositions; the AJ then decides the case exclusively on these depositions plus oral argument.

c. Rules of evidence

The procedural regulations relating to Type B adjudication should prescribe the rules of evidence. Best practice is to follow the APA provisions on evidence. “Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.”⁹²

⁸⁷ The APA provides that “In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.” § 557(d).

⁸⁸ See App. A4, text at notes 12-19, 28-33.

⁸⁹ 7 C.F.R. § 47.15(a) (documentary rather than oral hearings in cases in which claimed damages do not exceed \$30,000).

⁹⁰ BVA backlogs are quite long. Most parties appealing to BVA agree to a written-only hearing in order to receive a quicker decision. See App. A-8, text preceding note 22.

⁹¹ See App. A-1, text at notes 45-48.

⁹² APA § 557(d).

Thus under the APA the Federal Rules of Evidence (FRE) are not applicable; hearsay evidence is admissible. This is the general practice in Type B adjudication⁹³ and should be considered best practice.

One variation of the general rule is that the FRE can be consulted but not necessarily followed. In DOE security clearance cases, the regulations provide that formal rules of evidence do not apply but the FRE may be used as a guide to assure production of the most probative evidence available; hearsay evidence may in the AJ's discretion and for good cause shown be admitted without strict adherence to technical rules of admissibility and shall be accorded such weight as the circumstances warrant."⁹⁴ In my view, this formulation is likely to cause confusion and time consuming evidentiary disputes about whether specific FRE rules should be applied. It should not be best practice.

There are situations in which agencies should follow the FRE. PTAB and TTAB provide examples of this situation. Administrative patent judges (APJs) and administrative trademark judges (ATJs) apply the FRE (along with all of the discovery rules) in trial cases.⁹⁵ The apparent rationale is that such private-party patent disputes could be tried either in federal district court or the PTAB or TTAB and the evidence rules should not differ between the two fora. However, the FRE are not applicable in appeal proceedings before PTAB and TTAB (that is, cases involving disputes between the patent examiner and the applicant or patentee). In appeal proceedings, the judges admit any evidence that tends to prove or disproved alleged facts.⁹⁶

d. Opportunity for rebuttal

Best practice for evidentiary hearings includes an opportunity for rebuttal. The right to rebuttal normally entails cross-examination of an adverse witness who furnished oral testimony.

However, cross-examination is not always necessary. Under the APA, the right to cross-examine is not absolute. Instead, a party is entitled "to conduct such cross-examination as may be required for a full and true disclosure of the facts."⁹⁷ Thus best practice may permit the abridgement of cross-examination in appropriate circumstances.

One such circumstance involves concerns for national security or for protection of confidential informants. For example, in DOE security clearance cases, the AJ can dispense with cross if a witness is a confidential informant, or if cross-examination would jeopardize restricted data or national security.⁹⁸ Instead, the employee shall receive a summary or description of the information and appropriate consideration should be given to the lack of opportunity to cross

⁹³ For example, in EEOC hearings, "the rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence." 29 C.F.R. § 1614.109(e).

⁹⁴ 10 C.F.R. § 710.26(h). Similarly, in whistleblower cases, OHA is not bound by the formal rules of evidence but can use the FRE as a guide. 10 C.F.R. § 708.28(a)(4).

⁹⁵ 37 C.F.R. § 42.62; 37 C.F.R. § 2.122(a).

⁹⁶ 37 C.F.R. § 41.30.

⁹⁷ APA § 557(d). See ABA Guide ¶5.09.

⁹⁸ 10 C.F.R. § 710.26(l).

examine.⁹⁹ Similarly, in EOIR hearings, the IJ must permit a reasonable opportunity for cross-examination,¹⁰⁰ but the respondent cannot examine national security information that the government introduces in opposition to admission or discretionary relief.¹⁰¹

In agency proceedings involving primarily written evidence or evidence presented in public hearings, cross examination is inappropriate. Rebuttal of such evidence takes the form of additional written or oral comments.¹⁰²

Cross examination may be inappropriate in informal and inquisitorial proceedings. For example, there is no cross-examination in IRS CDP cases. The appeals officer has a conversation with the taxpayer in person or on the phone. The taxpayer argues that the IRS should use some less intrusive method of tax collection, but there is no cross-examination or even a transcript of this exchange.¹⁰³

5. Post-hearing practices

a. Written opinion

Following the APA,¹⁰⁴ best practice requires a Type B decisionmaker to provide a written opinion setting forth findings of fact, legal interpretations and conclusions, and reasons for discretionary action. A requirement of written findings and reasons improves the quality of agency decisionmaking, assists parties in determining whether to seek judicial review, and improves the quality of administrative reconsideration and judicial review.

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

The Administrative Judge shall make specific findings based upon the record as to the validity of each of the allegations contained in the notification letter and the significance which the Administrative Judge attaches to such valid allegations. These findings shall be supported fully by a statement of reasons which constitute the basis for such findings.¹⁰⁵

⁹⁹ 10 C.F.R. § 710.26(m).

¹⁰⁰ Immigration Court Practice Manual § 4.16(d). Practice

¹⁰¹ 8 U.S.C. § 1229a(b)(4).

¹⁰² Thus at public hearings conducted by the Army Corps of Engineers, participants have a reasonable opportunity for rebuttal of statements made by adverse witnesses but cross examination is not permitted. 33 C.F.R. § 327.8(b), (c), (d).

¹⁰³ Treas. Regs. § 301.6320(1)(d), Q&A D-6 and D-7.

¹⁰⁴ The APA requires that all decisions including initial, recommended and tentative decisions, include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record. § 557(c)(A). *See* ABA Guide ¶6.02.

¹⁰⁵ 10 C.F.R. § 710.27(c). Similarly, DOE's regulations relating to whistleblower hearings provides: "An initial agency decision issued by the Administrative Judge will contain appropriate findings, conclusions, an order, and the factual basis for each finding, whether or not a hearing has been held on the complaint..." 10 C.F.R. § 708.30(c).

In some agencies, such as EOIR, the regulations and manuals require a written decision but do not prescribe its contents. Best practice should specify the contents of the written decision.

b. Reconsideration

Best practice is that agencies should furnish an opportunity for higher-level reconsideration of initial adjudicatory decisions.¹⁰⁶ The ability to obtain reconsideration of an adverse decision is useful to correct the inevitable errors made by AJs and enhances the feelings of private parties that their case has been dealt with fairly and impartially.

To facilitate such reconsideration, the AJ decision should be disclosed to the parties. The reconsideration body should be entitled to summarily affirm the lower-level decision without being required to write a new opinion.

The intra-agency appellate structures vary greatly and provides a variety of models from which Type B adjudicators can choose. Some structures provide two Type B adjudicatory proceedings; the reconsideration decision is ordinarily based on written briefs with or without oral argument. For example, EOIR provides for both an initial Type B decision by an IJ followed by a Type B appellate procedure at the BIA level. Similarly, EEOC cases involve both an initial decision by an AJ followed by an appellate-level decision by OFO.¹⁰⁷ In environmental permitting cases, the initial decision is based on a notice and comment procedure that includes a public hearing; the EAB functions as a reconsideration body. In DOE Security Clearance cases, reconsideration of AJ decisions is provided by the DOE Headquarters Appeals Panel. In Army Corps of Engineer permit cases, there are two levels of Type B decisionmaking at the DE and RO levels.

In VA cases, the only type B hearing is at the level of the BVA. The BVA reviews a VARO decision denying benefits. The VARO decision is made by a ratings specialist but can be reviewed in by a Decision Review Officer (DRO). Both the initial and DRO proceedings should probably be classified as Type C adjudication.

In some cases, there is no agency reconsideration procedure available to private parties, but there is an internal review procedure. For example, in IRS CDP cases, the initial decision is made by an AO, but the IRS' decision is made by a team manager who reviews the AO decision. In PTAB and TTAB adjudication, there is no agency reconsideration procedure of APJ and ATJ decisions.

Agency reconsideration may be unnecessary if de novo judicial review is available. For example, proceedings in USDA SNAP cases against vendors who have allegedly violated the regulations consist only of an all-written hearing before a USDA ARO without an administrative appeal; but such decisions are subject to de novo reconsideration by a federal district court.¹⁰⁸

¹⁰⁶ See generally ABA Guide ¶ 6.03.

¹⁰⁷ See App. A-3, text at note 11.

¹⁰⁸ See App. A-1, text at notes 36-40.

4. Procedural regulations

a. Complete statement of procedures

Best practice is that all procedures and practices that affect persons outside the agency should be set forth in procedural regulations that are published in the Federal Register and the Code of Federal Regulations. This is required by the APA.¹⁰⁹ Rules relating to the decisional process should not be buried in practice manuals. Agencies should re-examine their procedural rules to make sure they are up-to-date and complete.

b. User-friendly regulations

The procedural regulations discussed in these best practices recommendations are intended to be used by the ordinary people (and their possibly inexperienced lawyers or lay representatives), as well as by the agency staff. Best practice is to make the regulations and practice manuals as user friendly as possible. They should be stated in simple, non-technical language.¹¹⁰ They should contain examples, model forms, and checklists.

¹⁰⁹ APA § 552(a)(1)(C).

¹¹⁰ The DOE's Whistleblower procedural regulations are a welcome example of user friendly drafting. They are addressed to "you," meaning the government employee complaining of whistleblower violations.

APPENDICES

APP. A-1: DEPARTMENT OF AGRICULTURE (1-06-16)

A. TYPE A USDA SCHEMES

Numerous USDA adjudicatory programs are Type A adjudication.¹¹¹ These are USDAOALJ0001 in our database. The regulations provide for Type A hearings before ALJs; appeals from ALJ decisions are decided by USDA's judicial officer.

Many of the statutes covered by these regulations call for a "hearing on the record" and thus trigger Type A adjudication. However, some statutes do not call for a hearing "on the record" but USDA nevertheless has included these programs in its list of Type A adjudication. For example, licensing provisions of the Animal Welfare Act call only for "notice and an opportunity for hearing."¹¹² The same is true of licensing provisions in the Perishable Agricultural Commodities Act. (PACA)¹¹³

The National Appeals Division (NAD) is an independent unit within USDA that conducts evidentiary hearings arising from adverse decisions by agencies engaged in USDA's credit, soil conservation, and insurance functions.¹¹⁴ It is USDANADO0002 in our database. NAD is headed by a Director who appoints its hearing officers.¹¹⁵ The hearing officers have no duties other than adjudicating.¹¹⁶ In *Lane v. USDA*,¹¹⁷ the 8th Circuit held that NAD hearings are covered by the APA (and consequently that they are subject to the Equal Access to Justice Act). The *Lane* decision has been followed by cases from two other circuits.¹¹⁸ USDA has acquiesced in the *Lane* decision and the regulations now provide that the APA and EAJA apply to NAD hearings.¹¹⁹ Thus NAD hearings are treated for purposes of this study as Type A adjudication—

¹¹¹ See 7 C.F.R. §§ 1.130 to 151. § 1.131 lists the USDA regulatory programs subject to these regulations.

¹¹² 7 U.S.C. § 2149 (a) (license suspension or revocation) and (b) civil penalties.

¹¹³ See e.g., 7 U.S.C. § 499h(b).

¹¹⁴ Agencies covered are the Farm Service Agency, Commodity Credit Corporation, Farmers Home Administration, Federal Crop Insurance Corporation, Rural Development Administration, Natural Resources Conservation Service, and certain state and local committees. 7 U.S.C. §6991(2); 7 C.F.R. §11.1. NAD does not provide review of statutes or regulations, only of individualized decisions. 7 C.F.R. 11.3(b).

¹¹⁵ The Director serves for a 6-year term and is not subject to removal during that term except for cause. 7 U.S.C. § 6992(b)(2).

¹¹⁶ 7 U.S.C. § 6992

¹¹⁷ 120 F.3d 106 (8th Cir. 1997).

¹¹⁸ *Five Points Road Joint Venture v. Johanns*, 542 F.3d 1121 (7th Cir. 2008); *Aageson Grain & Cattle v. USDA*, 500 F.3d 1038 (9th Cir. 2007). This line of cases is questionable, however. Prevailing law gives *Chevron* deference to an agency's interpretation of whether its governing statute triggers the APA. *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006). The *Lane* decision gave no deference to USDA's interpretation.

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

except that, by statute, its hearings are conducted by hearing officers appointed by its Director, rather than by ALJs.¹²⁰

B. TYPE B USDA SCHEMES

This memo is about three major Type B hearing schemes operated by USDA—reparation proceedings under the Perishable Agricultural Commodities Act (PACA), dispute resolution proceedings under the various nutrition programs, particularly SNAP (formerly known as Food Stamps), and dispute resolution involving agricultural credit and insurance agencies by the National Appeals Division.

1. PACA

PACA (originally enacted in 1930) includes provisions for reparation orders.¹²¹ PACA regulates dispute resolution between private participants in the fresh or frozen fruit and vegetable markets. The producers of fruits and vegetables are on one side; commission merchants, brokers, and dealers in such products (who must hold a license) are on the other side. PACA allows USDA to adjudicate damage claims by producers against licensees for non-payment or other delinquencies (such as unfair, deceptive, unreasonable, or discriminatory practices, including unreasonable rejection of produce).¹²² PACA reparation proceedings are not presently included in the ACUS database but should be included.¹²³

USDA decisions in PACA reparation cases are reviewable in federal district court. Review can occur either in a proceeding by a petitioner to enforce a reparation order or by either party to review a reparation order. The cases are tried *de novo*, but USDA's findings and conclusions are treated as *prima facie* correct.¹²⁴ In addition, producers who are victims of breach of contract can go directly to court and bypass the USDA reparation procedure entirely.¹²⁵ These unusual review provisions reflect the fact that the USDA reparation proceedings might otherwise be treated as an unconstitutional delegation of adjudicative power or a denial of the

¹²⁰ The APA allows a statute to supersede the APA requirement that hearings be conducted by ALJs. APA §556(b) (“This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statutes.”)

¹²¹ See 7 U.S.C. § 499a et seq. PACA reparation hearings are not included in the USDA's list of Type A adjudications. See 7 C.F.R. § 1.131(a).

¹²² See 7 U.S.C. § 499b. PACA also treats the proceeds of sale of produce as being held in trust for producers as well as giving the producers a floating lien over the producers' assets. These provisions greatly improve the position of the producers as creditors if a licensee files for bankruptcy. See 7 U.S.C. § 499e(c).

¹²³ PACA procedure is discussed in Paul R. Verkuil, *A Study of Informal Adjudication Procedure*, 43 U. CHI. L. REV. 739, 764-65 (1976)

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

¹²⁵ See 7 U.S.C. § 499e(b), stating that victims can recover damages either through the USDA process or by suing in any court of competent jurisdiction. “[T]his section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this chapter are in addition to such remedies.”

right to a jury trial. The existence of these unusual judicial review provisions may explain why reparation orders are treated as Type B adjudication rather than Type A (like most of the other USDA regulatory programs).

The procedures for PACA reparation orders are set forth in USCA's regulations.¹²⁶ The examiners in PACA hearings are attorneys employed in the Office of the USDA General Counsel.¹²⁷ Examiners can be disqualified for bias, but the regulations define bias rather narrowly to cover only a pecuniary interest or a blood or marital relationship to one of the parties.¹²⁸ There are no provisions prohibiting ex parte communications to the examiner or involvement by the USDA investigators in the proceedings. Examiners are given various powers including subpoena power, power to order depositions, or to conduct hearings by telephone or audiovisual equipment.¹²⁹

Parties seeking PACA reparations trigger the process by filing an "informal complaint." Staff members of the Deputy Administrator investigate the complaint and a copy of the investigational report is provided to the parties.¹³⁰ During this period, the parties may settle the dispute.¹³¹ The PACA branch also provides mediation services at this stage.¹³² If the case does not settle, the petitioner files a "formal complaint" which is served on the respondent.¹³³

The regulations provide for an oral hearing if the amount of the claimed damages exceeds \$30,000. If the damages do not exceed \$30,000, a documentary rather than an oral hearing is provided (unless the examiner finds that peculiar circumstances make an oral hearing necessary).¹³⁴

Oral hearings can be conducted by an in-person proceeding or by telephone or by audio-visual telecommunication equipment. The default is audio-visual equipment unless the examiner determines that an in-person hearing is necessary to prevent prejudice to a party, or is necessary because of a disability of any individual expected to participate in the hearing, or because an in-person hearing "would cost less than conducting the hearing by audio-visual communication."¹³⁵

¹²⁶ 7 C.F.R. §§ 47.1 to .22.

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

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

¹²⁹ 7 C.F.R. § 47.11(c).

¹³⁰ 7 C.F.R. § 47.7.

¹³¹ "The Deputy Administrator, in an effort to effect an amicable or informal adjustment of the matter, shall give written notice to the person complained against of the facts of conduct ... and shall afford such person an opportunity, within a reasonable time fixed by the Deputy Administrator, to demonstrate or achieve compliance..." 7 C.F.R. § 47.3(a), b).

¹³² <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=PACAMediationServices>

¹³³ 7 C.F.R. § 47.6(a).

¹³⁴ 7 C.F.R. § 47.15(a).

¹³⁵ 47 C.F.R. § 47.15(c)(3). "If the examiner determines that a hearing conducted by audio-visual telecommunication would measurably increase the [USDA's] cost of conducting the hearing, the hearing shall be

The examiner can substitute a telephone hearing for an in-person hearing or one by audio-visual equipment if a phone hearing would provide a full and fair evidentiary hearing, would not prejudice any party, and would cost less than conducting the hearing by audio-visual equipment or personal attendance of any individual.¹³⁶ The parties must exchange (ten days before the hearing) a written verified narrative of the testimony any of its witnesses (including experts) will present by phone.¹³⁷ I would like to find out how this provision is applied in practice—how many hearings are phone, audio-visual, or in person?

At the hearing, a party may appear in person or by counsel or other representative. Thus USDA permits lay representation.¹³⁸

After the hearing, the parties have an opportunity to submit proposed findings and conclusions and submit briefs. They must also make claims for attorney fees and other costs (although they do not yet know if they will be prevailing parties entitled to recover such costs).¹³⁹ The examiner “with the assistance and collaboration of department employees assigned for this purpose” shall prepare a report on the basis of evidence received at the hearing. It is prepared in the form of a final order for the signature of the Secretary of Agriculture but not served on the parties until the Secretary signs it.¹⁴⁰

The documentary procedure (applicable to most cases involving less than \$30,000 in damages¹⁴¹) dispenses with oral proceedings. The verified pleadings, investigation reports, stipulations, and additional written verified statements or deposition transcripts serve as the evidentiary record. The parties may submit briefs.¹⁴² The examiner’s report is the same as in the case of oral hearings.¹⁴³

The examiner’s report and the record in the case are transmitted to the Secretary of Agriculture.¹⁴⁴ If the Secretary agrees with the examiner’s report, the Secretary signs it without further ado. If the Secretary disagrees with the examiner’s report and if the Secretary “deems it advisable to do so,” the examiner’s proposed order is served on the parties as a tentative order and the parties are allowed a period of time (not exceeding 20 days) to file exceptions to the report and written argument or briefs in support thereof.¹⁴⁵

conducted by personal attendance of any individual who is expected to participate in the hearing or by telephone.”

Id.

¹³⁶ 7 C.F.R. § 47.15(c)(4).

¹³⁷ 7 C.F.R. § 15(f).

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

¹³⁹ 7 C.F.R. § 47.19(b), (c), (d).

¹⁴⁰ 7 C.F.R. § 47.19(e).

¹⁴¹ Parties in cases where the claimed damages exceed \$30,000 can consent to use the documentary procedure in lieu of oral hearings. 7 C.F.R. §47.20(b)(2).

¹⁴² 7 C.F.R. § 47.20(a), (c) to (i).

¹⁴³ 7 C.F.R. § 47.20(k).

¹⁴⁴ 7 C.F.R. § 47.21.

¹⁴⁵ 7 C.F.R. § 47.23.

2. Nutrition programs

The Food and Nutrition Service (FNS) of the Department of Agriculture (USDA) operates a series of federal-state programs that supply food to the poor. These include SNAP (Supplemental Nutrition Assistance Program), formerly known as Food Stamps; the Supplemental Nutrition Program for Women, Children and Infants (WIC); and school lunch and breakfast programs.¹⁴⁶ In the database, these are USDAARBO0009 (verified).

In general, adjudication at the federal level under these programs is conducted by the Administrative Review Officers (AROs) in the Administrative Review Branch (ARB) of FNS and is mostly done through written reviews rather than oral hearings.

These programs also involve a system of state and local-level hearings in which individuals can challenge denial of applications to receive benefits under these programs or can challenge disqualification from the programs. Although this memorandum describes the USDA regulations relating to these state and local adjudicatory schemes, I have not investigated them further. The definition of “adjudication” for purposes of this ACUS study is limited to federal-level adjudication.

a. SNAP adjudication

(1) Federal hearings

(a) Governing statutes

Under SNAP, FNS adjudicates cases involving local retailers or wholesalers (hereinafter “vendors”) who are authorized to sell food to SNAP recipients. These cases often involve “trafficking,” which means giving cash instead of food to the recipients. FNS may reject a vendor’s application to participate in SNAP or seek to disqualify the vendors from the program, impose civil money penalties, or issue a warning letter. The statute does not call for hearings in these cases, but authorizes USDA to adopt regulations providing for administrative review.¹⁴⁷ These hearings are Case Types 4 and 5 in USDAARBO0009 which I believe should be merged.¹⁴⁸ As discussed below, these cases are subject to a written-only procedure by an ARO designated by the ARB.

By statute, such review must be requested within 10 days of receiving notice. The statute provides that a vendor or a state agency may “file a written request for an opportunity to

¹⁴⁶ For a general discussion of these programs, see Hilary Hoynes & Diane Schanzenbach, U.S. FOOD AND NUTRITION PROGRAMS (National Bureau of Economic Research, 2015)

¹⁴⁷ 7 U.S.C. § 2023(a). In the case of rejection of an application, the statute calls for a “hearing” as provided in § 2023. 7 U.S.C. § 2018(b).

¹⁴⁸ The description of this merged case type in the database should state that it covers claims against states as well as against vendors.

submit information in support of its position to such person or persons as the regulations may designate.”¹⁴⁹ The reviewer considers the submitted information along with other available information and makes a final determination that takes effect in 30 days.¹⁵⁰ There is no further administrative appeal. These sanctions are subject to de novo judicial review in federal district court.¹⁵¹

FNS also adjudicates cases against states because of overpayments to recipients and for other violations of the SNAP program requirements,¹⁵² including overpayments arising out of major systemic errors.¹⁵³ These cases are designated as USDASNAP0012 in our database and involve somewhat more formal procedures than are provided to vendors.¹⁵⁴

One type of case against states is treated differently. Under SNAP, FNS subsidizes 50% of state administrative costs. FNS can recoup part of this subsidy if it is determined that the state has engaged in systematic overpayments to recipients that substantially exceed the national norm for errors. In these cases, the statute provides that the hearing provided to the state is a Type A proceeding, meaning that it is covered by the APA and the hearing is before an administrative law judge.¹⁵⁵

(b) SNAP adjudication regulations

The regulations provide details of the procedures available to a vendor whose application to participate in SNAP has been denied or withdrawn, or who has been disqualified from SNAP or subject to other sanctions. These proceedings appear to be wholly in writing without an opportunity to provide oral testimony, cross-examine witnesses, or make an oral argument. On receipt of a written request for review of the administrative action, the action shall be stayed pending disposition of the request.¹⁵⁶ The request must be made within 10 days of the date of delivery of the notice of the action.¹⁵⁷ The dispute is heard by an ARO designated by the ARB. The ARO makes a determination based on the information submitted by the appropriate FNS office, the information submitted by the firm in support of its position, and any additional information, in writing, obtained by the designated reviewer from any other person having relevant information.¹⁵⁸ FNS notifies the firm of the determination; it takes effect 30 days after date of delivery of the determination.¹⁵⁹

¹⁴⁹ 7 U.S.C. § 2023(a)(3).

¹⁵⁰ 7 U.S.C. § 2023(a)(5).

¹⁵¹ 7 U.S.C. § 2023(a)(15); 7 C.F.R. §279.7.

¹⁵² 7 U.S.C. § 2022(a)(1).

¹⁵³ 7 U.S.C. § 2022(b)(5); 7 C.F.R. §276.7(a).

¹⁵⁴ See 7 C.F.R. § 276.7, discussed below. I suggest that these cases be treated as a case type under USDAARBO0009 rather than as a separate scheme.

¹⁵⁵ 7 U.S.C. § 2023(a)(6) to (a)(12). Judicial review of ALJ decisions is on the administrative record, whereas judicial review is de novo with respect to other cases resolved under § 2023.

¹⁵⁶ 7 C.F.R. § 279.1.

¹⁵⁷ 7 C.F.R. § 279.2(c).

¹⁵⁸ 7 C.F.R. § 279.5(a)

¹⁵⁹ 7 C.F.R. § 279.5(e), (f).

In FY 2013, ARB received 1239 review requests relating to SNAP. The actions were sustained in about 90% of the cases.¹⁶⁰

In the cases of claims against states, the regulations provide for somewhat greater protection than is provided to vendors.¹⁶¹ States have the right to request an oral hearing in addition to a review of written statements. Review is provided by the State Food Stamp Appeals Board in the case of negligence and disallowance of federal funds, otherwise by a single ARO.¹⁶² “[T]he people reviewing the claim shall be people who were not involved in the decision to file the claim.”¹⁶³

States have the right to file written information with the Appeals Board.¹⁶⁴ The proceeding is described as “informal” and the rules of civil procedure do not apply.¹⁶⁵ The Appeals Board Chair presides at the hearing and receives into evidence oral testimony of state agency witnesses and additional documents that are relevant and material. FNS shall make staff available to provide any additional information or clarification requested by the Board, but the Department and FNS may not introduce new evidence at the hearing.¹⁶⁶ Neither side can cross-examine witnesses from the other side.¹⁶⁷ As in the case of vendor reviews, de novo judicial review is available to the state.¹⁶⁸ In FY 2013, 2 cases were opened against states and 1 was decided.¹⁶⁹

(2) State and local level hearings

The SNAP regulations provide a detailed scheme of “fair hearings” at the state or local level whereby a household receiving SNAP benefits can appeal an adverse agency action affecting its participation.¹⁷⁰

The SNAP regulations calling for state and local-level hearings are exceptional in making every effort to assist the household at each stage of the proceeding. Notably, the regulations provide that the agency may provide for ADR in the form of a “conference” attended by the

¹⁶⁰ www.fns.usda.gov/sites/default/files/snap/2013-annual-report.pdf

¹⁶¹ This procedure is described in USDASNAP0012.

¹⁶² 7 C.F.R. § 276.7(a)(2). According to the database, the hearing officer or Board members are appointed directly by the Secretary. There are four members consisting of a chair, two primaries, and an alternate. The ARB chief serves as executive secretary. Board members are generally career or Schedule C professionals whose regular duties have no association with the Board’s business. FNS employees may not serve on the Board.

¹⁶³ *Id.*

¹⁶⁴ 7 C.F.R. § 276.7(g).

¹⁶⁵ 7 C.F.R. § 276.7(h)(1).

¹⁶⁶ 7 C.F.R. § 276.7(h)(2), (3).

¹⁶⁷ 7 C.F.R. § 276.7(h)(3).

¹⁶⁸ 7 C.F.R. § 276.7(j).

¹⁶⁹ ACUS Database.

¹⁷⁰ 7 C.F.R. § 273.15.

eligibility worker and his or her supervisor and by the household or its representatives. The conference “may lead to an informal resolution of the dispute.”¹⁷¹

In SNAP fair hearings, the household can represent itself or be represented by a lawyer, relative, friend, or other spokesman. If at any point the household expresses disagreement with agency action, it must be reminded of its right to a fair hearing. If there is an individual or organization available that provides free legal representation, the agency must inform the household of it.¹⁷² Households have 90 days after the agency takes the adverse action to request a hearing. The agency must assist the household in preparing a request for hearing (including an oral request) and must provide bilingual explanations and assistance.¹⁷³ Benefits continue pending the hearing.¹⁷⁴

SNAP fair hearings must be conducted by an impartial official who has no personal stake or involvement in the case, was not directly involved in the initial determination, and was not the immediate supervisor of the eligibility worker who took the action.¹⁷⁵ “The household may not be familiar with the rules of order and it may be necessary to make particular efforts to arrive at the facts of the case in a way that makes the household feel most at ease.” The household may examine the file and get free copies of its contents (with confidential material redacted), can bring witnesses, advance arguments “without undue interference,” and “question or refute any testimony or evidence, including an opportunity to confront and cross-examine adverse witnesses.”¹⁷⁶ If the household loses at the local level, it is entitled to an entirely new hearing at the state level (but if the local decision goes in favor of the household, it is final).¹⁷⁷

b. School lunch and breakfast adjudication

(1) Federal hearings

FNS conducts evaluations and audits of state and school board management under the school breakfast and lunch programs. If such audits result in denial of a school authority’s claim for reimbursement or withholding of payments, the school authority can appeal by filing a written request with the ARB.¹⁷⁸ These are Case Type 1 in our database. The written request must be postmarked within 15 calendar days after the authority received notice of the adverse action. An ARO will be assigned to the case. The authority may “refute the action specified in the notice in person and by written documentation to the ARO.”¹⁷⁹ The written documentation

¹⁷¹ 7 C.F.R. § 273.15(d). Such conferences are mandatory in the case of a denial of expedited service.

¹⁷² 7 C.F.R. § 273.15(f).

¹⁷³ 7 C.F.R. § 273.15(g), (h), (i).

¹⁷⁴ 7 C.F.R. § 273.15(k).

¹⁷⁵ 7 C.F.R. § 273.15(m).

¹⁷⁶ 7 C.F.R. § 273.15(p).

¹⁷⁷ 7 C.F.R. § 273.15(q).

¹⁷⁸ 7 C.F.R. § 210.29(d)(3).

¹⁷⁹ 7 C.F.R. § 210.29(d)(3)(ii).

must be filed with the ARO not later than 30 days after appellant received the notice. “The appellant may retain legal counsel or may be represented by another person.”¹⁸⁰

“A hearing shall be held by the ARO in addition to, or in lieu of, a review of written information submitted by the appellant only if the appellant so specifies in the letter of request for review.”¹⁸¹ “A representative of FNS shall be allowed to attend the hearing to respond to the appellant’s testimony and to answer questions posed by the ARO.”¹⁸² Any information on which FNS’ action was based shall be available to appellant from date of receipt of the request for review.¹⁸³ “The ARO shall be an independent and impartial official other than, and not accountable to, any person authorized to make decisions that are subject to appeal...”¹⁸⁴ The ARO’s determination is based on information provided by FNS and the appellant, and on the regulations.¹⁸⁵ The determination must be made within 60 calendar days of receipt of the request for review. The action being appealed remains in effect during the appeal process. The ARO’s determination is the final administrative determination afforded to the appellant.¹⁸⁶

Another provision of the regulations relates to disputes about federal payment of state administrative expenses under these nutrition programs. These procedures are written and resemble the written reviews conducted by AROs under SNAP discussed above. When a review is requested, the ARO considers all available info and makes a final determination within 45 days after receipt of the state agency’s additional information.¹⁸⁷ These hearings are Case Type 2 in our database.

As in the case of SNAP & WIC, the regulations provide for a local-level hearing for a family to appeal from a decision denying an application for school food benefits. The regulations also provide that a local education agency can challenge the continued eligibility of any child for such benefits.¹⁸⁸ These regulations are simpler than those relating to SNAP or WIC but provide for all the elements of an oral fair hearing. Families can be assisted by an attorney or other person and have an opportunity to examine relevant documents. Either side has an opportunity to present oral or documentary evidence and to question or refute any testimony or other evidence and to confront and cross-examine adverse witnesses. The hearing official cannot have participated in making the decision under appeal or in any previously held conference.¹⁸⁹ Benefits continue during the hearing period.¹⁹⁰

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ 7 C.F.R. § 210.29(d)(iv).

¹⁸⁴ 7 C.F.R. § 210.29(d)(v).

¹⁸⁵ 7 C.F.R. § 210.29(d)(vi).

¹⁸⁶ 7 C.F.R. § 210.29(d)(vii), (viii), (ix).

¹⁸⁷ 7 C.F.R. § 235.11(f).

¹⁸⁸ 7 C.F.R. § 245.7.

¹⁸⁹ 7 C.F.R. § 245.7(a)(2).

¹⁹⁰ 7 C.F.R. § 245.7(b).

c. WIC adjudication

Most WIC adjudication is conducted by the states. FNS regulations require that vendors who are subject to disqualification or civil money penalties receive oral hearings from state agency adverse actions.¹⁹¹ Thus more protection is provided to vendors under WIC than under SNAP, but this difference can be explained by the fact that SNAP vendors receive de novo judicial review but WIC vendors do not.

The WIC regulations provide for both “full” and “abbreviated” administrative review at the state level. In general, abbreviated reviews are provided in cases involving more objective criteria or lesser sanctions than in cases where the state must provide full reviews.¹⁹² Because these proceedings are conducted at the state rather than the federal level, the procedures are not summarized in detail here.

Full administrative review entails an opportunity for the aggrieved party “to present its case” and to cross-examine adverse witnesses. It entails a right to be represented by counsel and to examine the evidence on which the state’s action is based. There must be an impartial decisionmaker whose determination is based solely on whether the state agency correctly applied federal and state statutes, regulations, and policies, according to the evidence presented at the review.¹⁹³

An abbreviated administrative review provides a vendor with written notice and opportunity to provide a written response. The decisionmaker must be someone other than the person who rendered the initial decision and whose determination is based solely on the information provided to the vendor concerning the cause for the adverse action and the vendor’s response.¹⁹⁴

The WIC regulations also provide for notice and “fair hearing” at the state or local level for individuals if the state or local agency denies them participation in WIC, disqualifies them, or makes a claim for repayment of the value of benefits.¹⁹⁵ The state or local agency must adopt rules of procedure setting forth the rules for notice, requesting a hearing, conducting a hearing, rules of conduct at the hearing, and rights and responsibilities of the appellant. The procedures shall not be unduly complex or legalistic.¹⁹⁶ These provisions are similar to the state or local SNAP hearings discussed above but are considerably less protective to the individuals.

¹⁹¹ 7 C.F.R. § 246.18

¹⁹² See 7 C.F.R. § 246.18(a)(1). No review at all is provided for other actions such as state provision of generalized criteria or for minor sanctions against vendors. Similarly, local agencies receive full administrative review of state agency action denying an application to participate or disqualifying a local agency, or any other adverse action that affects a local agency’s participation. 7 C.F.R. §246.18(a)(3). Farmers are also provided full administrative review of state agency action denying an application or disqualifying the farmer from participation. 7 C.F.R. § 246.18(a)(4).

¹⁹³ 7 C.F.R. § 246.18(b).

¹⁹⁴ 7 C.F.R. § 246.18(c).

¹⁹⁵ 7 C.F.R. § 246.9(a), (b).

¹⁹⁶ 7 C.F.R. § 246.9(h).

In WIC cases brought by individuals protesting adverse action, the hearing must be conducted by an impartial official who has no personal stake or involvement in the decision and who was not directly involved in the initial determination.¹⁹⁷ The individual can be represented by a friend, relative, legal counsel, or other spokesperson.¹⁹⁸ The agency must provide individuals a reasonable time to request the hearing—not less than 60 days from when the agency gives them notice of adverse action. Decisions must be based on the hearing record and the transcript and exhibits are the exclusive record for final decision.¹⁹⁹ Decisions must summarize the facts, specify the reasons for the decision, and identify the supporting evidence and pertinent regulations or policy.²⁰⁰ Benefits continue until the individual is given notice of the decision.²⁰¹ If the decision is by a local agency, the individual can appeal to a state agency (but benefits do not continue during the appeal phase).²⁰² The state agency must inform the individual of any available judicial review.²⁰³

The WIC regulations provide for federal-level dispute resolution proceedings of FNS decisions that sanction states for failing to follow federal policies and failure to submit or to follow correction plans.²⁰⁴ These are Case Type 3 in our database. In the event a state agency that administers a WIC program disagrees with such a sanction decision, it has a right to a written review or an oral hearing provided by an ARO.²⁰⁵ If the agency wants an oral hearing, it must identify the state's position, provide the facts and reasons in support of its position, and a list of the witnesses it intends to call.²⁰⁶ The ARO's decision (following a written review or an oral hearing) is the final determination of FNS.

This hearing structure does not apply when the dispute concerns a claim by FNS that program funds were lost through agency negligence or fraud, misused, or otherwise diverted. In this situation, “the State agency shall have full opportunity to submit evidence, explanation or information concerning alleged instances of noncompliance or diversion before a final determination is made in such cases.”²⁰⁷ This would appear to be an example of Type C adjudication since the regulation does not provide for a written or oral hearing.

¹⁹⁷ 7 C.F.R. § 246.9(i).

¹⁹⁸ 7 C.F.R. § 246.9(c).

¹⁹⁹ 7 C.F.R. § 246.9(k)(1).

²⁰⁰ 7 C.F.R. § 246.9(k)(2).

²⁰¹ 7 C.F.R. § 246.9(k)(3).

²⁰² *Id.*

²⁰³ 7 C.F.R. § 246.9(l).

²⁰⁴ 7 C.F.R. § 246.19.

²⁰⁵ 7 C.F.R. § 246.22.

²⁰⁶ 7 C.F.R. § 246.22(b)(2).

²⁰⁷ 7 C.F.R. § 246.23(a)(3).

APP. A-2: DEPARTMENT OF ENERGY
(12-22-15)²⁰⁸

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

A. General information

The caseload of OHA (measured by cases opened in FY 2014) is as follows.²⁰⁹

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

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

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

In initial hearings, DOE is represented by a lawyer. About half of respondents are represented. They can be represented by non-lawyers.

Discovery is permitted in all types of cases.²¹⁰ It includes depositions and documents produced in response to a subpoena.²¹¹ The AJ has subpoena authority. Ex parte contacts are prohibited. Parties receive notice of the hearing.

The formality of DOE hearings varies by case type. About 20% are document-only hearings (meaning no live-witness testimony or cross-examination). Of the remainder, about 20% involve in-person hearings and 60% are conducted via video. Some hearings are open to the public; others (such as security clearance cases) are closed.²¹²

²⁰⁸ Thanks for assistance by Dan Solomon, Ann Augustyn, and Alan Morrison.

²⁰⁹ The figures in our database are for FY 2013 and show 266 cases opened in that year.

²¹⁰ See 10 C.F.R. § 708.28 (2014).

²¹¹ See *id.* at §§ 708.28, 1003.8.

²¹² See *id.* at § 1003.62(a).

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

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

Voluntary ADR is available at all stages, from before the case or claim is filed to the post-hearing stage. ADR includes mediation and arbitration as well as neutral evaluation, mini-trials, peer review panels, ombudsmen, and partnering. ADR is provided by the agency ADR official who is part of the Office of Conflict Prevention and Resolution (OCPR).²¹³ During FY 2014, OCPR processed 38 mediations. Mediation took place in eight cases, four of which were resolved. 26 cases were withdrawn from mediation. Most mediations concern equal employment opportunity issues, an area where OHA does not otherwise provide for hearings.

If a party is dissatisfied with the decision of the AJ, the party can appeal to the Director of OHA.²¹⁴ The appeal structure varies depending on which case type is involved. Appeals are considered on a document-only basis and must be decided within 60 days. During FY 2013, there were four appeals initiated and four decided (all whistleblower cases). In security clearance cases, a further appeal is available to the Secretary of Energy.

B. Detailed Treatment of personnel and whistleblowing cases

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

1. Generic hearing regulations

OHA hearings are governed by a set of generic procedural regulations set forth in 10 C.F.R. Part 1003. These regulations provide for an evidentiary hearing if it would materially

²¹³ See *Alternative Dispute Resolution*, OFFICE OF CONFLICT PREVENTION AND RESOLUTION, U.S. DEPARTMENT OF ENERGY, <http://energy.gov/oha/services/applications-exceptions/alternative-dispute-resolution> (last visited May 22, 2015).

²¹⁴ See 10 C.F.R. § 1003.30 (2014).

advance the proceeding.²¹⁵ “If material factual issues remain in dispute after an application or appeal has been filed, the Director of OHA or his designee may issue an order convening an evidentiary hearing in which witnesses shall testify under oath, subject to cross-examination, for the record and in the presence of a Presiding Officer. A Motion for Evidentiary Hearing should specify the type of witness or witnesses whose testimony is sought, the scope of questioning that is anticipated, and the relevance of the questioning to the proceeding.”²¹⁶

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

2. Personnel Security Cases

Personnel security cases (sometimes referred to as security clearance cases) involve challenges by DOE or contractor employees to a decision that the employee be denied or deprived of access to classified material (which presumably means that the employee doesn’t get or loses the job). 10 C.F.R. Part 710 sets forth procedural regulations applicable to personnel security cases. These regulations implement Executive Orders 12968²¹⁷ and 10865.²¹⁸ Executive Order 10,865 provides for a right to an adjudicatory hearing for a person denied access to classified material or whose access is revoked. It appears that the right to an evidentiary hearing arises from these executive orders rather than from an applicable statute.²¹⁹

The regulations provide for detailed notice by the Manager of a DOE facility to an employee about whom there is substantial doubt concerning access.²²⁰ The notice states the information that creates a substantial doubt (which shall be as comprehensive and detailed as national security permits). The employee can choose to have the Manager make the decision without a hearing or can elect a hearing before an AJ. If the employee selects a decision by the Manager without a hearing and it is unfavorable, the employee can appeal the decision to the DOE Headquarters Appeals Panel.²²¹

If the employee opts for an AJ hearing, the case is assigned to an AJ. The AJ has subpoena authority. The AJ holds a prehearing conference and conducts a hearing within 90 days after a request for hearing is received.²²² At the hearing, the employee can be represented

²¹⁵ See *id.* at § 1003.62(a).

²¹⁶ *Id.* at § 1003.62(e).

²¹⁷ See Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 7, 1995).

²¹⁸ See Exec. Order No. 10,865, 25 Fed. Reg. 1,583 (Feb. 24, 1960).

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

²²⁰ See 10 C.F.R. § 710.21 (2014).

²²¹ See *id.* at § 710.22(c).

²²² See *id.* at § 710.25.

by a “person of his own choosing.”²²³ The AJ is prohibited from engaging in ex parte contacts (with the exception of procedural or scheduling matters). Hearings are not open to the public. “DOE Counsel shall assist the [AJ] in establishing a complete administrative hearing record in the proceeding and bringing out a full and true disclosure of facts, both favorable and unfavorable. . . .”²²⁴ It is unclear whether this provision permits ex parte contact between DOE Counsel and the AJ.

All witnesses are subject to cross-examination, “if possible,” and “[w]henver reasonably possible, testimony shall be given in person.”²²⁵ The AJ has the duty to assure that restricted data or national security information is not disclosed to persons who are not authorized to receive it. Formal rules of evidence shall not apply but the Federal Rules of Evidence (FRE) may be used as a guide to “assure production of the most probative evidence available.”²²⁶ The utmost latitude shall be permitted with respect to relevancy, materiality, and competence. Every effort shall be made to obtain the best evidence available.

Hearsay is admissible in the AJ’s discretion for good cause without strict adherence to technical rules of admissibility and shall be accorded such weight as circumstances warrant. Cross-examination can be dispensed with if the witness is a confidential informant and disclosure of identity would be harmful to the national interest; or in various circumstances relating to jeopardy to restricted data or national security. The employee shall receive a summary or description of the information in these circumstances and appropriate consideration given to the lack of opportunity to cross-examine.²²⁷

The AJ’s decision must contain detailed and specific fact findings and a statement of reasons. To decide favorably to the employee, the AJ must determine that “the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest.”²²⁸

The employee can appeal an unfavorable decision to the DOE Headquarters Appeals Panel. The Manager can appeal a decision favorable to the employee to the Appeals Panel. The Appeals Panel has three members consisting of DOE headquarters employees; one member is the Principal Deputy Chief for Mission Support Operations. The second member is a DOE attorney designated by the General Counsel. The third member is designated by the head of the DOE Headquarters element with cognizance over the employee. Only one member of the Appeal Panel shall be from the “security field.”²²⁹ The Appeals Panel can consider new

²²³ *Id.* at § 710.26(a).

²²⁴ *Id.* at § 710.26(d).

²²⁵ *Id.*

²²⁶ *Id.* at § 710.26(h).

²²⁷ *See id.* at § 710.26(m).

²²⁸ *Id.* at § 710.27(a).

²²⁹ *Id.* at § 710.29(b).

information submitted by either side, provided that the other side has an opportunity to respond. Appeals must be decided within 45 days of the closing of the administrative record.²³⁰ A further appeal to the Secretary of Energy is afforded whenever an individual was denied an opportunity to cross-examine adverse witnesses; the Secretary must personally review the record.²³¹

According to the 2014 OHA Annual Report, average case processing time for personnel security cases was a brisk 96 days. In 59% of the cases, the AJ determined that the individual should not be provided or retain a security clearance. The 2014 Annual Report, however, provides an example of an individual—he previously had foreign citizenship and his wife had close contact with her family members in a foreign country—whose security clearance was restored.²³² The individual’s clearance was restored on a finding that his “heart and mind” are allied with the US and that if he is ever confronted with the choice of deciding between the interests of the US and his foreign national family or place of birth, he will choose US interests.

3. Whistleblower Complaints

Detailed regulations prescribe the rules for hearings in the case of whistleblower complaints by employees of DOE contractors. The statutory authorization for these hearings is somewhat unclear. The regulations claim to be authorized by various statutes, most of which confer rulemaking authority on DOE but do not provide for hearings. The most relevant of the statutes cited as authority is 42 U.S.C. § 5851(b)(2)(A) relating to whistleblowing. This section is administered by the Department of Labor (DOL). It calls for “notice and opportunity for public hearing” in connection with whistleblower complaints.²³³ However, DOL apparently ruled that it had no jurisdiction over complaints by DOE contractors because the statute applied only to the Nuclear Regulatory Commission and its contractors. Consequently, DOE had to adopt its own whistleblower regulations.²³⁴ Thus, these regulations may not implement any statutory hearing requirement. However, by virtue of the detailed procedural regulations, they should be considered Type B adjudication. The regulations are an interesting and welcome example of user-friendly language; they are directed to “you,” meaning the complaining employee.

Whistleblower complaints by employees of DOE contractors allege retaliation by employers for disclosure of information concerning dangers to public or worker safety, substantial violations of law, fraud, or gross mismanagement. They also concern complaints for retaliation because an employee participated in congressional proceedings or refused to

²³⁰ See *id.* at § 710.29(f).

²³¹ See *id.* at § 710.31.

²³² See Case No. PSH-14-0011.

²³³ See 42 U.S.C. § 5851(b)(2)(A) (2012).

²³⁴ See 10 C.F.R. Part 708. See 57 Fed. Reg. 7,533 (Mar. 3, 1992).

participate in dangerous activities.²³⁵ DOE encourages informal settlement of whistleblower complaints, including through mediation.²³⁶

If complaints are not resolved informally, the employee can choose to have the complaint referred to OHA for an investigation followed by a hearing. The employee can also elect a hearing without an investigation. If there is an investigation by OHA, the investigator “may not participate or advise in the initial or final agency decision” and may not supervise or direct the AJ who hears the case.²³⁷

An OHA AJ schedules a hearing to be held by the 90th day after receipt of the complaint or after issuance of the investigator’s report, whichever is later.²³⁸ The AJ may recommend, but not require, mediation at any time before the initial agency decision.²³⁹

At the hearing, the parties have the right to be represented by a person of their own choosing or proceed without representation. Testimony is given under oath and witnesses are subject to cross-examination. Formal rules of evidence do not apply, but OHA may use the FRE as a guide. A court reporter makes a transcript. The AJ may order discovery on a showing that discovery is designed to produce evidence regarding an unprivileged matter that is relevant. The AJ may permit discovery by deposition on oral examination or written questions; written interrogatories; production of documents or things; permission to enter upon land or other property for inspection; and requests for admission. The AJ may issue subpoenas for appearance of witnesses or production of documents or physical evidence. The AJ has typical powers over evidence and other procedural matters. “The [AJ] is prohibited, beginning with his or her appointment and until a final agency decision is issued, from initiating or otherwise engaging in ex parte (private) discussions with any party on the merits of the complaint.”²⁴⁰

The employee has the burden of proof to establish by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding or refused to participate in dangerous activity, and that such act was a contributing factor to alleged retaliatory acts by the contractor. Once the employee meets this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee’s disclosure, participation, or refusal.²⁴¹

²³⁵ See 10 C.F.R. § 708.1.

²³⁶ See *id.* at § 708.20.

²³⁷ See *id.* at §§ 708.22(b), 708.25(b).

²³⁸ See *id.* at § 708.26.

²³⁹ See *id.* at § 708.27.

²⁴⁰ *Id.* at § 708.28(b)(9).

²⁴¹ See *id.* at § 708.29.

The AJ must issue an initial decision after receiving the transcript of the hearing (or if later, the date the AJ receives post-hearing submissions). The initial decision contains appropriate findings, conclusions, an order remedying retaliation (if retaliation is found), and the factual basis for each finding. The AJ may rely on, but is not bound by, the investigator's report.²⁴²

A dissatisfied party may file a notice of appeal with the OHA Director within 30 days after receiving the initial decision. Such an appeal is necessary to exhaust administrative remedies. Within 15 days, the appellant must file a statement identifying the issues it wishes the OHA Director to review. The Director may consider any source of information that will advance the evaluation, provided that all parties have a right to respond to third party submissions.²⁴³ The appeal decision must be issued within 60 days after the record is closed.

In whistleblower cases, a second level of appeal is provided. Any party can file a petition for review by the Secretary of Energy within 30 days after receiving an appeal decision from the OHA Director. The Secretary will reverse or revise an appeal decision by the OHA Director only under "extraordinary circumstances."²⁴⁴

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

By way of example, the 2014 Annual Report summarizes the Gallbein case.²⁴⁵ Gallbein was terminated by his employer after making disclosures, but the AJ determined that these disclosures did not concern substantial violations of law, a specific danger to employees or public health, or fraud, gross mismanagement etc. Consequently, Gallbein failed to meet the evidentiary burden under Part 708. The AJ rejected Gallbein's whistleblowing complaint and the OHA Director affirmed that decision.

4. FOIA & Privacy Act Requests

The regulations provide for written appeals to OHA of denials by DOE officials of requests for documents under the Freedom of Information Act (FOIA) and for information about an individual under the Privacy Act.²⁴⁶ These appeals consist of written reviews without an oral hearing and without opportunity for further review within the agency.

The review is initiated based on a request filed by the private party whose request for information or documents was denied. The 2014 Annual Report states that a majority of the FOIA requests are from labor unions seeking to determine whether DOE contractors are

²⁴² See *id.* at § 708.30(c).

²⁴³ See *id.* at § 708.33(b)(3).

²⁴⁴ *Id.* at § 708.35(d).

²⁴⁵ See Case No. WBA-13-0017.

²⁴⁶ See 10 C.F.R. §§ 1004.8, 1008.11 (2014).

complying with federal wage and hour laws. The average case processing time is 12 days. The most common type of case concerns the adequacy of DOE's search in response to a FOIA request.

These written reviews are not required to be conducted by any statute or other source of law and are not evidentiary hearings. They provide an opportunity for the requestor to make arguments concerning the applicability of FOIA or the Privacy Acts and presumably to introduce factual material, if that is relevant.

5. Exceptions

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

The 2014 Annual Report gives the example of this, Felix Storch, Inc. (FSI).²⁴⁷ FSI applied for a waiver of requirements relating to energy efficiency standards for residential freezers, which a particular model could not meet. Relief was denied because FSI introduced the new product into the market after adoption of the standard and long after the rulemaking proceeding that gave rise to the standards. Consequently, introduction of the new product was a business decision and does not give rise to special hardship, gross inequity, or unfair distribution of regulatory burdens.

6. Medical Certificates

Under the regulations, OHA provides a review in the case of a determination that a security officer at DOE or its contractors is medically unqualified for the job. The determination can be challenged by an "independent review" by DOE's Office of Health, Safety and Security following which OHA provides a final review.²⁴⁸ The regulations do not explain what sort of procedure OHA should use in conducting its final appeal beyond an examination of the file and the security officer's written request that states "with specificity" the basis for disagreement with the independent review.²⁴⁹ It can be inferred, therefore, that no oral proceeding is available. This appears to be Type C adjudication as no evidentiary hearing is provided.

²⁴⁷ See Case No. EXC-14-0001.

²⁴⁸ See 10 C.F.R. § 1046.15(c)-(d) (2014).

²⁴⁹ See *id.*

7. Worker Safety Provisions

This case type concerns worker safety programs administered by DOE. The only programs currently in force involve compensation for beryllium exposure to workers at DOE contractors,²⁵⁰ and civil penalties for contractors who violate DOE worker safety standards.²⁵¹ OHA provides hearings under these programs under its generic procedural regulations.²⁵² Neither the 2013 nor 2014 annual reports of OHA list any cases decided under the worker safety provisions (although they might be included under the “others” category).

²⁵⁰ *See id.* at Part 850.

²⁵¹ *See id.* at Part 851.

²⁵² *See id.* at Part 1003.

APP. A-3: EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION

(12-18-15)²⁵³

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

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

There are five case types: (i) discrimination based on race, color, religion, sex, and national origin; (ii) discrimination based on age for employees aged 40 or older; (iii) discrimination based on disability; (iv) discrimination based on genetic information; and (v) unequal pay based on gender. The procedures for all five case types are set forth in 29 C.F.R. Part 1614.

The process by which federal employees adjudicate discrimination claims is carefully prescribed and is quite idiosyncratic.²⁵⁴ EEOC maintains a helpful website.²⁵⁵ An ACUS study about EEOC federal sector adjudication evaluated the status and organizational placement of EEOC’s administrative judges (AJs).²⁵⁶

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

²⁵³ Thanks to Chai Feldblum and Anne Torkington for assistance with this memorandum.

²⁵⁴ See generally ROBERT E. MCKNIGHT, JR., REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS, ch. 14 (3d ed. & 2014 supp.).

²⁵⁵ See *Federal Sector*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://eeoc.gov/federal/> (last visited May 26, 2015).

²⁵⁶ See Admin. Conf. of the U.S., *Equal Employment Opportunity Commission: Evaluating the Status and Placement of Adjudicators in the Federal Sector Hearing Program* (2014), available at <https://www.acus.gov/report/equal-employment-opportunity-commission-evaluating-status-and-placement-adjudicators-federal> [hereinafter ACUS EEOC study]. Much information from this study is incorporated in this deep dive memo.

The employee must first consult an Equal Employment Opportunity (EEO) counselor at the employing agency within 45 days from the day the discrimination occurred. The counselor explains the employee's rights and duties under Title VII. Only claims discussed during the counseling period can be the basis for a complaint and can eventually be litigated in court. The counselor offers the employee a choice to participate in EEO counseling or in an ADR process (including mediation).²⁵⁷ If the dispute does not settle, the counselor issues a notice of right to file a complaint. This notice triggers a 15-day period for filing a formal complaint with the employing agency (normally on a standard form complaint document).

The agency can either dismiss the complaint (for a variety of reasons) or conduct an impartial investigation that must be completed within 180 days.²⁵⁸ ADR continues to be available during the investigation. When the investigation is completed, the employing agency issues a notice giving the complainant two choices: (i) request a hearing before an EEOC AJ; or (ii) ask the agency to issue an immediate final decision.²⁵⁹

The regulations relating to AJ hearings,²⁶⁰ provide that the agency can make an offer of resolution prior to the hearing. If the complainant rejects it and the AJ decision provides a less favorable result than the offer of resolution, the complainant can be denied recovery of attorney fees. The AJ can order discovery (including depositions, interrogatories, disclosure of documents, or requests for admission) but lacks subpoena power. The hearing is closed to the public. AJs do not apply the rules of evidence, but shall exclude irrelevant or repetitious evidence. The AJ can impose sanctions for non-disclosure of evidence. Summary judgment is possible. The hearing is transcribed by a court reporter; the employing agency pays for verbatim transcripts if needed. The AJ must furnish a decision within 180 days after receiving the file. Neither the regulations nor the EEOC's annual reports mention whether videoconferencing is used for hearings.

The regulations contain no provision prohibiting ex parte communications between the AJ and the disputing parties.²⁶¹ However, the EEOC website says that ex parte communications are prohibited (except for "purely procedural" communications). The regulations contain no provisions for separation of functions (although the website says that attorneys with the EEOC Office of Federal Operations can furnish guidance and assistance to AJs).

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

²⁵⁷ See 29 C.F.R. § 1614.105 (2014).

²⁵⁸ See *id.* at § 1614.106.

²⁵⁹ See *id.* at § 1614.108(f).

²⁶⁰ 29 C.F.R. § 1614.109.

²⁶¹ See ACUS EEOC study, *supra* note 256, at 9.

A complainant might disagree with the employing agency's final decision in one of two situations. First, the complainant requested a final agency decision instead of an AJ hearing. Second, the complainant requested an AJ hearing but disagrees with the agency's final order issued after the AJ hearing. In either case, the complainant can appeal the agency's final decision to OFO within 30 days (or can proceed directly to court for a de novo trial without further exhausting EEOC remedies).²⁶²

The EEOC's decision on such appeals is made by appellate attorneys in OFO who review the entire file. Apparently this proceeding does not involve oral proceedings, only examination of the written record and written statements or briefs.²⁶³ The EEOC appellate decision is de novo but no new evidence is submitted. The substantial evidence rule applies to review of the AJ's findings of fact. Complainants or agencies can request reconsideration of the appeal decision.

A complaining employee (but not the employer agency) can seek de novo review in the federal district court after exhausting this complaint process (and in some situations without exhausting it, such as the situation in which the complainant requested a final agency decision and does not appeal that decision).²⁶⁴ Alternatively, if an employee is satisfied with the EEOC's decision but the employing agency has not complied with it, the employee can seek judicial enforcement.²⁶⁵

The EEOC currently employs approximately 110 AJs. In FY 2013, employees sought AJ hearings in 7,077 cases. In FY 2013, 6,789 cases were resolved at the AJ level; the number of cases pending at the end of the year was 8,313. In FY 2014, 8,086 cases were filed and 6,347 were resolved at the AJ level. Cases pending at end of FY 2014 were 10,363. The average processing time for each case increased from 383 days in FY 2013 to 419 days in FY 2014. Thus, the workload per AJ is about 65 cases per year or about 1.3 per week.²⁶⁶ Of the cases heard by AJs in FY 2014, 126 found that discrimination had occurred.

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

²⁶² If the complainant goes to court, the action is not an appeal from agency action. Rather, it is an original action, subject to an exhaustion requirement. The AJ's decision may be entered as evidence, though the courts give it no deference.

²⁶³ See 29 C.F.R. § 1614.403 (providing for filing statements or briefs with OFO).

²⁶⁴ See ACUS EEOC study, *supra* note 256, at 14–15.

²⁶⁵ *Id.*

²⁶⁶ The statistics in this paragraph and the following paragraph are drawn from the EEOC's Annual Report on the Federal Work Force, Part I (2014). <http://www.eeoc.gov/federal/reports/fsp2014/upload/Final-FY-2014-Annual-Report-Part-I.pdf>, pp. I-21 to I-25 (last visited Dec. 18, 2015).

A complainant can be represented by an attorney or a lay advocate (such as a union representative).²⁶⁷ If the representative is an employee of the agency, the representative must be given time to prepare the case. There is provision for the recovery of attorney fees if the employee is the prevailing party, but only if the employee was represented by an attorney.

Alternative dispute resolution (ADR) is extensively employed in the EEOC's federal employee process.²⁶⁸ EEOC encourages federal agencies to provide ADR in employment discrimination cases including counseling (which is mandatory as explained above), negotiation, mediation and settlement conferences at various points in the process, including before and after the complaint is filed.

The AJs and appeals attorneys are subject to performance evaluation. They are evaluated quarterly and annually. Their opinions are read by supervisors and by other judges. Judges or appeals attorneys perceived to be doing a poor job are placed on a performance improvement plan. There is pressure to meet annual quotas. The AJs are almost all paid at the GS 14 levels (7% were GS 13s).²⁶⁹

²⁶⁷ See 29 C.F.R. §1614.605.

²⁶⁸ See *id.* at §§ 1614.102(b)(2), 105(b)(2), 603; U.S. Equal Employment Opportunity Commission Handbook for Administrative Judges, ch. 3 (2002); *Federal Sector Alternative Dispute Resolution Fact Sheet*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://eeoc.gov/federal/adr/facts.cfm>. (last visited May 26, 2015).

²⁶⁹ See ACUS EEOC study, *supra* note 256, at 43.

APP. A-4: ENVIRONMENTAL PROTECTION AGENCY AND ARMY CORPS OF
ENGINEERS
(1-06-16)²⁷⁰

A. EPA

The EPA conducts a large volume of adjudication.²⁷¹ Broadly speaking, adjudication involving EPA enforcement (such as assessment of civil penalties) is conducted as Type A adjudication.²⁷² Our database EPAOOALJ0001 contains 48 case types.

1. Minor civil penalties.

One important area of EPA adjudication concerns civil penalties for violation of environmental laws. Most civil penalties are adjudicated as Type A cases. EPA employs 4 ALJs who preside over Type A adjudicatory hearings.²⁷³ However, smaller civil penalties under several statutes, including the Clean Water Act are adjudicated as Type B cases. The smaller civil penalties are referred to as Class I cases; larger civil penalties are referred to as Class II.

The regulations relating to Class I cases provide that the presiding officer is a regional judicial officer (RJO). The RJO is an EPA attorney rather than an ALJ. The detailed regulations covering penalty adjudication are virtually the same for Class I and Class II cases, except that RJOs preside in Class I cases. Discovery in Class I cases is limited. The regulations contain elaborate provisions preventing ex parte communication and assuring separation of functions in Class I cases. Provisions relating to bias are the same for RJOs and ALJs. In the period 2010-2015, 26 Class I civil penalties were adjudicated by RJOs and 11 were appealed to EAB. In that period, ALJs adjudicated 6 Class II penalties.

2. Permitting disputes.

Adjudication involving the issuance, modification, reissuance, and revocation of various environmental permits is conducted as Type B adjudication and is the subject of this memorandum.²⁷⁴ Generally, the applicable statutes provide for a “public hearing” in connection

²⁷⁰ Thanks to Kathie Stein and Randy Hill for assistance with this memo.

²⁷¹ See generally Randolph L. Hill, et al., *Internal Administrative Appeals of Governmental Decisions on the Environment*, in *Environmental Decisionmaking* (forthcoming 2016) (hereinafter *Hill*); Anna L. Wolgast et al., *The United States Environmental Adjudication Tribunal*, 3 J. COURT INNOV. 185 (2010) (hereinafter *Wolgast*).

²⁷² Regulations for EPA APA hearings are set forth in 40 C.F.R. Part 22. See *Wolgast* 188-90.

²⁷³ <http://www2.epa.gov/aboutepa/about-office-administrative-law-judges-oalj>

²⁷⁴ EPA treats termination of a permit before its expiration date as a Type A proceeding as it is akin to a sanction. See 40 C.F.R. § 22.3; EAB Practice Manual 4, 36.

with permitting,²⁷⁵ language that would not trigger the APA's Type A adjudication provisions. EPA's Type B adjudication (EPAOPRMT0006 in our database) is governed by detailed regulations.²⁷⁶ Many of the permit programs are administered by state environmental agencies; the regulations require that states provide procedures parallel to those used by the EPA.²⁷⁷ After an initial decision in *either* Type A or Type B adjudication, the parties can appeal to an internal EPA appellate body called the Environmental Appeals Board (EAB).²⁷⁸ The EAB is the final EPA decisionmaker on administrative appeals under all major environmental statutes the EPA administers.

The EPA originally treated permit cases as Type A adjudication (that is, subject to the APA's adjudication provisions), but transitioned to a non-APA system in 1980 and 2000.²⁷⁹ The decision to conduct permitting hearings as Type B adjudication was upheld by the First Circuit in the *Dominion Energy* case. *Dominion Energy* applied *Chevron* to uphold the EPA's interpretation of statutes using the term "public hearing."²⁸⁰ The EPA now treats most permit cases under all of the environmental statutes it administers as Type B proceedings.

3. Initial decision to grant, deny, or terminate permits

Broadly speaking, the regulations create a notice and comment system for making initial permitting decisions. The process is collaborative and institutional. This procedure applies both to the issuance (or refusal to issue) a permit as well as to terminate a permit.²⁸¹ The regional administrator (or state authority) first issues a draft permit or draft denial of an application, accompanied by a statement of basis or a fact sheet explaining the basis for the decision including any conditions placed on the permit.²⁸² The public and local governments are notified of the draft decision and are invited to submit comments.²⁸³

EPA will hold a public hearing whenever the Director finds a significant degree of public interest in a draft permit (or on the Director's own motion).²⁸⁴ The regional administrator

²⁷⁵ E.g. 33 U.S.C. § 1342(a), relating to NPDES permits

²⁷⁶ 40 C.F.R. Part 124.

²⁷⁷ See 40 C.F.R. § 124.1

²⁷⁸ The EAB is described in 40 C.F.R. § 1.25(e) and discussed further below.

²⁷⁹ 40 C.F.R. § 124.21.

²⁸⁰ *Dominion Energy Brayton Point, LLC v Johnson*, 443 F.3d 12 (1st Cir. 2006) (interpreting language under the Clean Water Act).

²⁸¹ See 40 C.F.R. § 124.13. *But see* note 5, *supra*, providing that some permit revocation proceedings are handled as Type A adjudication.

²⁸² 40 C.F.R. §§ 124.6 to .8.

²⁸³ 40 C.F.R. § 124.10 and .11.

²⁸⁴ 40 C.F.R. § 124.12(a)(1) to (3). See generally *Sierra Pacific Industries*, 16 EAB – (July 18, 2013), pp. 33-36 (available on EAB website). The *Sierra Pacific* opinion held that the region's decision to deny a public hearing was clearly erroneous. It enumerated the factors to be considered in determining whether the "significant degree of

designates a presiding officer for the hearing who is responsible for its scheduling and orderly conduct. The presiding officer is normally a Regional Judicial Officer.²⁸⁵ Any person may submit oral or written statements and data concerning the draft permit. The public comment period on the draft permit is extended to the close of the public hearing and may be extended further.²⁸⁶ A tape recording or written transcript of the hearing shall be made available to the public.²⁸⁷ Persons must “raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) and supply all supporting materials during that period.”²⁸⁸

The regional administrator issues a “final permit decision” after the public comment period concludes. The final permit decision contains a response to comments specifying which provisions, if any, of the draft permit were changed in the final decision. It also includes the reasons for the changes, and describes and responds to all significant comments on the draft permit.²⁸⁹

4. Appeal to the EAB

The EAB hears appeals from final permit decisions by EPA (but not decisions made under state authority). The EAB was created in 1992 “to recognize the growing importance of EPA adjudicatory proceedings as a mechanism for implementing and enforcing the environmental laws and to ‘inspire confidence in the fairness of Agency adjudication.’”²⁹⁰ It alleviated decisionmaking burdens on the EPA administrator.²⁹¹ The EAB is independent of all Agency components and answers only to the Administrator.²⁹²

public interest” standard has been met. These include the materiality of issues in the request for a hearing, the number of requests and comments, media coverage, significance of the issues, and demographic information such as environmental justice concerns.

²⁸⁵ 40 C.F.R. § 124.12(b). The presiding officer is ordinarily a regional judicial officer. “A Regional Judicial Officer shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as a Regional Judicial Officer. A Regional Judicial Officer shall not knowingly preside over a case involving any party concerning whom the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. A Regional Judicial Officer shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel.” 40 C.F.R. § 22.4(b).

²⁸⁶ 40 C.F.R. § 124.12(c).

²⁸⁷ 40 C.F.R. § 124.12(d).

²⁸⁸ 40 C.F.R. § 124.13.

²⁸⁹ 40 C.F.R. § 124.17.

²⁹⁰ EAB Practice Manual, p. 1. See also 57 Fed. Reg. 5320 (Feb. 13, 1992) (amending 40 C.F.R. 1.25 to establish the EAB). This preamble has an excellent discussion of the reasons for establishing the Board.

²⁹¹ See Wolgast 186-87.

²⁹² Ibid.

When EAB is the decisionmaker in an enforcement proceeding (Type A adjudication), it is prohibited from engaging in ex parte discussion on the merits of the proceeding with Agency staff members who performed a prosecutorial or investigative function in the proceeding (or a factually related proceeding) or with any interested person outside EPA.²⁹³ We understand that the EAB observes ex parte restrictions in all appeals, whether involving permitting or enforcement.²⁹⁴

Any person who filed comments on the draft permit or participated in a public hearing on the draft permit may file a petition for review, including review of any conditions imposed by the permit.²⁹⁵ Only issues raised by the petitioner or by others at the permit issuance stage will be considered by the EAB.²⁹⁶ EAB assigns a lead judge to the case who works with an assigned staff attorney to determine whether the case is properly within the scope of the Board's jurisdiction, has been timely filed, and whether it should be dismissed on jurisdictional grounds without an adjudication of the merits. For the vast majority of appeals, the case then proceeds to briefing.²⁹⁷

EAB may hold oral argument on its own initiative or at its discretion if requested. The request must explain why oral argument should be permitted.²⁹⁸ Opinions are published in Environmental Appeals Decisions and posted on the web.²⁹⁹

The EAB acts as an appellate body. It considers cases solely on the administrative record³⁰⁰ and exercises a limited scope of review of the initial permit decision. A petition to EAB must demonstrate that each challenge to the permit decision is based on: (A) A finding of fact or conclusion of law that is clearly erroneous, or (B) An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review."³⁰¹ EAB's review power is exercised sparingly because most permit issues should be resolved at the regional level.³⁰² However, the Board thoroughly considers the merits of the issues presented to it, and will remand a permit if the region's analysis is incomplete or its rationale unclear, if the region failed to follow required procedures, or if the region failed to address significant comments.

²⁹³ 40 C.F.R. § 22.8. Such separation of functions is required by the APA. § 554(d).

²⁹⁴ Email from EAB Judge Kathie Stein to Michael Asimow.

²⁹⁵ EAB permits electronic filing of documents. Practice Manual 11.

²⁹⁶ Practice Manual 43.

²⁹⁷ Wolgast 191.

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

²⁹⁹ Wolgast 192.

³⁰⁰ 40 C.F.R. § 124.19(a)(4)(ii); Hill, 10.

³⁰¹ 40 C.F.R. § 124.19(a)(4)(i).

³⁰² In Re Charles River Pollution Control District (EAB 2015).

The EAB is composed of four Environmental Appeals Judges appointed by the EPA Administrator.³⁰³ The Board sits in randomly-assigned panels of three and decides each matter by a majority vote. Each EAB judge is a career member of the government's Senior Executive Service with significant experience in EPA permit and enforcement matters.³⁰⁴ An EAB judge shall recuse him or herself from deciding a particular case if the member in previous employment performed prosecutorial or investigative functions with respect to the case, participated in the preparation or presentation of evidence in the case, or was otherwise personally involved in the case.³⁰⁵

Statistics concerning the regional appeal process are not available. We understand that the EAB has considered about 600 appeals over the last 10 years, about 2/3 of the cases involving permit appeals and 1/3 penalties.³⁰⁶ As of Sept. 2015, of 1058 final decisions issued by EAB (including Type A, Type B, and CERCLA reimbursement cases), approximately 91% were not judicially reviewed. Of the remainder, 2% were settled on appeal or voluntarily dismissed, 6% were won by EPA, and less than 1% were reversed.³⁰⁷

The EAB encourages ADR and offers the services of an EAB judge acting as a neutral evaluator and mediator. Video-conferencing equipment is available for use in ADR proceedings.³⁰⁸

EAB also considers petitions for reimbursement of reasonable costs incurred by persons who have complied with orders issued by EPA or another federal agency under CERCLA to abate actual or threatened releases of hazardous substances. The statute provides for a reimbursement petition to the President.³⁰⁹ The President delegated his authority to decide claims for reimbursement to the EPA Administrator³¹⁰ who re-delegated that authority to the EAB.³¹¹ The Board is also authorized, as appropriate, to authorize payment of such claims.

The Board has established procedures for submission and review of reimbursement petitions. Under these procedures, petitioners must demonstrate that they were not liable for response costs or that EPA's selection of the ordered response action was arbitrary and

³⁰³ The Board is assisted by eight attorneys who serve as counsel to the Board and three administrative professionals. Wolgast 191; Email from EAB Judge Kathie Stein to Michael Asimow.

³⁰⁴ Hill 2.

³⁰⁵ 40 C.F.R. § 1.25(e). Board members are also disqualified by reason of financial bias. Wolgast 191.

³⁰⁶ Email from EAB Judge Kathie Stein to Michael Asimow.

³⁰⁷ Id.

³⁰⁸ EAB FAQ, item 40; EAB ADR Program Information Sheet.

³⁰⁹ CERCLA § 106, 42 U.S.C. § 9606(a), (b)(2).

³¹⁰ Exec. Order 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987).

³¹¹ EPA Deleg. of Auth. 14-27, Petitions for Reimbursement (June 27, 2000).

capricious. If the petition raises fact issues, EAB can designate an EPA employee who had no prior involvement in the matter to serve as a hearing officer and issue a recommended decision. EAB may also decide to hold oral argument. If reimbursement is granted, there is a further proceeding to determine the amount. Reimbursement decisions are reviewable by a de novo proceeding in federal court.

B. Army Corps of Engineers (Corps)

1. Decisions on permits

The Corps conducts a wide range of individualized permitting³¹² involving waters of the United States. One set of permit requirements concerns building of dams, bridges, and other projects that might impede navigation.³¹³ A second set arises under the Clean Water Act and requires that landowners obtain a permit in order to discharge dredge or fill into waters of the United States, including many wetlands (the second set is often referred to as “404 permits”).³¹⁴

The permit process requires a public interest balancing of the benefits to the applicant against environmental detriments caused by the project.³¹⁵ The Corps is decentralized; most permitting authority is delegated to the 36 district engineers (DEs).³¹⁶ Many permitting decisions are delegated to the states;³¹⁷ state decisions are not otherwise discussed in this memo. The same process applies to the modification, suspension, or revocation of a permit.³¹⁸ The statute provides that permits for discharge of dredged or fill material into the navigable waters may issue “after notice and opportunity for public hearings.”³¹⁹ Consequently, such hearing procedures are Type B adjudication.³²⁰

³¹² The Corps’ website states that it issues about 90,000 permits per year and only about 5% of applications are denied. I am seeking further statistical information.

³¹³ 33 U.S.C. § 403.

³¹⁴ 33 U.S.C. § 1344. See the 404 Guidelines. http://water.epa.gov/lawsregs/rulesregs/cwa/upload/CWA_Section404b1_Guidelines_40C.F.R.230_July2010.pdf. The Corps’ permit process (and the standards it applies) is described in detail in William Want, LAW OF WETLANDS REGULATION ch. 6 (2015).

³¹⁵ 33 C.F.R. § 320.1(a)(1). See § 320.4 for discussion of the public interest balancing process including the factors to be taken into account.

³¹⁶ 33 C.F.R. § 320.1(a)(2). In certain cases, the permit decision must be referred to the Division Engineer, which is a position above that of the DE. 33 C.F.R. § 325.8(b).

³¹⁷ 33 U.S.C. § 1344(g).

³¹⁸ 33 C.F.R. § 325.7.

³¹⁹ 33 U.S.C. § 1344(a).

³²⁰ See *Buttrey v. United States*, 690 F.2d 1170 (5th Cir. 1982), upholding the Corps’ “paper hearing” procedures. The “public hearing” language of the statute does not trigger the APA and the Corps’ procedures satisfied due process.

The permitting process requires that the applicant file a detailed application with the DE.³²¹ Prior to filing, the district staff is available to advise potential applicants of studies or other information that they will have to submit. Once the application is complete, the DE gives public notice of the application in sufficient detail to permit interested persons to comment.³²² “The notice must therefore include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.”³²³ The public is invited to submit comments and the DE considers all such comment in the public interest balancing process.³²⁴ The comments are furnished to the applicant who is entitled to respond to them and may voluntarily attempt to resolve conflicts with the objectors.³²⁵

There is frequently a public hearing in connection with the application.³²⁶ The presiding officer (PO) at the public hearing is ordinarily the DE.³²⁷ At the hearing, the PO shall allow any person to submit oral or written statements, to call witnesses who may present oral or written statements, and to present recommendations as to an appropriate decision. The participants shall have a reasonable opportunity for rebuttal but cross-examination is not permitted. Additional written statements can be filed within 10 days of the public hearing.³²⁸ The regulations provide that the DE can attempt to informally resolve the issues between public objectors and the applicant, which could be considered a form of mediation.³²⁹

After consideration of all this material, the DE decides whether or not to issue the permit (with or without conditions³³⁰) and prepares a statement of findings.³³¹

The regulations contain a provision for administrative reconsideration of a jurisdictional determination that particular property is subject to permitting requirements or to the denial or

³²¹ See 33 C.F.R. § 325.1.

³²² 33 C.F.R. § 325.3. The public notice also specifies the evaluation factors that the DE will take into account in making the permit decision. *Id.*, § 325.3(c).

³²³ 33 C.F.R. § 325.3(a). See *National Wildlife Fed. v. Marsh*, 568 F. Supp. 985, 994 (D.D.C. 1983) (failure to disclose staff report in time for public comment required reversal of permit grant under this provision of the regulations).

³²⁴ 33 C.F.R. § 325.2(a)(3).

³²⁵ *Id.* See *Mall Properties v. Marsh*, 672 F. Supp. 561 (D. Mass. 1987), overturning a decision to grant a permit to a shopping mall because the Corps failed to disclose a meeting that the DE had with the Governor of Connecticut who opposed the project.

³²⁶ 33 C.F.R. §§ 327.1 to .9. The public notice of proposed permitting generally provides for a public hearing; if not, any member of the public can request one.

³²⁷ 33 C.F.R. § 327.5(a).

³²⁸ 33 C.F.R. § 327.8.

³²⁹ 33 C.F.R. § 327.4(b).

³³⁰ 33 C.F.R. § 325.4.

³³¹ 33 C.F.R. § 325.2(a)(6). In appropriate cases, the DE’s decision also includes an environmental impact statement under NEPA.

modification of a permit or of the conditions in a permit.³³² This reconsideration provision does not appear to be mandated by statute. The decision is appealed to an official at least one level higher than the original decisionmaker (such as the division engineer for appeal of the decisions of a district engineer).³³³ The appellate decisionmaker is normally assisted by a Review Officer (RO) who conducts the process and assists the appellate decisionmaker. The RO must be uninvolved with the case under review and conducts an independent review of the record.³³⁴ The RO normally makes a site investigation to clarify the administrative record. The RO conducts an informal appeal conference “to provide a forum that allows the participants to discuss freely all relevant issues and material facts associated with the appeal.”³³⁵ The discussion at the informal appeal conference is not transcribed and does not supplement the administrative record, but the RO writes a memo for the record after the conference summarizing the presentations made at the conference.³³⁶

The appellate decisionmaker then makes a final appeal decision on the merits of the appeal.³³⁷ The appeal decision will disapprove the DE’s decision only if it was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the record, or plainly contrary to a law, regulation, executive order, or officially promulgated corps policy guidance.³³⁸ The appellate decisionmaker will not attempt to substitute its judgment for that of the DE. Appeal decisions are not precedential.³³⁹

The regulations contain no specific procedures for revocation of a permit. However, the standard permit conditions contain brief provisions that provide for such a procedure.³⁴⁰ The District Commander gives notice to a permittee if “the public interest necessitates revocation” or the permittee fails to comply with any permit condition or term. If the permittee requests a hearing, the commander through the resource manager shall grant a hearing. In an emergency

³³² 33 C.F.R. §§ 331.1 to 331.12. *See* Want, *supra* note xx, at §9.02. The reconsideration provision is only available to denied permittees, not to members of the public who oppose the granting of a permit.

³³³ 33 C.F.R. § 331.1(b).

³³⁴ 33 C.F.R. § 331.3(b). The RO can receive expert advice from any Corps employee or other recognized expert so long as that person had not been previously involved in the action under review.

³³⁵ 33 C.F.R. § 331.7(e).

³³⁶ 33 C.F.R. § 331.7(e)(6).

³³⁷ 33 C.F.R. § 331.9. While reviewing an appeal and reaching a decision on the merits, the division engineer can consult with or seek information from any person, including the district engineer. §331.9(a).

³³⁸ 33 C.F.R. § 331.9(b).

³³⁹ 33 C.F.R. § 331.7(g). Under the regulations, the appeal decision constitutes exhaustion of remedies. 33 C.F.R. § 331.12. Whether an unfavorable appeal decision in the case of a denied application for a jurisdictional determination that a wetland is “waters of the United States” should be treated as “final agency action” for judicial review purposes is currently before the Supreme Court. *Hawkes v. United States Army Corps of Engineers*, 782 F.3d 994 (8th Cir. 2015), cert. granted, 2015 WL 8486656. 2015).

³⁴⁰ 33 C.F.R. § 327.30, App. C, ¶¶ 21 and 22.

the permit can be summarily revoked. There are no substantive requirements for this hearing and no transcript needs to be created.³⁴¹

1. Enforcement of permitting decisions and administrative civil penalties

DEs investigate violations such as unpermitted construction or violation of conditions in a permit.³⁴² They can issue cease and desist orders and corrective orders.³⁴³ DEs can request the US Attorney to take civil or criminal action to enforce the cease and desist or corrective orders or to collect civil penalties.³⁴⁴

Alternatively, the Corps can impose civil penalties.³⁴⁵ It must give public notice and an opportunity for comment on a proposed civil penalty.³⁴⁶ A permittee may be represented at all stages of the proceeding by counsel (but apparently not by a lay representative).³⁴⁷

Hearings on civil penalty cases shall be “fair and impartial” and afford permittees and other interested parties an opportunity to present written or oral evidence.³⁴⁸ The Hearings shall be “informal” and not subject to the APA.³⁴⁹ Thus Corps’ civil penalty hearings are Type B adjudication. Any person who commented on the proposed civil penalty may testify at the hearing.

The DE selects the presiding officer (PO) who shall exercise no other responsibility (direct or supervisory) for the investigation or prosecution of any case before him and have no prior connection with the case.³⁵⁰ Ex parte communication to or from the PO (either by an interested person outside the Corps or by interested Corps staff) is prohibited.³⁵¹ The PO has subpoena power. The permittee has the right to examine and to respond to the administrative

³⁴¹ McClung v. Paul, 788 F.3d 822, 827 (8th Cir. 2015).

³⁴² 33 C.F.R. § 326.3(a), (b).

³⁴³ 33 C.F.R. § 326.3(c), (d).

³⁴⁴ 33 U.S.C. §§ 1319(b), (c), (d), 1344(s); 33 C.F.R. § 326.5.

³⁴⁵ 33 U.S.C. § 1319(g); 33 C.F.R. § 326.6. These Class I penalties cannot exceed \$10,000 per day or \$25,000 in total. See Want, *supra* note x, at §§ 8.6 and 8.7 for discussion of civil penalties.

³⁴⁶ 33 U.S.C. § 1319(g)(4); 33 C.F.R. § 326.6(c).

³⁴⁷ 33 C.F.R. § 326.6(f). This provision mentions only “counsel,” in contrast to §327.7, which provides that at a public hearing, “any person may appear on his own behalf, or may be represented by counsel, *or by any other representatives.*”

³⁴⁸ 33 C.F.R. § 326.6(i).

³⁴⁹ 33 U.S.C. § 1319(g)(2)(A); 33 C.F.R. §326.6(h)(1). However, Class II penalties, which cannot exceed \$10,000 per day or \$125,000 in total must be assessed in accordance with APA procedure and thus would be classified as Type A adjudication. 33 U.S.C. §1319(g)(2)(B).

³⁵⁰ 33 C.F.R. § 326.6(h)(3), (4). The presiding officer is a member of the Corps Counsel staff or any other qualified person designated by the DE to hold a hearing on a proposed administrative civil penalty case. 33 C.F.R. § 326.6(a)(3)(v).

³⁵¹ 33 C.F.R. § 326.6(a)(3)(vi), (h)(5).

record by introducing evidence and through cross examination.³⁵² The hearing is tape recorded or transcribed.³⁵³ Oral argument is permitted.³⁵⁴ The regulations do not provide for the use of the phone or video-conferencing or for any particular ADR mechanism.

After the hearing, the PO shall forward a recommended decision, accompanied by a written statement of reasons, to the DE. It shall be based on a preponderance of the evidence. The DE then issues a final order.³⁵⁵ The PO's recommended decision is part of the record but is not disclosed to the parties until the DE's final decision is released.³⁵⁶ In considering the case, the DE is bound by the same ex parte rules that applied to the PO except that the DE is permitted to communicate ex parte with the PO or with the DE's staff.³⁵⁷

³⁵² 33 C.F.R. § 326.6(i)(8). (9).

³⁵³ 33 C.F.R. § 326.6(i)(6).

³⁵⁴ 33 C.F.R. § 326.6(i)(11).

³⁵⁵ 33 C.F.R. § 326.6(j)(5). The order is subject to judicial review. 33 C.F.R. §326.6(l)

³⁵⁶ 33 C.F.R. § 326.6(j)(1), (2).

³⁵⁷ 33 C.F.R. § 326.6(j)(3).

APP. A-5: Executive Office of Immigration Review
(1-06-16)³⁵⁸

This memo discusses the adjudicatory process in immigration cases, including disputes relating to admissibility, removal, and asylum.³⁵⁹ The Executive Office of Immigration Review (EOIR), a division of the Department of Justice, is responsible for conducting adjudicatory hearings and administrative appeals.³⁶⁰ Consistent with the ground rules for this ACUS project, this memo considers only adjudicatory evidentiary hearings required by law, but not other forms of informal adjudication which either precede evidentiary hearings or which entirely supplant them. The latter are plentiful in the immigration context.³⁶¹

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

Judicial opinions and academic scholarship severely criticize the quality of IC and BIA decision-making, question the independence of the EOIR decisionmakers, and advance a variety of restructuring proposals.³⁶² Such criticisms and proposals are beyond the scope of this memorandum and will not be further addressed.

³⁵⁸ Thanks to Dana Leigh Marks and Jennifer Chacon for assistance with this memo.

³⁵⁹ See 8 U.S.C. § 1229a(a)(3), providing that proceedings under this section are the exclusive procedure for determining whether a respondent may be admitted to or removed from the U.S.; 8 C.F.R. § 1003.12, providing the rules for all immigration hearings including deportation, exclusion, removal, bond, departure control, asylum proceedings, and disciplinary proceedings. See also Immigration Court Practice Manual ¶1.5 (hereinafter “Practice Manual”) for list of the types of determinations made by EOIR. For a summary of the removal process, see Lenni Benson & Russell Wheeler, “Enhancing Quality and Timeliness in immigration Removal Adjudications” 9-12 (ACUS 2012) (hereinafter Benson & Wheeler).

³⁶⁰ See 8 C.F.R. § 1003.0. EOIR also conducts hearings through its Office of the Chief Administrative Hearing Officer (OCAHO) in cases involving employer sanctions, anti-discrimination provisions and document fraud. These are Type A hearings (meaning conducted by ALJs and subject to the APA). They are not discussed in this memo.

³⁶¹ Numerous adjudicatory decisions by immigration personnel do not trigger adjudicatory hearings. For example, there is no right to an adjudicatory hearing in connection with expedited removal by a DHS officer at ports of entry of an alien who makes no claim to refugee status. 8 U.S.C. § 1225(b)(1)(A)(i).

³⁶² See e.g., Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010); Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, SSRN 2628962 (2015), forthcoming LAW & SOC. REV. (2016) (inconsistent results in bond hearings) (hereinafter Ryo); Appleseed, *Reimagining The immigration Court Assembly Line* (2012), <http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf>

A. Immigration Court

The IC presently consists of about 250 IJs in about 60 ICs, although EOIR is trying to hire more.³⁶³ Working conditions are difficult for the IJs who lack adequate staff support.³⁶⁴ Each IJ on average currently handles more than 1800 matters per year; some handle more than 3000.³⁶⁵ IJs are subject to performance evaluation. The impact of these evaluations (introduced in 2008) are still being debated.³⁶⁶

Respondents may face waiting times of several years. These waiting times have increased because of the recent surge in unaccompanied minors from Central America whose cases are given priority.³⁶⁷ In FY 2014, the IC received 306,000 cases and completed 248,000.³⁶⁸ Its backlog at the end of FY 2014 was 418,861 cases.³⁶⁹ This backlog has increased steadily from 262,681 cases at the end of FY 2010. Because many respondents are held in detention, the lengthy waiting times are a matter of serious concern.

Detailed regulations provide the rules of pleading and practice at IC proceedings.³⁷⁰ IC jurisdiction commences when the Department of Homeland Security (DHS) files detailed charging documents (often called “Notice to Appear”) with the IC and serves them on the alien (hereinafter referred to as the respondent).³⁷¹ The respondent is opposed by an attorney representing DHS. Generally the first encounter between respondents and the IC is a “master calendar” proceeding at which an IJ explains respondent’s rights and notifies them of the right to retained counsel and schedules further proceedings.³⁷²

The respondent may be represented by an attorney who is eligible to practice in any state and is registered with EOIR or by a lay representative at no expense to the government.³⁷³ Thus

³⁶³ See generally Benson & Wheeler 6-7, for discussion of the legal status of IJs. EOIR is drastically underfunded, a reality that constrains the hiring of additional IJs or providing them with additional staff support. *Id.* 31-32. Some IJs have administrative responsibilities and thus do not carry full caseloads.

³⁶⁴ See Legomsky, note 3, at 1651-57.

³⁶⁵ For analysis of IJ workloads, see Benson & Wheeler 24-30. These are much heavier caseloads than in other federal Type B adjudications. *Id.* at 27.

³⁶⁶ See Legomsky, note 3 at 1662-63, arguing that the evaluations focus mostly on productivity. Benson & Wheeler 106-10. Benson and Wheeler state that the evaluation process is subject to potential manipulation, but they encountered little evidence of it. *Id.*, 117-18. However, the President of the National Association of Immigration Judges does not agree with these statements. Email from Dana Leigh Marks to Michael Asimow, Dec. 18, 2015.

³⁶⁷ See Molly Hennessy-Fiske, Los Angeles Times, May 16, 2015; August 18, 2015.

³⁶⁸ EOIR, FY 2014 Statistics Yearbook, p. A2.

³⁶⁹ EOIR, FY 2014 Statistics Yearbook, p. W1. As of December, 2015, the backlog is 457,106 cases. Statement of Juan P. Osuna, Director of EOIR, before the House of Representatives Committee on the Judiciary, “Oversight of the Executive Office of Immigration Review,” Dec. 3, 2015.

³⁷⁰ See 8 C.F.R. §§ 1003.12 et seq., 1240.1 et seq.; Practice Manual.

³⁷¹ See 8 C.F.R. §§ 1003.13 to 15; Practice Manual ¶ 4.2.

³⁷² Benson & Wheeler pp.14-15. A case may be scheduled to several master calendar proceedings, for example to give the respondent time to get an attorney or to prepare applications for relief.

³⁷³ 8 C.F.R. § 1003.16. According to EOIR, approximately 55% of respondents before the IC are represented. See FY 2014 Statistics Yearbook, p. F1. However, Eagly & Shafer conclude that only 37% of respondents had counsel in removal proceedings (using as a sample all cases decided between 2007 and 2012) and only 45% of that number

lay representation is permitted in IC proceedings according to detailed regulations.³⁷⁴ Permitted lay representatives include law students,³⁷⁵ law graduates not yet admitted to the bar,³⁷⁶ reputable individuals with a pre-existing relationship to the person represented,³⁷⁷ accredited representatives,³⁷⁸ and an accredited official of a foreign government to which the respondent owes allegiance. Both attorney and lay representatives practicing before the IC or BIA are subject to disciplinary sanctions.³⁷⁹ Non-lawyer immigration specialists, visa consultants, and “notaries” are not authorized to represent parties before an IC.³⁸⁰

The statute and regulations make no provision for ADR. However, an IJ may schedule a pre-hearing conference to narrow issues, obtain stipulations, exchange information voluntarily, and otherwise to simplify and organize the proceeding.³⁸¹ The ACUS study of IC procedures indicates that IJs used various techniques to narrow the issues, but that prehearing conferences are not routine (largely because of the caseload pressures). The study recommends better utilization of various devices to narrow the issues and improve pre-hearing document sharing.³⁸²

had representation at all IC hearings. Less than 2% of respondents facing removal secured pro bono representation from nonprofits or law school clinics. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV [ms. p. 6-9] (2016). The discrepancy arises from the fact that respondents with counsel are involved in more proceedings than unrepresented respondents; consequently, counting only proceedings inflates the percentage of parties who are represented. Only about 14% of respondents held in detention were represented. Success rates of respondents represented by counsel were much better than for unrepresented parties. In addition, Eagly & Shafer report that the presence of counsel produced substantial efficiency gains. See also Benson & Wheeler 56 (almost all IJs believe that the presence of attorneys enhances efficiency and makes their jobs easier); Ryo 30-32 (represented detainees have much better results in bond hearings than unrepresented detainees).

³⁷⁴ 8 C.F.R. § 1292.1 et seq.; Practice Manual, ch. 2.

³⁷⁵ The student must file a statement that he or she is participating under the direct supervision of a faculty member, licensed attorney, or accredited representative, in a legal aid program or clinic conducted by the law school or non-profit organization and is appearing without remuneration from the respondent.

³⁷⁶ The law graduate must file a statement that he or she is appearing under the supervision of a licensed attorney or accredited representative without remuneration. In the case of law students or graduates, the IJ (or other official before whom he or she wishes to appear) has discretion not to permit such appearance or to require the presence of the supervising faculty member, attorney, or accredited representative.

³⁷⁷ Practice Manual ¶2.9. The relationship may be as a relative, neighbor, clergyman, business associate or personal friend. This requirement may be waived in cases where adequate representation would not otherwise be available. The IC must give permission for this representation. Such permission shall not be granted with respect to any individual who regularly engages in immigration and naturalization practice or preparation or holds himself out to the public as qualified to do so.

³⁷⁸ Accredited representatives work for non-profit charitable organizations recognized by the Board that make only nominal charges for representation. Such representatives must be of good moral character and be accredited by the Board. 8 C.F.R. § 1292.2; Practice Manual ¶ 2.4.

³⁷⁹ 8 C.F.R. § 1292.3.

³⁸⁰ Practice Manual ¶2.7.

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

³⁸² Benson & Wheeler 68-74.

The regulations and the practice manual relating to the IC and the BIA do not require separation of functions or prohibit ex parte contacts. However, the “Ethics and Professionalism Guide For Immigration Judges” prohibits ex parte contacts (unless expressly authorized by law).³⁸³ This Guide superseded an earlier code of conduct for both IJs and BIA members that permitted ex parte contacts with DOJ employees.³⁸⁴ It is unclear whether the earlier guidance permitting ex parte contacts between BIA members and DOJ employees remains in effect or whether such contacts occur in practice.

IJs have subpoena power and can order the taking of depositions of witnesses who are not available to testify at the hearing.³⁸⁵

IC hearings are generally conducted in person or through video conference.³⁸⁶ Video conference hearings are generally used to hear cases of respondents in detention³⁸⁷ and are quite controversial.³⁸⁸

The IC provides interpreters for the native language of the respondent.³⁸⁹ It has embarked on a program to provide full and complete interpretation to all respondents in court proceedings but has had some difficulties in doing so.³⁹⁰

At IC hearings (often referred to as individual calendar or merits hearings), respondents are provided with a reasonable opportunity to examine the evidence against them and to present evidence on their behalf and to cross-examine witnesses.³⁹¹ The respondent cannot examine national security information proffered by the government in opposition to admission or

³⁸³ <http://www.justice.gov/eoir/immigration-judge-conduct-and-professionalism> (Rule XXXII) (2011).

³⁸⁴ 72 Fed. Reg. 35510 (2007), Canon XV (IJs), Canon XV (BIA members); Legomsky, note 3 at 1674.

³⁸⁵ 8 C.F.R. § 1003.35; Practice Manual ¶4.20.

³⁸⁶ Telephone hearings are also possible but only with consent of the respondent. 8 U.S.C. § 1229(b)(2)(B); 8 C.F.R. § 1003.2(c). Credible fear determinations may be reviewed by the IJ through telephone conferences without consent of the respondent. *Id.*

³⁸⁷ In 2012, IJs conducted about 134,000 hearings by video conference. See Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NORTHWESTERN U. L. R. -- (forthcoming 2015).

³⁸⁸ The ACUS study canvassed the arguments on both sides of the video conference issue and made various suggestions for improving video hearings, assuming that video conferencing is here to stay. Benson & Wheeler 89-100. EOIR contends that video conference is a “force multiplier” that improves efficiency, lowers transportation costs, strengthens court safety, expands access to counsel, and reduces the time immigrants spend in detention. Critics of televised adjudication believe that the practice prejudices respondents as opposed to those who receive face-to-face hearings. Eagly concludes that IJs do not appear to be biased against respondents whose cases are heard by video conference rather than in person. However, she contends that video conferencing depresses the engagement of respondents with the adversarial process, making them less likely to retain counsel or request a hearing or apply for discretionary relief.

³⁸⁹ Practice Manual 4.11.

³⁹⁰ <https://www.linkedin.com/pulse/immigration-courts-could-lose-third-interpreters-jim-harvill?articleId=6057577953682866176> (discussing potential pay cuts for interpreters).

³⁹¹ See Practice Manual ¶4.16 for discussion of IC hearings.

discretionary relief.³⁹² In absentia hearings are conducted if the respondent fails to appear.³⁹³ IC hearings are generally open to the public.³⁹⁴

IJ decisions shall be based only on evidence produced at the hearing.³⁹⁵ The provisions on burden of proof are unusual. An applicant for admission has the burden of establishing admissibility “clearly and beyond doubt.” Respondents have the burden to establish by clear and convincing evidence that they are lawfully present in the U.S. pursuant to a prior admission. In contrast, DHS has the burden to establish removability by clear and convincing evidence in the case of a respondent who has been admitted to the U.S. No decision on removability is valid unless based on reasonable, substantial, and probative evidence.³⁹⁶ A respondent has the burden of proof (presumably by a preponderance of the evidence) to establish eligibility for relief from removal and has the burden to establish that he or she merits a favorable exercise of discretion.³⁹⁷

Many immigration decisions require an assessment of the credibility of witnesses. The statute allows the IJ to consider a variety of circumstances in assessing credibility including demeanor and consistency of the statements.³⁹⁸

The IJ’s decision may be in writing or oral. If oral, a memorandum summarizing the oral decision shall be served on the parties.³⁹⁹ A respondent may file one motion to reconsider an IJ decision that the respondent is removable; the motion must specify the errors of law or fact in the IJ order. The respondent may also file one motion to reopen proceedings based on newly discovered facts.⁴⁰⁰ An IJ’s decision is final unless the party reserves the right to appeal.⁴⁰¹

³⁹² 8 U.S.C. § 1229a(b)(4).

³⁹³ 8 C.F.R. § 1003.26.

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

³⁹⁵ 8 U.S.C. § 1229a(c)(1)(A).

³⁹⁶ 8 U.S.C. § 1229a(c)(3).

³⁹⁷ 8 U.S.C. § 1229a(c)(4).

³⁹⁸ The IJ may base a credibility determination on the demeanor, candor, or responsiveness of the witness, the inherent plausibility of the account, the consistency between witness’ oral and written statements (considering the circumstances under which the statements were made), the internal consistency of such statements with other evidence of record, and any inaccuracies or falsehoods in such statements whether or not they go to the heart of the applicant’s claim, or any other relevant factor. There is no presumption of credibility but if no adverse credibility determination is explicitly made, the witness shall have a rebuttable presumption of credibility on appeal. 8 U.S.C. § 1229a(c)(4)(C).

³⁹⁹ 8 C.F.R. § 1003.37.

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

⁴⁰¹ 8 C.F.R. § 1003.39.

B. Board of Immigration Appeals

The BIA consists of 17 members headed by a Chairman.⁴⁰² The EOIR director can also appoint temporary Board members; temporary members are present or retired IJs, retired BIA members, or senior EOIR attorneys.⁴⁰³ The BIA hears appeals of decisions by IJs. Either the respondent or DHS can appeal.⁴⁰⁴ Cases can also be certified to the BIA or the BIA can certify a case to the Attorney General.⁴⁰⁵

The Chairman divides the Board into three-member panels and designates a presiding member of each panel. Panels decide cases by majority vote.⁴⁰⁶ However, most BIA cases are assigned to a single panel member. Cases are assigned to a three-member panel only for certain important matters identified by the case management system. For example, cases will be assigned to three-member panels if needed to settle inconsistencies between rulings of different IJs or to establish a precedent construing the meaning of laws, regulations, or procedures.⁴⁰⁷

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

Single member BIA members frequently make decisions without opinions, adopting the IJ decision without further explanation, or writing brief opinions of a few sentences.⁴⁰⁸ Oral argument can be scheduled at the discretion of a three-judge panel but no oral argument is allowed in a case assigned to a single Board member.⁴⁰⁹

In FY 2014, BIA received 29,723 cases; it completed 30,822.⁴¹⁰ Its backlog at the end of FY 2014 was 21,843 cases, which is considerably less than the backlog of 30,133 at the end of FY 2010.⁴¹¹

⁴⁰² 8 C.F.R. § 1003.1(a). The Chairman supervises and issues operating instructions for the Board but has no authority to direct the result of an adjudication assigned to another Board member.

⁴⁰³ 8 C.F.R. § 1003(a)(4). -

⁴⁰⁴ For list of decisions that can be appealed to BIA, see 8 C.F.R. §1003(b)

⁴⁰⁵ 8 C.F.R. §§ 1003.1(c), .1(h).

⁴⁰⁶ 8 C.F.R. § 1003(a)(3).

⁴⁰⁷ 8 C.F.R. § 1003(e)(6).

⁴⁰⁸ 8 C.F.R. § 1003(e)(4); Legomsky, note 3 at 1657. The procedural shortcuts at the BIA level (brief or no opinions, rising caseload, single-member opinions) are an important reason for the surge in petitions for review to the Court of Appeals. *Id.* 1658-65.

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

⁴¹⁰ EOIR FY 2014 Statistics Yearbook, p. Q1.

⁴¹¹ *Id.* p. W3. For further analysis of the types of matters heard by BIA, see Benson & Wheeler 21-22.

APP. A-6: INTERNAL REVENUE SERVICE-COLLECTION DUE PROCESS⁴¹²
(12-21-15)

The primary role of the IRS Office of Appeals (OA) is to negotiate disputes between taxpayers and the IRS, a function it has performed since 1927. The vast majority of tax disputes are settled at this level.⁴¹³ Tax disputes that are not settled are adjudicated by the Tax Court (TC), a tribunal independent of the IRS, or can be the subject of a claim for refund and litigated either in the federal District Court or the Court of Federal Claims.

The TC is an Article I court of record.⁴¹⁴ Its procedures are quite formal and similar to those of the federal district court.⁴¹⁵ In *Freytag*, the majority held that the TC was a “court of law,” while the dissenters considered the chief judge was a “head of department.”⁴¹⁶ Because the TC resembles an Article III court more than an administrative agency conducting adjudication, it is excluded from this ACUS study.

In addition to tax dispute settlement, OA also conducts hearings in cases relating to tax liens and levies—that is, collection activity of unpaid taxes by the IRS. This function is referred to as “collection due process” (CDP) and is included in our database as TRSYIRSA0008.⁴¹⁷

Taxpayers request CDP hearings in only a small percentage of the events that could give rise to CDP hearings. Each year there are about 3.6 million notices sent to the taxpayer stating that collection action (lien or levy) will be taken. There were 40,355 CDP cases in FY 2014. As the end of FY 2014, there were 758 appeals officers. Cases received by OA totaled 113,608.⁴¹⁸ We estimate, therefore, that CDP cases totaled 35.5% of the OA caseload in FY 2014. Based on that estimate, there is a full-time equivalent (FTE) of 269 OA officers serving as appeals officers in CDP cases (35.5% of the total). The caseload per OA officer would be about 1,500 CDP cases per year or about 7.5 cases per working day.

CDP hearings are required by several statutes in the Internal Revenue Code.⁴¹⁹ They qualify as Type B adjudication. These statutes were enacted in 1998 as part of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA).⁴²⁰ The statutory scheme of CDP hearings supplanted a similar non-statutory program.⁴²¹

⁴¹² Thanks to Bryan Camp, Nina E. Olson and Kiersten B. Wielobob for assistance in writing this memo.

⁴¹³ See 26 C.F.R. § 601.106 (2014) for detailed treatment of the OA’s settlement function.

⁴¹⁴ See I.R.C. § 7441 (2012).

⁴¹⁵ See *Freytag v. Comm’r*, 501 U.S. § 868 (1991) (concerning the appointment of “special trial judges” by the Chief Judge of the TC).

⁴¹⁶ *Id.* at 890–891, 901.

⁴¹⁷ This entry in the database has not been verified by the IRS.

⁴¹⁸ See Internal Revenue Service, 2014 Data Book.

⁴¹⁹ See I.R.C. §§ 6320(b) (imposition of liens), 6330(b) (levies on property).

⁴²⁰ See Pub. L. No. 105-206, § 3401. 112 Stat. 685, 746 (1998) [hereinafter RRA]. For discussion of the legislative history, see Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 78-80 (2009).

⁴²¹ See *Tucker v. Comm’r*, 135 T.C. 114, 137 (2010).

CDP hearings are needed because IRS collection tactics (liens and levies) can have a very damaging economic and personal effect on the taxpayer. Usually these collection tools are computer-driven without any human involvement. The IRS presumes that all taxpayers with unpaid taxes “won’t pay” (as distinguished from “can’t pay”) and acts accordingly in trying to collect the tax. Taxpayers must take the initiative to persuade the collection division that they are unable to pay. Often assets are seized before any human being in the IRS collection division ever speaks to the taxpayer and considers compromise or payment plans. The rationale for CDP hearings is that it initiates a process consisting of contact between the taxpayer and an IRS officer who has not been previously involved in the collections process about possible compromises. However, as pointed out above, only a small percentage of taxpayers avail themselves of CDP. A study indicated that between 16% and 27% of taxpayers who employed the CDP process received better outcomes after appealing the lien or levy determination.⁴²²

Section 6320 addresses the filing of a tax lien by the IRS. The IRS must give notice to the taxpayer within 5 days after a lien has been filed. Section 6330 addresses levies (that is, seizures of the taxpayer’s property pursuant to a tax lien). The IRS must notify the taxpayer of a proposed levy not less than 30 days before it occurs.

In both cases, the notice must include “in simple and nontechnical terms” the right of the person to request a hearing during a defined time period. If a person requests a hearing and states the grounds for it, a hearing is held by the OA.⁴²³ Taxpayers requesting a CDP hearing must file Form 12153 with the IRS. Regulations and IRS guidance answer many questions relating to notice.⁴²⁴ Taxpayers may continue negotiating with collection officers even after filing Form 12153, so alternative dispute resolution (including mediation) is available. If taxpayers do not meet the deadline for filing Form 12153, they can receive an “equivalent hearing,” which is similar to CDP but the decision is not judicially reviewable.

The matters to be considered in a CDP hearing are limited. They include:

- verification “that the requirements of any applicable law or administrative procedure have been met;”
- spousal defenses (the Code contains a number of provisions protecting “innocent spouses” who have joint and several liability for tax deficiencies or underpayments by reason of having signed joint returns);
- challenges to the appropriateness of collection actions (including that collection will cause economic or other hardship); and

⁴²² See Camp, *supra* note 420, at 86 (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-112, TAX ADMINISTRATION: LITTLE EVIDENCE OF PROCEDURAL ERRORS IN COLLECTION DUE PROCESS APPEAL CASES, BUT OPPORTUNITIES EXIST TO IMPROVE THE PROGRAM 3–4 (2006). The GAO study is available at <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-07-112/pdf/GAOREPORTS-GAO-07-112.pdf>.

⁴²³ See I.R.C. §§6320(b)(1), 6330(b)(1).

⁴²⁴ See Treas. Regs. §§301.6320-1(a), 6330-1(a) (2014); I.R.S. Publ’n 1660 (rev. Oct. 2012).

- offers of collection alternatives, including posting a bond, substitution of other assets, an installment agreement, or an offer-in-compromise.⁴²⁵

The appeals officer must decide “whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.”⁴²⁶

Normally CDP hearings do not consider the existence or amount of the underlying tax liability. Those issues were the subject of a prior notice of deficiency (the so-called 90-day letter); they were either successfully negotiated between the taxpayer and the OA or litigated before the TC or in a refund action, the deficiency notice, or became final because the taxpayer failed to file a TC appeal.⁴²⁷ However, if for some reason the taxpayer did not receive a notice of deficiency before the IRS started collection action, (for example because the deficiency notice was mailed to the wrong address), the CDP hearing also considers the existence or amount of the tax liability.⁴²⁸ In this situation, the issues of tax liability and of collection are determined by different OA officers. The same is true where taxpayer asserts an innocent spouse defense.

Prior to adoption of the statutes requiring IRS to conduct CDP hearings, the IRS maintained a similar program called the Collection Appeals Program (CAP) which still exists. CAP provides for a much quicker hearing that covers more collection issues than are covered in CDP, such as IRS decisions to levy on specific assets. However, a CAP decision cannot be appealed in court.⁴²⁹

CDP hearings “shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax.”⁴³⁰ These regulations say that an officer is disqualified only when the officer had been previously involved in an appeals hearing involving the same tax and tax period. However, the case law reads the statute more broadly. Thus, a CDP appeals officer was disqualified from conducting a CDP hearing with respect to the 2002 return when the officer had previously conducted a CDP hearing with respect to the 2000 and 2001 returns and, in doing so, had considered financial information from the 2002 return.⁴³¹ Similarly, an officer is disqualified when she had previously negotiated with the taxpayer who had submitted an offer in compromise of his tax liability.⁴³²

CDP hearings are informal and may be conducted via correspondence, over the phone, or face-to-face. However, to qualify for a hearing, the taxpayer must not raise issues that are deemed to be frivolous or made with a desire solely to delay or to impede collection. If taxpayer

⁴²⁵ See I.R.C. § 6330(c)(1), (2).

⁴²⁶ See *id.*, § 6330(c)(3).

⁴²⁷ See Treas. Regs. §§ 301.6212-1, 6213-1 (2014).

⁴²⁸ See *id.* at § 301.6330-1(e).

⁴²⁹ See IRS Publ’n. 1660.

⁴³⁰ I.R.C. §§ 6320(b)(3), 6330(b)(3). See detailed discussions and examples in Treas. Regs. § 301.6620-1(d), Q&A D4; § 301.6330-1(d), Q&A D4.

⁴³¹ See *Cox v. Comm’r*, 514 F.3d 1119, 1125–27 (10th Cir. 2008).

⁴³² See *Baber v. Comm’r*, T.C. Memo 2009-30.

raises frivolous issues (often of the tax protestor variety), OA will reject the CDP request with respect to those issues and treat it as if no hearing was ever requested.⁴³³ CDP hearings are inquisitorial rather than adversarial. Thus, the IRS is not separately represented at the hearing. There is no transcript or recording of a CDP hearing. There is no right to subpoena witnesses or documents and no right to present witness testimony or cross-examine adverse witnesses.⁴³⁴

The RRA provided that ex parte communications between the OA appeals officer and other IRS officials are prohibited to the extent that such communications appear to compromise the independence of the appeals officers.⁴³⁵ This section provides: “[IRS shall] (4) ensure an independent appeals function within the Internal Revenue Service, including the prohibition in the plan of ex parte communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of the appeals officers.”⁴³⁶ This provision applies to OA settlement activities as well as to CDP hearings, but is considerably stricter in the case of CDP hearings.⁴³⁷ However, ex parte communications concerning “administrative, ministerial, or minor procedural matters” are permissible.⁴³⁸ Thus, an ex parte request by an OA appeals officer to the General Counsel’s Office seeking copies of relevant documents was not a prohibited ex parte communications.⁴³⁹

A taxpayer can represent him or herself or can be represented by an attorney, certified public accountant, or a person enrolled to practice before the IRS. (Enrolled persons must pass an exam and take continuing education courses). A taxpayer can also be represented by a member of his or her immediate family, or in the case of a business, by regular full-time employees, general partners or bona fide officers. In addition, taxpayers can be represented by a Low Income Taxpayer Clinic.⁴⁴⁰

The decision in a CDP hearing by an appeals officer is reviewed by a team manager who makes the final decision at the OA level.⁴⁴¹

Appeals officers are legally appointed by the IRS Commissioner (that is, they are not “inferior officers” who must be appointed by the President or the head of a department).⁴⁴²

⁴³³ IRC § 6330(g). *See Ryskamp v. Comm’r*, 797 F.3d 1142, 1147-49 (D.C. Cir. 2015) (IRS must state why it determined that a hearing request was frivolous; Tax Court can review whether IRS determination was facially plausible).

⁴³⁴ *See* Treas. Regs. §301.6320-1(d), Q&A D6 & D7; §301.6330-1(d), Q&A D6 & D7 (2014). *See, e.g.*, *Tucker v. Comm’r*, 135 T.C. 114, 118 (2010) (hearing conducted by phone and followed up by correspondence).

⁴³⁵ RRA § 1001(a)(4), 112 Stat. at 689. This section was not codified in the Internal Revenue Code.

⁴³⁶ *Id.*

⁴³⁷ *See* Rev. Proc. 2000-43, 2000-2 C.B. 404. Updated guidance was later issued as Rev. Proc. 2012-18, 2012-10 I.R.B. 455.

⁴³⁸ *See* Rev. Proc. 2000-43, A-6.

⁴³⁹ *See* *Byers v. Comm’r*, 740 F.3d 668, 678 (D.C. Cir. 2014).

⁴⁴⁰ *See* IRS Publ’n. 1660.

⁴⁴¹ *See, e.g.*, *Tucker*, 135 T.C. at 139.

⁴⁴² *See id.* at 155.

Like all other IRS employees, OA employees are subject to performance evaluation.⁴⁴³ In general, the IRS is authorized to establish goals or objectives for any individual or groups and use these goals and objectives to make performance distinctions and taking personnel actions.⁴⁴⁴ However, under RRA the IRS “shall not use records of tax enforcement results to—(1) to evaluate employees; or (2) to impose or suggest production quotas or goals with respect to such employees.”⁴⁴⁵ Consequently, OA appeals officers are not subject to performance goals or quotas.

The decision in a CDP hearing is subject to appeal to the TC.⁴⁴⁶ The Tax Court reviews the CDP decision under an arbitrary and capricious test.⁴⁴⁷ Review is on a closed record. In the opinion of one author, the system of closed-record judicial review by the TC of CDP decisions is very costly of IRS and TC resources and produces almost no benefit for taxpayers.⁴⁴⁸

In cases in which the taxpayer never received a notice of deficiency and the CDP hearing also included the existence and amount of the tax liability, the TC performs de novo review of the latter issues. The same is true of rejection of innocent spouse claims arising in a CDP hearing.

TC decisions are subject to further review before the Court of Appeals and potentially the Supreme Court. The Court of Appeals also reviews the OA determination under the arbitrary and capricious test. If the amount of tax is not in dispute, the correct venue is the Court of Appeals for the District of Columbia, not (as is ordinarily the case) the court for the circuit in which the taxpayer resides.⁴⁴⁹

⁴⁴³ See 5 U.S.C. § 4302.

⁴⁴⁴ See 5 U.S.C. § 9508(a)(2).

⁴⁴⁵ RRA § 1204(a), 112 Stat. at 722.

⁴⁴⁶ See I.R.C. § 6330(d)(1) (2012).

⁴⁴⁷ See, e.g., *Longo v. Comm’r*, T.C. Memo 2012-39 (OA decision remanded because appeals officer failed to take account of petitioner’s health condition in ruling that his offer in compromise should be rejected).

⁴⁴⁸ See *Camp*, *supra* note 420, at 88-118. For a more positive account, see Nina E. Olson, *Taking the Bull by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection*, 63 *TAX LAW.* 227, 234-37 (2010).

⁴⁴⁹ See *Byers*, 740 F.3d at 675-77.

APP. A-7: UNITED STATES PATENT AND TRADEMARK OFFICE
(12-22-15)

The United States Patent and Trademark Office (PTO) is located in the Department of Commerce.⁴⁵⁰ This memo covers the PTO’s adjudication of patent and trademark disputes.

A. Patents

The Patent Trial and Appeal Board (PTAB)⁴⁵¹ carries out the USPTO’s adjudicatory functions related to patents. In our database PTAB is USDCPATE0021. PTAB consists of the PTO Director and Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and administrative patent judges (APJs). Decisions of PTAB are not further reviewable at the administrative level.

APJs shall be “persons of competent legal knowledge and scientific ability who are appointed by the Secretary of Commerce in consultation with the Director.”⁴⁵² There are about 225 APJs,⁴⁵³ earning \$137,200 to \$168,700 per year. The APJs are highly experienced; most of them are former private patent attorneys.⁴⁵⁴ Most of the APJs are at the PTAB office in Alexandria, Va., but some are located at one of the four satellite office of the Board.

PTAB has two different functions—appeals and trials. It hears *appeals* by patent applicants of adverse decisions by patent examiners and from *ex parte* re-examination decisions.⁴⁵⁵ It conducts *trials* in cases of disputes between patent holders and third parties, including inter partes review, re-examinations, post-grant review, derivation proceedings, and covered business method patent reviews.⁴⁵⁶ A three-member APJ panel decides each appeal or trial.⁴⁵⁷

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

⁴⁵⁰ 35 U.S.C. § 1.

⁴⁵¹ PTAB is the successor to the Board of Patent Appeals and Interferences. See America Invents Act, Pub. L. 112-29, 125 Stat. 284 (2011).

⁴⁵² 35 U.S.C. § 6(a).

⁴⁵³ Michael Wagner, *An Introduction to Administrative Patent Judges at the Patent Trial and Appeal Board*, FEDERAL LAWYER (March 2015, p. 36). Wagner says that the USPTO plans to add an additional 60 judges.

⁴⁵⁴ *Id.*

⁴⁵⁵ 35 U.S.C. § 6(b).

⁴⁵⁶ *Id.*

⁴⁵⁷ 35 U.S.C. § 6(c). The judges are connected by video conference facilities so they may be located at different offices of the Board. Wagner, *supra* note 4, p. 36.

The regulations permit parties to be represented by a registered patent attorney or a registered non-attorney patent agent.⁴⁵⁸ In appeal cases, the Board may allow the appearance of counsel who is other than a registered representative, but not by an unregistered lay representative.⁴⁵⁹ In trial cases, parties may represent themselves but, if represented by counsel, must appoint both a lead and backup counsel, both of whom must be registered representatives. The Board may allow a backup counsel who is not a registered practitioner “upon showing that counsel is an experienced litigating attorney and has an established familiarity with the subject matter at issue in the proceeding.”⁴⁶⁰ In either case, counsel can be disqualified and subject to sanctions.⁴⁶¹

The regulations prohibit *ex parte* communications with PTAB members or employees assigned to the proceeding in trial cases⁴⁶² but not in in appeal cases.⁴⁶³ It is unclear whether the *ex parte* provision applicable to trials prohibits communications by PTAB staff members to decisionmakers or decisionmaking staff or is limited to communications by outsiders.

1. Appeals

Part 41 of the regulations prescribe procedures for appeals.⁴⁶⁴ Appeals are sometimes referred to as *ex parte* proceedings, meaning that the only parties are the USPTO and a patent applicant or patentee. The *ex parte* reexamination process can be triggered by any person through a request to the PTO claiming that a “substantial new question of patentability” exists with respect to the patent.⁴⁶⁵ An applicant can appeal if a patent application has been rejected or an *ex parte* reexamination request has been granted. Appeals are Case Type 6 in USDCPATE0021.

All the evidence considered by the PTAB in deciding an appeal is presented in the appellant’s briefs. The briefs can rely only on evidence previously considered by the examiner (except when a new administrative or judicial precedent arose after the examiner’s consideration).⁴⁶⁶ The appellant can request an oral argument if the appellant believes it to be

⁴⁵⁸ 37 C.F.R. § 1.31.

⁴⁵⁹ 37 C.F.R. § 41.5(a). The regulations do not permit lay representation before the PTAB.

⁴⁶⁰ 37 C.F.R. § 42.10(c).

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

⁴⁶² “Communication regarding a specific proceeding with a Board member...is not permitted unless both parties have an opportunity to be involved in the communication.” 37 C.F.R. §42.5(d).

⁴⁶³ 37 C.F.R. § 41.11.

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

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

⁴⁶⁶ 37 C.F.R. § 41.47(e).

necessary or desirable; cases are given the same consideration whether or not there is an oral argument. The Board can refuse the application for an oral argument if it is determined to be unnecessary.⁴⁶⁷

2. Trials

Part 42 of the regulations describes the procedure in trials.⁴⁶⁸ Trial cases involve a third party that is challenging a patent (in other words, a party other than the patent applicant or owner and the USPTO). These include inter partes reviews,⁴⁶⁹ post-grant reviews,⁴⁷⁰ derivations,⁴⁷¹ and challenges to covered business method patents.⁴⁷² These are case types 1 through 5 in USDCPATE0021. As an alternative, proceedings challenging the validity of a patent can also be brought as civil actions in federal district court.⁴⁷³

Under the regulations, the term “trial” means a “contested case instituted by the PTAB based upon a petition.” A trial begins with a written decision notifying the petitioner and patent owner of the institution of the trial.⁴⁷⁴

The regulations provide for discovery during trial proceedings.⁴⁷⁵ Discovery includes a series of initial disclosures (either by agreement or by order)⁴⁷⁶ plus additional discovery (either by agreement or by order on a showing that additional discovery is in the interest of justice).

Uncompelled direct testimony must be submitted in the form of an affidavit or deposition transcript; compelled testimony (including cross-examination of affiants) is also presented in the form of depositions.⁴⁷⁷ Expert testimony is furnished in affidavit form.⁴⁷⁸ The Federal Rules of Evidence are applicable to trial proceedings.⁴⁷⁹ Any party can request oral argument.⁴⁸⁰ The parties may agree to settle any case but the proposed settlement is not binding on the Board.⁴⁸¹

⁴⁶⁷ 37 C.F.R. § 41.47(f).

⁴⁶⁸ Or at least so I assume. See note 15. For detailed procedural rules including a timeline, see the Office Patent Trial Practice Guide, 77 Fed. Reg. 48756 (2012).

⁴⁶⁹ An inter partes review arises when a third party challenges a patent because it lacks novelty or was obvious, based on the prior art. See 35 U.S.C. §§ 311, 102, 103; 37 C.F.R. § 42.100 et seq. This replaces the former category of inter partes re-examination. The provision for inter partes review does not violate Art. III of the Constitution. *MCM Portfolio LLC v. Hewlett-Packard*, 2015 US App. Lexis 20848 (Fed. Cir. 2015).

⁴⁷⁰ Post-grant review involves a challenge to a patent on grounds other than lack of novelty or obviousness, such as a failure to meet the clear statement requirements of §112. See 35 U.S.C. §321 et seq.; 37 C.F.R. § 42.200 et seq.

⁴⁷¹ In a derivation proceeding, a patent applicant B complains that an earlier patent held by A was derived from B’s idea and A’s application was not authorized. See 35 U.S.C. § 135(a)(1); 37 C.F.R. § 42.400 et seq.

⁴⁷² 37 C.F.R. § 42.300 et seq.

⁴⁷³ See 35 U.S.C. § 315.

⁴⁷⁴ 37 C.F.R. § 42.2.

⁴⁷⁵ See 37 C.F.R. § 42.51.

⁴⁷⁶ See 77 Fed. Reg. 48756, 48761-62 (2012).

⁴⁷⁷ See 37 C.F.R. § 42.53(a).

⁴⁷⁸ 37 C.F.R. § 42.65.

⁴⁷⁹ 37 C.F.R. § 42.62(a).

⁴⁸⁰ 37 C.F.R. § 42.70(a).

⁴⁸¹ 37 C.F.R. § 42.74(a).

The parties may resort to binding arbitration but the Board is not a party to the arbitration.⁴⁸² The case terminates in a judgment rendered by the Board.⁴⁸³

3. Statistical information⁴⁸⁴

In FY 2014, 1494 trial petitions were filed with PTAB.⁴⁸⁵ In FY 2014, PTAB instituted 650 trials and rendered 143 written decisions.⁴⁸⁶ In FY 2015 (through 7/16/15), 1528 trial petitions were filed which projects to about 2000 cases for the year.⁴⁸⁷ In FY 2015 (through 7/16/15), PTAB instituted 706 trials; there were 337 final written decisions.⁴⁸⁸ The backlog is about 700 undecided cases.⁴⁸⁹

In FY 2013, there were 10,758 ex parte appeals fled with PTAB; in FY 2014, there were 9,585 appeals filed. In FY 2013, PTAB decided 9,489 appeals and decided 5,619 in FY 2014. There were 23,508 appeals pending at the end of FY 2013, 25,527 pending at the end of FY 2014, and 24403 pending as of March, 2015.⁴⁹⁰

If we assume that in FY 2015, there will be about 2000 trial petitions filed and 10,000 appeals filed,, the trial workload per each of the 200 APJs would be about 60 cases per year.

B. Trademarks

Trademark adjudication occurs before the Trademark Trial and Appeal Board (TTAB). The governing statute is the Lanham Act.⁴⁹¹ Procedural regulations are set forth in 37 C.F.R. Part 2. USPTO has published a useful practice manual.⁴⁹² The TTAB is USDCTRAD0020 in our database.

Like PTAB, TTAB practice is divided into trials (often called “inter partes” proceedings, meaning that they involve disputes between a third party and a trademark registrant) and appeals (often referred to as “ex parte” cases, meaning challenges by persons whose application for

⁴⁸² 37 C.F.R. § 42.410.

⁴⁸³ 37 C.F.R. § 42.73.

⁴⁸⁴ http://www.uspto.gov/sites/default/files/documents/aia_statistics_07-16-2015.pdf.

⁴⁸⁵ Of the 1494 filings, 1310 were for inter partes review, 177 for covered business method review, 2 for post-grant review, and 5 for derivation proceedings.

⁴⁸⁶ In FY 2014, there were 226 denials (that is PTAB dismissed the case before the hearing). 239 cases were settled. 42 petitioners gave up (meaning they requested an adverse decision).

⁴⁸⁷ Of the 1528 filings, 1385 were for inter partes review, 130 for covered business methods, 8 for post-grant review, and 5 for derivations.

⁴⁸⁸ In FY 2015 (through 7/16/15), there were 358 denials. 434 cases were settled. There were 63 requests for adverse decision.

⁴⁸⁹ See Lex Machina, Patent Trial and Appeal Board, 2015 Report.

⁴⁹⁰ See Wagner, note 4, stating that at the end of 2014, PTAB had a “staggering” 25,370 ex parte appeals pending. Of these, 14508 have been pending more than 14 months. Data on appeals was supplied in an email from Saurabh Vishnubhakat to Michael Asimow, Feb. 29, 2016.

⁴⁹¹ 15 U.S.C. § 1051 et seq.

⁴⁹² http://www.uspto.gov/sites/default/files/trademarks/process/appeal/TBMP_full_version.pdf.

registration of a mark were rejected by a trademark examiner). Trials are case type 1 in USDCTRAD0020; appeals are case type 2.

The TTAB includes the Director and Deputy Director of the USPTO, the Commissioner for Patents, and the Commissioner for Trademarks, and administrative trademark judges (ATJs). There are currently about 23 ATJs.⁴⁹³

As in the case of patents, the relevant statutes do not call for evidentiary hearings. Instead the statute provides for an “appeal” to the TTAB from the final decision of a trademark examiner.⁴⁹⁴ The TTAB shall “determine and decide” in cases of interference, opposition to registration, application to register as a concurrent user, or application to cancel the registration of a mark.⁴⁹⁵ In context, however, it is clear that an evidentiary hearing is required (although these hearings are entirely in writing except for oral argument). Therefore TTAB proceedings are Type B adjudication.

There is no administrative appeal from a TTAB decision; TTAB decisions are reviewable by the US Court of Appeals for the Federal Circuit⁴⁹⁶ or alternatively by a federal district court action.⁴⁹⁷ In addition, the Code provides that any person who could seek judicial review in the Federal Circuit can bring a civil action in federal district court.⁴⁹⁸

Only attorneys can represent parties before the Trademark Office.⁴⁹⁹ Unlike the case of patent litigation, there is no registration requirement for attorneys. Although parties can represent themselves,⁵⁰⁰ non-lawyers cannot represent clients.⁵⁰¹ Thus there is no lay representation in trademark practice.

1. Appeals (ex parte cases)

An applicant for trademark registration may appeal a final refusal by the examiner appeal to the TTAB.⁵⁰² The applicant and the examiner file briefs with the TTAB.⁵⁰³ The record is complete prior to the filing of an appeal. The TTAB will ordinarily not consider additional

⁴⁹³ <http://thettablog.blogspot.com/2012/10/updated-roster-of-ttab-administrative.html>.

⁴⁹⁴ 15 U.S.C. § 1070.

⁴⁹⁵ 15 U.S.C. § 1067(a).

⁴⁹⁶ 15 U.S.C. § 1071(a)(1); 37 C.F.R. §2.145(a), (b).

⁴⁹⁷ 15 U.S.C. § 1071(b).

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

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

⁵⁰⁰ Self-representation includes representation by a non-lawyer representing a corporation in which the person is an officer, a partnership in which the person is a partner, or a firm in which the person is a member. *Id.* § 11.14(e).

⁵⁰¹ 37 C.F.R. §§ 11.14(b), (e); 2.17(f).

⁵⁰² See 15 U.S.C. § 1062(b)

⁵⁰³ 37 C.F.R. § 2.142(b).

evidence after an appeal is filed.⁵⁰⁴ The appellant may on request receive an oral argument before at least three ATJs. In that case, the examiner will also make an oral argument.⁵⁰⁵

2. Trials (inter partes cases)

Inter partes trademark disputes (such as opposition to registration,⁵⁰⁶ cancellation of registration,⁵⁰⁷ interference,⁵⁰⁸ or concurrent use⁵⁰⁹) commence upon filing a notice with the Trademark Office.⁵¹⁰ The applicant or registrant must file an answer to this notice.⁵¹¹

The Federal Rules of Civil Procedure (FRCP) govern inter partes proceedings.⁵¹² The assignment of testimony periods corresponds to setting a case for trial in court proceedings and the taking of depositions during the assigned testimony periods corresponds to the trial in court proceedings. The oral hearing corresponds to the oral summation in court proceedings.⁵¹³

The discovery rules are modeled on the FRCP,⁵¹⁴ including the requirement of mandatory initial disclosures⁵¹⁵ and a mandatory conference to discuss settlement and agree on a discovery plan.⁵¹⁶ A TTAB attorney or an ATJ may participate in this conference. In general, the material so discovered can be offered in evidence by the adverse party.

The TTAB then schedules a second discovery period in which the plaintiff and defendant present their case in chief, again by taking the deposition of the party's witnesses⁵¹⁷ either upon written or oral questions.⁵¹⁸ Adverse parties can cross-examine the witnesses.⁵¹⁹ Objections to questions are noted in the record. The Federal Rules of Evidence apply to TTAB proceedings.⁵²⁰

⁵⁰⁴ If either party desires to introduce additional evidence, it can request the Board to suspend the appeal and remand the application for further examination. 37 C.F.R. § 2.142(d).

⁵⁰⁵ 37 C.F.R. § 2.142(e)

⁵⁰⁶ 15 U.S.C. § 1063.

⁵⁰⁷ 15 U.S.C. § 1064. Typically cancellation petitions allege that a registered mark would cause the owner of an existing mark damages by blurring or dilution.

⁵⁰⁸ 15 U.S.C. § 1066.

⁵⁰⁹ 15 U.S.C. § 1052(d).

⁵¹⁰ 37 C.F.R. §§ 2.101, 2.111. 054

⁵¹¹ 37 C.F.R. § 2.104.

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

⁵¹³ 37 C.F.R. § 2.116(d), (e), (f).

⁵¹⁴ 7 C.F.R. § 2.120(a). (b).

⁵¹⁵ FRCP 26(a).

⁵¹⁶ FRCP 26(f).

⁵¹⁷ See 7 C.F.R. § 2.121

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

⁵¹⁹ 37 C.F.R. § 2.123(e)(3).

⁵²⁰ 37 C.F.R. § 2.2.122(a).

After completion of the discovery period, the parties file briefs with the TTAB.⁵²¹ On request, the parties conduct oral argument before at least 3 ATJs.⁵²²

3. Statistical information⁵²³

In FY 2014, the TTAB received 2794 appeals.⁵²⁴ Of these, 456 matured to the point they were ready for decision and 405 were actually decided.⁵²⁵ At the end of FY 2014, 81 appeals were awaiting decisions.⁵²⁶ The mean time from commencement of an appeal to completion was 43.8 weeks; the median was 36 weeks.

Of inter partes (trial) cases in FY 2014, there were 5509 oppositions⁵²⁷ and 1722 cancellations.⁵²⁸ Of these, 127 matured to the point that they were ready for decision and 132 cases were decided.⁵²⁹ At the end of FY 2014, 24 trials were awaiting decisions.⁵³⁰

It is unclear what happened to most of the appeals, oppositions, and cancellations. Did parties give up or were most of the cases settled? For purposes of our workload statistics, we will have to decide which numbers to use. Probably we should use the number of cases actually decided or the number that matured to the point they were ready for decision. Otherwise the workload of TTAB (and the caseloads of ATJs) will be inflated relative to other agencies.

⁵²¹ 37 C.F.R. § 2.128.

⁵²² 37 C.F.R. § 2.129.

⁵²³ <http://www.uspto.gov/trademarks-application-process/appealing-trademark-decisions/ttab-incoming-filings-and-performance>.

⁵²⁴ There were 2219 appeals during the first three quarters of FY 2015.

⁵²⁵ In the first three quarters of 2015, 355 appeals matured to be ready for decision and 291 were decided.

⁵²⁶ At the end of the third quarter of 2015, 119 appeals and 36 trials were awaiting decision.

⁵²⁷ 3800 in first three quarters of FY 2015.

⁵²⁸ 1288 in first three quarters of FY 2015.

⁵²⁹ In the first three quarters of 2015, 106 trial cases matured to be ready for decision and 86 were decided.

⁵³⁰ At the end of the third quarter of 2015, 119 appeals and 36 trials were awaiting decision.

APP. A-8: VETERANS' BENEFITS
(JAN. 6, 2016)⁵³¹

The system of hearings for resolution of disputes about veterans' benefits is DOVABENE0001 in our website. It lists 34 case types. This memo focuses on the Board of Veterans Appeals (BVA) which conducts Type B adjudication.⁵³²

1. VA claims adjudication--introduction

The Department of Veterans Affairs (VA) decides a vast number of benefit claims.⁵³³ The caseload is rising steadily. The number of new claims currently exceeds one million per year, but this figure understates the caseload many such claims seek several different benefits.⁵³⁴ As of the end of 2015, there were about 368,000 pending claims before VA Regional Offices (VAROs) which make the initial decision in claims cases. Of this number, about 78,000 had been pending more than 125 days.⁵³⁵ There have been many criticisms of the VA's claims process and numerous proposals for improving it,⁵³⁶ but these are beyond the scope of this memorandum.

Claims for service-connected disability (by far the most common type of claim) require complex medical judgments. The claimant must suffer from a current disability that is connected to a disease or injury received during service (the "nexus" requirement). VA must assign a rating (from 0% to 100%) to the disability. It is estimated that around 88% of claims for disability compensation are granted, at least in part.⁵³⁷

Claimants who disagree with a VARO decision can seek relief before the BVA. A veteran who loses before the BVA can obtain judicial review from the Court of Appeals for Veterans Claims (CAVC). The Court of Appeals for the Federal Circuit (CAFC) reviews CAVC decisions on questions of statutory or regulatory interpretation. Discussion of the judicial review phase is beyond the scope of this memorandum.

⁵³¹ Thanks to James Ridgway, Stacey-Rae Simcox, and Ron Smith for assistance with this memo.

⁵³² By statute the BVA shall "conduct hearings and dispose of appeals properly before the Board." 38 U.S.C. § 7101.

⁵³³ Over 4,000,000 veterans receive pensions or benefits and about 940,000 were added during the last 4 years. The annual outlay to pay these benefits is about \$54 billion. http://www.benefits.va.gov/reports/detailed_claims_data.asp (as of Dec. 5, 2015).

⁵³⁴ See James D. Ridgway, "Why So Many Remands? A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims," 1 VET. L. REV. 113, 145-50 (2009). Each unrelated benefit in a claim is referred to as an "issue." Ridgway observes that 22% of disability claims had at least eight issues. *Id.* at 146. He estimates that the number of different benefits sought is at least double and probably more than triple the number of claims that VA receives each year.

⁵³⁵ These figures are a remarkable improvement from the situation a few years ago, apparently achieved by a lot of overtime and possibly an increase in mistakes. Email from Stacey-Rae Simcox to Michael Asimow, 1/65/16. In 2012, there were 883,930 cases pending and 611,073 pending more than 125 days. As discussed below, however, there are much longer delays at the BVA level. It takes more than 3 years on average from the time of an unfavorable VARO decision to a BVA decision.

⁵³⁶ See, e.g., James D. Ridgway, *A Benefits System for the Information Age*, 7 VET. L. REV. 36 (2015).

⁵³⁷ James D. Ridgway, "The Veterans' Judicial Review Act Twenty Years Later," NYU ANN. SURVEY OF AMER. LAW 116 (2010) (hereinafter *NYU*).

2. The VA claims process is inquisitorial and paternalistic

The adjudicatory process for resolving VA claim disputes is uniquely inquisitorial and paternalistic. Thus there is no statute of limitations on making a claim. The VARO is subject to elaborate notice requirements. It must notify the claimant of any information or evidence that is necessary to substantiate the claim and furnish all necessary assistance to the claimant in obtaining evidence and obtaining medical opinions.⁵³⁸ The various procedural rules are heavily slanted in the direction of assisting veterans and requiring the VA to develop all issues raised in any documents or testimony. No government official appears during VARO consideration or BVA hearings to oppose the granting of benefits. At all levels, the VA must give the veteran the benefit of the doubt if the positive and negative evidence is approximately balanced.⁵³⁹ A veteran may “reopen” a rejected application by presenting “new and material evidence” and some cases are reopened on multiple occasions (in fact about three-quarters of the claims filed with the VA are actually reopened claims rather than new ones). A decision by the VARO or BVA can be set aside at any time if based on a “clear and unmistakable error.”

The VA’s inquisitorial system of fact determination and decisionmaking is rooted in the long and convoluted history of veterans’ benefits.⁵⁴⁰ These benefits were regarded as gratuities, not entitlements, and the bureaucratic structure that delivered the benefits was wholly paternalistic. In a paternalistic system, there was no place for lawyers or for adversarial procedures like administrative trials.⁵⁴¹ Today, veterans’ benefits are an entitlement, not a gratuity, but the older paternalistic and inquisitorial decisionmaking process has survived.⁵⁴² However, the judicial review system is adversarial, not inquisitorial, and has compelled the VA to move in the direction of more adversarial claims procedures.⁵⁴³

⁵³⁸ See 38 U.S.C. §§ 5102(b) and 5103(a) (imposing obligations to notify claimant of any information needed to complete the application or to substantiate the claim); 5103A (imposing on the VA an obligation to exercise reasonable efforts to assist the claimant in obtaining evidence and records and in providing medical examinations and opinions). See *Shinseki v. Sanders*, 556 U.S. 396, 406-11 (2009) (simplifying rules of prejudicial error when VA fails to give notice required by regulations).

⁵³⁹ 38 U.S.C. § 5107(b).

⁵⁴⁰ For a detailed account of the history of veterans’ benefits, see James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans Benefits Before Judicial Review*, 3 VET. L. REV. 135 (2011).

⁵⁴¹ See Richard E. Levy, “Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefit System,” 13 KANSAS J. OF L. & PUB. POL. 303, 304-15 (2003) (distinguishing the paternalistic model from the social insurance model applicable to more modern benefit programs).

⁵⁴² Even the judicial review system has paternalistic elements. By statute a claimant must file an appeal with CAVC within 120 days after mailing of the BVA’s decision. This deadline is not “jurisdictional,” so it is subject to equitable tolling. The paternalistic nature of VA benefits was an important factor in the Supreme Court’s decision on this point. “What is most telling [of Congress’ intent in imposing the 120-day rule] are the singular characteristics of the review scheme that Congress created for the adjudication of veterans’ benefit claims. The solicitude of Congress for veterans is of long standing... And that solicitude is plainly reflected in the VJRA, as well as in subsequent laws that place a thumb on the scale in the veteran’s favor in the course of administrative and judicial review of VA decisions...” *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (internal citations and quotation marks deleted).

⁵⁴³ See Ridgway, *supra* note 4, 7 VET. L. REV. at 45-47; Charles L. Cragin, *The Impact of Judicial Review on the Department of Veterans Affairs’ Claim Adjudication Process*, 46 MAINE L. REV. 23 (1994).

3. The VA claims process--VARO level⁵⁴⁴

A claim is processed by various teams at the VARO, but the decision is the responsibility of a single lay adjudicator (referred to herein as a “ratings specialist”).⁵⁴⁵ The file includes the detailed medical opinions submitted by the claimant (such as reports of personal physicians) and by the VA medical staff as well as by independent physicians consulted by the VA. For the most part, the VARO process operates on a documents-only basis without a personal appearance by the veteran.

Claimants dissatisfied with the VARO decision file a Notice of Disagreement (NOD). The claimant can obtain a review of the case by a Decision Review Officer (DRO), a senior VARO adjudicator who has not previously been involved in investigation of the case.⁵⁴⁶ The DRO may seek additional evidence. At the veterans’ request, the DRO will provide an informal hearing. If the claimant remains dissatisfied with the VARO decision after DRO review, the VARO prepares a statement of the case (SOC) which contains detailed findings and an explanation of the decision. Within 60 days from the mailing of the SOC, the veteran must file Form VA-9 to perfect the right of appeal to the BVA.

4. The BVA

The BVA’s decision is de novo but is based primarily on the written record made at the VARO level.⁵⁴⁷ Claimants frequently seek to introduce new evidence at the BVA level. If the claimant waives remand to the VARO to evaluate the new evidence, the BVA judge considers this evidence and decides the case accordingly.⁵⁴⁸ In many cases, BVA has no organized written record from which to decide the case, only a disorganized case file that may run to hundreds or thousands of pages.⁵⁴⁹ It is required to consider and decide every possible issue or claim raised by the appellant’s appeal documents and in all of the documents and oral testimony submitted prior to the Board’s decision.⁵⁵⁰

The BVA has about 64 Veterans Law Judges (VLJs) and about 400 staff counsel. BVA has a total of 614 employees.⁵⁵¹ In addition, there were 45 acting judges in FY 2014 (about 12 FTEs), so there are about 76 VLJs. The BVA decided about 56,000 cases in FY 2014 (about 736 for each judge). This was a considerable increase over the 42,000 cases decided in FY 2013.

⁵⁴⁴ For an outline of the claims process, see <http://www.benefits.va.gov/compensation/process.asp>

⁵⁴⁵ 38 CFR § 3.103(c)(1).

⁵⁴⁶ 38 C.F.R. § 3.2600.

⁵⁴⁷ 38 U.S.C. § 7104(a). 38 C.F.R. §19.4.

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

⁵⁴⁹ The VA is in the process of converting its paper-based system to an electronic data system, but the conversion process is costly and far from completed. About 30% of the BVA’s inventory of appeals in 2014 were paperless. See BVA 2014 Annual Report, p. 16. http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2014AR.pdf.

⁵⁵⁰ *Percy v. Shinseki*, 23 Vet. App. 37, 47 (2009) (citing numerous cases).

⁵⁵¹ See BVA 2014 annual report, p. 3. The statistics in the next three paragraphs are taken from this report.

During FY 2014, BVA provided about 11,000 informal hearings. Requesting a hearing considerably prolongs the BVA decisional process, so the great majority of the claimants waive the hearing; their cases are decided on the written record. BVA hearings are conducted by single VLJs either in person or by video-conference. The proceedings are quite informal.⁵⁵² The Board handled about 54% of its hearings by video-conference in FY 2014 and hopes to increase this percentage.⁵⁵³

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

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

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

5. Representation in the VA claims process

VA practice at the VARO level is mostly de-lawyered. Veterans are usually represented at both the VARO and BVA levels by lay representatives supplied free by a veteran service organization (VSO) such as the American Legion.⁵⁵⁴ Veterans are seldom represented by lawyers during the VARO process because the statute prohibits compensation of lawyers before the filing of a NOD.⁵⁵⁵ The regulations permit representation by non-lawyer "agents" (who must pass an

⁵⁵² See the BVA's pamphlet "How Do I Appeal?" <http://www.bva.va.gov/docs/Pamphlets/How-Do-I-Appeal-Booklet--508Compliance.pdf>.

⁵⁵³ At present, the video-conference system is not very convenient because the terminals are often located far from veterans and their representatives. However, BVA is working to improve access to terminals. Email from Stacey-Rae Simcox to Michael Asimow, 1/5/16.

⁵⁵⁴ See 38 C.F.R. §§ 14.628, 14.629(a). All representatives (including those employed by the VSOs) are subject to a code of conduct and to suspension from practice for violations. 38 U.S.C. § 5904(a); 38 C.F.R. § 14:632. In 2014, VSOs represented 76.8% of veterans before the BVA. Of the remainder, attorneys represented veterans in 10.9% of BVA cases, agents by 1.1%, "other" 1.8%, no representation 9.4%.

⁵⁵⁵ 38 U.S.C. § 5904(c)(2). The Supreme Court upheld the constitutionality of the \$10 fee limit on compensation of attorneys in *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 3045 (1985). The Court believed that the presence of attorneys would be detrimental to the paternalistic and inquisitorial VA adjudication system. It also believed that the free VSO representatives probably did about as good a job as attorneys. For criticism of the assumptions in *Walters* in light of present day realities at the VA, see Stacey Rae-Simcox, *Thirty Years After*

examination and take CLE courses) and by other lay representatives on a one-time only basis.⁵⁵⁶ The success rate of lawyers and non-lawyer representatives before BVA is similar, but attorneys had a clear edge in denied cases.⁵⁵⁷

Walters, SSRN 2650434 (2015). After *Walters*, Congress permitted compensation of attorneys after the veteran files a NOD.

⁵⁵⁶ 38 CFR § 14.630.

⁵⁵⁷ Attorneys were successful in 35.5% of their cases, agents 30.3%, others 28.1%, and no representation 22%. The various VSOs fell within a range of 28.1% (American Legion) to 35.7% (Military Order of the Purple Heart). In the defeat column, lawyers lost 13.7% of their cases while the VSO's were in a range of 18.7% (Paralyzed Veterans of America) to 23.6% (State Service Organizations). BVA 2014 Annual Report p 27. These statistics do not cover success rates at the VARO level, only the BVA level. There is no empirical evidence about whether the VSO representatives or the agents perform as well as lawyers.