

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
REPORT TO THE HOUSE OF DELEGATES
RECOMMENDATION

1 **RESOLVED**, That the American Bar Association urges Congress to amend and
2 modernize the adjudication provisions of the Administrative Procedure Act and to expand
3 certain fundamental fair hearings provisions of that Act by enacting legislation consistent
4 with the attached draft bill entitled “Federal Administrative Adjudication in the 21st
5 Century,” dated February 2005.
6

**FEDERAL ADMINISTRATIVE ADJUDICATION
IN THE 21ST CENTURY ACT**

A BILL

To amend title 5, United States Code, to modernize the adjudication provisions of the Administrative Procedure Act and to extend certain fundamental fair hearing provisions to additional hearings required by statute.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Administrative Adjudication in the 21st Century Act".

SEC. 2. DEFINITIONS.

(a) Section 551 of title 5, United States Code, is amended--

(1) by striking "and" at the end of paragraph (13);

(2) by striking the period at the end of paragraph (14) and inserting "and"; and

(3) by adding the following at the end:

"(15) 'Type A adjudication' means adjudication required by statute to be—

"(A) determined on the record after opportunity for an agency hearing; or

"(B) conducted in accordance with sections 556 and 557 of this title;

"(16) 'Type B adjudication' means an agency evidentiary proceeding required by statute, other than a Type A adjudication;

"(17) 'agency evidentiary proceeding' means an agency proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing; and

"(18) 'presiding officer' means the initial decisionmaker in a Type B adjudication."

(b) Section 551(4) of title 5, United States Code, is amended to read as follows:

"(4) 'rule' means the whole or a part of an agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency;"

SEC. 3. TYPE A AND B ADJUDICATIONS.

Section 554 of title 5, United States Code, is amended—

(1) in subsection (a),

(A) by striking "adjudication required by statute to be determined on the record after opportunity for an agency hearing" in the matter preceding paragraph (1) and inserting "Type A adjudication and Type B adjudication";

46 (B) by inserting "or in a Type A or Type B adjudication" at the end
47 of paragraph (1); and

48 (C) by striking paragraph (2) and redesignating paragraphs (3), (4),
49 (5), and (6) as paragraphs (2), (3), (4), and (5), respectively;

50 (2) in subsection (b), by inserting "in a Type A or Type B adjudication"
51 after "an agency hearing" in the matter preceding paragraph (1);

52 (3) in subsection (c),

53 (A) by inserting "In a Type A or Type B adjudication," at the
54 beginning of the subsection; and

55 (B) by striking "on notice and in accordance with sections 556 and
56 557 of this title" and inserting "in accordance with the procedures for Type
57 A adjudication specified in subsection (d) or Type B adjudication
58 specified in subsection (e)";

59 (4) in subsection (d),

60 (A) by designating the first sentence as paragraph (2) and by striking "he"
61 in that sentence and inserting "he or she";

62 (B) by designating the second sentence as paragraph (3) and redesignating
63 the existing paragraphs (1) and (2) in that sentence as subparagraphs (A) and (B),
64 respectively;

65 (C) by designating the third and fourth sentences as paragraph (4) and, in
66 the first sentence as so redesignated, by striking all after " agency in a" and
67 inserting "Type A adjudication may not, in that or a factually related adjudication,
68 participate or advise in the initial or recommended decision or any review of such
69 decision except as witness or counsel in public proceedings"; and

70 (D) by inserting the following at the beginning of the subsection:

71 "(1) A Type A adjudication shall be conducted in accordance with sections 556 and 557 of
72 this title."; and

73 (5) by striking subsection (e) and inserting the following:

74 "(e)(1) A Type B adjudication shall be conducted in accordance with the procedures
75 specified in this subsection.

76 "(2) A party may present its case or defense by oral or documentary evidence and
77 conduct such cross-examination as may be required for a full and true disclosure of the
78 facts. An agency may, when a party will not be prejudiced thereby, adopt procedures for
79 the submission of all or part of the evidence in written form.

80 "(3) The functions of a presiding officer or an officer who reviews the decision of
81 a presiding officer shall be conducted in an impartial manner.

82 "(4)(A) A presiding officer shall make the recommended or initial decision in the
83 adjudication unless he or she becomes unavailable to the agency.

84 "(B) Except to the extent required for the disposition of ex parte matters as
85 authorized by law, the presiding officer shall not consult with any person or party on a
86 fact in issue, unless on notice and with an opportunity for all parties to participate.

87 "(C) A full-time presiding officer shall not be responsible to or subject to the
88 supervision or direction of an agency employee engaged in the performance of
89 investigative or prosecuting functions. A part-time presiding officer in an adjudication
90 shall not be subject to the supervision or direction of an agency employee engaged in the
91 performance of investigative or prosecuting functions in the same adjudication.

92 "(D) An employee or agent engaged in the performance of investigative or
93 prosecuting functions for an agency in an adjudication may not, in that or a factually
94 related adjudication, participate or advise in an initial or recommended decision or any
95 review of such decision, except as witness or counsel in public proceedings.

96 "(E) The requirements of this paragraph do not apply—

97 "(i) in determining applications for initial licenses;

98 "(ii) to proceedings involving the validity or application of rates, facilities,
99 or practices of public utilities or carriers; or

100 "(iii) to the agency or a member or members of the body comprising the
101 agency.

102 "(5) The requirements of sections 556(e) and 557(d) shall apply to the proceeding
103 and, in particular, the requirements that apply to an administrative law judge under
104 section 557(d) shall apply to the presiding officer in the proceeding.

105 "(6) The decision of a presiding officer shall include a statement of findings,
106 conclusions, and reasons, on material issues of fact, law, and discretion presented on the
107 record. The decision may be delivered orally or in writing in the discretion of the
108 presiding officer. In the event the decision is reviewed at a higher agency level, the
109 parties shall have an opportunity to submit comments on the decision before the review
110 process is completed.

111 "(7) An agency engaged in Type B adjudications may adopt rules that provide
112 greater procedural protections than are provided in this section.

113 "(f) Unless otherwise specified, after the date of enactment of this subsection, the
114 establishment of an opportunity for hearing in an adjudication subject to the requirements
115 of this section shall be deemed to provide for a Type A adjudication."

116 **SEC. 4. SUNSHINE ACT EXCEPTION.**

117 Section 552b(c)(10) of title 5, United States Code, is amended by striking "formal
118 agency adjudication pursuant to the procedures in section 554 of this title" and inserting
119 "an agency evidentiary proceeding under section 554 of this title."

120 **SEC. 5. DECLARATORY ORDERS.**

121 Section 555 of title 5, United States Code, is amended by adding the following at
122 the end:

123 "(f) The agency, with like effect as in the case of other orders, and in its sound
124 discretion, may issue a declaratory order to terminate a controversy or remove
125 uncertainty."

126 **SEC. 6. ISSUES RELATING TO EVIDENCE.**

127 Section 556(d) of title 5, United States Code, is amended--

128 (1) by inserting "and may be entirely based on evidence that would be
129 inadmissible in a civil trial" at the end of the third sentence; and

130 (2) by adding the following after the second sentence: "Evidence may be
131 excluded, although relevant, if its probative value is substantially outweighed by the
132 danger of confusion of the issues, or by considerations of undue delay, waste of time, or
133 needless presentation of cumulative evidence."

134 **SEC. 7. TRANSCRIPTS.**

135 Section 556(e) of title 5, United States Code, is amended--

136 (1) by striking all after "of this title" in the first sentence; and

137 (2) by adding the following after the first sentence: "Agencies shall make a
138 transcript available to the parties at the actual cost of duplication."

139 **SEC. 8. ALJ AND PO ETHICAL STANDARDS; REMOVAL AND DISCIPLINE**
140 **OF PRESIDING OFFICERS.**

141 (a) Title 5, United States Code, is amended by inserting after section 559 the
142 following:

143 **"§ 559a. Ethics and independence of Presiding Officers and Administrative Law**
144 **Judges**

145 "(a) The Office of Government Ethics shall prescribe regulations providing for
146 appropriate ethical standards for administrative law judges and presiding officers who
147 conduct adjudications under section 554 of this title.

148 "(b) The regulations shall be prescribed in accordance with section 553(b) and (c)
149 of this title.

150 **"§ 559b. Removal and discipline of presiding officers**

151 "(a) A presiding officer, as defined in section 551 of this title and who is full-
152 time, may be disciplined or removed from his or her position as presiding officer only for
153 good cause and only after a hearing before the Merit Systems Protection Board, subject to
154 judicial review. The hearing shall be a Type A adjudication.

155 "(b) The exceptions applicable to administrative law judges, relating to national
156 security or reductions in force, shall be applicable to the discipline or removal of a
157 presiding officer."

158 (b) The analysis for chapter 5 of title 5, United States Code, is amended by
159 inserting the following after the item relating to section 559:

160 "560a. Ethics and independence of Presiding Officers and Administrative Law Judges.

161 "560b. Removal and discipline of presiding officers."

162 **SEC. 9. SUPERCEDING CONTRARY STATUTORY PROVISIONS.**

163 The provisions of this act supersede existing contrary statutory provisions.

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REPORT

Introduction

The Administrative Procedure Act of 1946 (APA)¹ controls the procedures of almost all federal government administrative agencies and it has achieved nearly constitutional status. The APA is of immense importance to the governmental process and to uncounted millions of people who are impacted by federal agencies. The APA regulates *all* federal agency rulemaking and *all* judicial review of agency action (with narrowly drawn exceptions in each case). Under the Freedom of Information Act,² an amendment to the APA passed in 1966, *all* federal government information is covered (again with specific exceptions). The Negotiated Rulemaking Act and the Administrative Dispute Resolution Act³ comprehensively regulate agency alternate dispute resolution.

As discussed in greater detail below, only a portion of agency adjudication is subject to the adjudication provisions of the APA. We call these “Type A adjudications.” Type A adjudications are the cases in which administrative law judges (ALJs) ordinarily preside—primarily benefits cases involving Social Security, Medicare,⁴ and Black Lung. In addition, Type A adjudication covers a wide array of regulatory adjudication, such as that conducted by the FTC, NLRB, SEC, and FERC. Type A adjudication also covers a variety of other programs involving civil penalties, labor, transportation, and communication. The APA provides significant protections to litigants in Type A adjudication. These include detailed provisions relating to the merit selection, independence, compensation, freedom from performance evaluation, and tenure of ALJs.

Numerous statutes that call for evidentiary hearings as part of regulatory or benefit programs are not governed by the APA’s adjudication provisions. We refer to these as “Type B adjudications.” Presiding officers (POs) rather than ALJs conduct these hearings. We believe it would be in the public interest to extend certain APA provisions that prescribe fundamental norms of fair adjudicatory procedure to Type B adjudication. Although all presiding officers should, of course, be selected based on merit, competence and experience, we do not propose that the APA’s specific provisions relating to the selection, compensation and tenure of ALJs be extended to POs in Type B adjudication since it is not practical to do so.

This resolution attempts to modernize the adjudication provisions of the APA by accomplishing the following goals.

1. Extend certain APA procedural protections to Type B adjudication (Part I of this Report).
2. Require adoption of ethical standards for ALJs and POs and protect full-time POs against removal or discipline without cause. (Part II).
3. Clarify the definitions of rule and adjudication under the APA (Part III).

¹ 5 U.S.C. §551 et. seq. The APA is cited herein without the prefatory 5 U.S.C.

² APA §552.

³ 5 U.S.C. §§561 et.seq; 571 et.seq.

⁴ The new prescription drug provision will undoubtedly increase the number of Medicare cases heard by ALJs. See Eleanor D. Kinney, *Changes in the Adjudication of Medicare Beneficiary Appeals in the New Medicare Prescription Drug Legislation: Reform or Retreat?* 29 Admin. & Regul. Law News 6 (Spring 2004) (transfer of ALJs deciding Medicare cases from Social Security to HHS).

4. Clarify the circumstances in which newly adopted adjudication schemes will be Type A as opposed to Type B adjudication (Part IV).
5. Clarify the APA provisions relating to evidence (Part V).
6. Clarify the ability of all adjudicating agencies to issue declaratory orders.
7. Clarify the right to obtain transcripts at agency's cost of duplication (Part VI).
8. Clarify that legislation adopted pursuant to these recommendations will supersede existing contrary statutory provisions (Part VII).

I. Extending APA procedural protections to Type B adjudication

The existing APA adjudication provisions cover only Type A adjudication. *The proposal discussed in this section of the report would not change Type A adjudication or alter the various provisions in the APA that safeguard ALJ independence.*⁵ We propose to extend certain procedural protections that are presently applicable to Type A adjudication to Type B adjudication.⁶

A. Type A adjudication under the APA

The term “Type A adjudication” covers all those hearing schemes to which the existing APA adjudicatory provisions apply.⁷ These proceedings, often referred to “formal adjudication,” are ordinarily conducted by ALJs.⁸ They include hearings relating to Social Security, Medicare, and Black Lung benefits as well as to hearings provided by an array of regulatory agencies. There are approximately 1,350 federal ALJs.

In general, Type A adjudications are presently identified by statutes (outside the APA) that either i) explicitly require that sections 556-557 of APA apply or ii) call for adjudication “required by statute to be determined *on the record* after opportunity for an agency hearing.”⁹ As discussed in Part IV, the phrase “on the record” has acquired talismanic properties and most cases hold that those very words (or other clear evidence of Congressional intent) must be used before Type A adjudication provisions come into play. Other than the changes described in Parts II to VII of this Report, which are not fundamental in nature, we propose *no changes* in Type A adjudication since we view the system of Type A adjudication as working well.

B. Type B adjudication and informal adjudication

⁵ The proposals discussed in Parts II to VII apply to Type A adjudication but do not involve fundamental changes.

⁶ These recommendations relate only to “adjudication” which, as discussed in part III below, means action of *particular* rather than *general* applicability. Thus, proceedings for ratemaking for an entire industry, like those in *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973), would be treated as rulemaking, not adjudication, and would not be treated as Type B adjudication.

⁷ APA §§554, 556-58. See proposed §551(15) defining “Type A adjudication.”

⁸ Type A adjudication includes some relatively rare situations in which ALJs do not preside. First, a statute may provide that APA §§556-57 apply except that ALJs do not preside. APA §556(b). See Michael Asimow, editor, *A Guide to Federal Agency Adjudication* ¶10.03 (ABA Section of Administrative Law and Regulatory Practice, 2003) (hereinafter referred to as *Guidebook*). Second, the APA allows the agency head or heads to preside instead of ALJs, although this rarely if ever occurs. Third, in initial licensing or ratemaking cases, the APA allows the agency to designate staff members other than ALJs as presiding officers. §556(b). Type A adjudication covers hearings and procedures described in this footnote even though in fact ALJs do not preside.

⁹ APA §554(a) (emphasis added). See *Guidebook* ¶3.01. Under the proposed default provision discussed in part IV below, adjudicatory hearings called for in future statutes will be Type A adjudication (even if the statute does not use the magic words “on the record”) unless Congress provides the contrary.

The recommendation proposes extension of certain fundamental procedural protections set forth in the existing APA to “Type B adjudication,” meaning evidentiary proceedings required by statute other than Type A adjudication.¹⁰ Type B adjudication covers a wide range of evidentiary proceedings that are conducted by presiding officers (POs) who are not ALJs.¹¹ Although people sometimes refer to Type B adjudication as “informal adjudication,” this usage is not proper. Many Type B hearings are as “formal” or even more “formal” than Type A hearings.¹² The term “informal adjudication” is properly used to describe the vast array of adjudications conducted by federal agencies with respect to which no statute requires a hearing.¹³ There are literally millions of informal adjudications, ranging from economically important orders (such as refusal to grant a bank charter) to low-stakes decisions (such as allocation of campsites by federal forest rangers). Our proposals do not affect informal adjudication as defined in this paragraph.

C. Rationale

The provisions in Title V of the U. S. Code relating to rulemaking, judicial review, alternative dispute resolution, and government information apply across the board, but the APA’s provisions for adjudication apply only to a portion of federal agency evidentiary proceedings.¹⁴ This unfortunate balkanization of hearing procedures defeats the purpose of the drafters of the APA who wished to achieve greater uniformity and to provide basic fair-hearing norms in most agency adjudication.¹⁵

A 1992 study by ALJ John H. Frye III (based on 1989 data) identified about 83 case-types (involving about 343,000 cases annually) of Type B adjudication.¹⁶ Frye identified 2,692 POs. Of the 83 case-types, 15 accounted for 98% of the total. The largest Type B category is deportation cases. There are a substantial number of law enforcement cases, including civil penalties administered by numerous agencies,¹⁷ as well as passport

¹⁰ See proposed APA §§551(16) and (17).

¹¹ In practice, numerous titles are used to describe POs, but we used the generic term PO to include all such presiders. See proposed APA §551(18).

¹² Most Type A hearings are Social Security cases which are conducted in a non-adversarial, relatively informal fashion.

¹³ The term “informal adjudication” is sometimes used to describe Type B proceedings that are conducted informally but we believe that the term “informal adjudication” should be reserved for the vast array of adjudicatory proceedings as to which no statute requires an evidentiary hearing.

¹⁴ APA §§555 and 558 apply to all adjudications but provide protections that fall far short of those provided in Type A adjudication or the protections we propose should be applicable to Type B adjudication. See *Guidebook* ¶¶9.04, 9.06.

¹⁵ Jeffrey S. Lubbers, *APA Adjudication: Is the Quest for Uniformity Faltering?* 10 Admin. L. J. 65 (1996); Cooley R. Howarth, *Restoring the Applicability of the APA’s Adjudicatory Procedures*, 56 Admin. L. Rev. – (2004); Attorney General’s Manual on the APA 9 (1947).

¹⁶ John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 Admin. L. Rev. 261, 264 (1992). Frye eliminated 46 case types that showed a caseload of less than one case per year. See also Paul Verkuil et. al., *The Federal Administrative Judiciary*, Vol. 2 [1992] ACUS Rec. & Rep. 779, 788-90, 843-73. In comparison to the 343,000 Type B adjudications, the ACUS study estimated that there were about 300,000 Type A adjudications per year in the late 1980’s.

¹⁷ Under the Clean Water Act. EPA can impose a “class 1 civil penalty” (\$10,000 per violation up to \$25,000 maximum) or a “class 2 civil penalty” (\$10,000 per violation with a maximum of \$125,000). A class 2 penalty must follow “notice and opportunity for a hearing on the record in accordance with section 554 of Title 5.” A class 1 penalty also requires notice and a hearing but “such hearing shall not be subject to section 554 and 556 of Title 5 but shall provide a reasonable opportunity to be heard and present evidence.” 33 U.S.C.A. §1319(g)(2). Thus Class 2 penalties call for Type A adjudication but Class 1

denials or security clearance disputes. Type B adjudication includes many benefit cases such as veterans' benefits and Medicare Part B cases decided by employees of insurance carriers. A substantial number of cases deal with economic matters (farm credit, public contract disputes, bid protests, or debarment of contractors) and federal employment relationships (such as those administered by the Merit Systems Protection Board).

In 2002, Raymond Limon updated Frye's study.¹⁸ Limon found 3,370 Type B POs, about a 25% increase from 1989 figures. In contrast, there are 1,351 ALJs in 29 different agencies (a 15% increase).¹⁹ Frye reported 393,800 Type B proceedings each year; Limon reported 556,000 (a 41% increase).²⁰

POs may be full-time decisionmakers or may be agency staff members who engage in part-time judging along with other tasks.²¹ Frye found that full-time POs decide about 90% of the Type B cases (but part-time POs decided cases in 34 of the 83 case-types, mostly the less active ones).²² Most of the full-time POs are lawyers but most of the part-time POs are not lawyers.²³

Based on the criteria set forth in Part IV, it would be desirable to convert many of the existing systems of Type B adjudication to Type A adjudication. However, it is unlikely that Congress will be persuaded to do so in the foreseeable future. Thus, our proposal recognizes that second-best is better than nothing at all. It is intended to insure fundamental, baseline procedural protection in the large universe of Type B adjudication.²⁴ In practice, so far as we can determine, such protections are normally provided in existing Type B adjudication schemes. Nevertheless the public deserves to be guaranteed that such protections will always be provided through generally applicable

penalties call for Type B adjudication. For a thorough treatment of civil penalties and Type B adjudication, see William F. Funk, *Close Enough for Government Work?—Using Informal Procedures for Imposing Civil Penalties*, 24 Seton Hall L. R. 1 (1993).

¹⁸ Office of Administrative Law Judges, *The Federal Administrative Judiciary Then and Now—A Decade of Change 1992-2002* (Dec. 23, 2002).

¹⁹ Limon stated that in 1992 there were 1167 ALJs; in 2002, there were 1351 ALJs. Limon 3, n.4. During much of the period between the Frye and Limon reports, the hiring of ALJs was frozen. But for the freeze, the number of ALJs would undoubtedly have expanded more rapidly.

²⁰ Numerous recent statutes call for Type B adjudication. For example, a recently enacted statute provides for “collection due process” (CDP) hearings by the IRS. IRC §§6320, 6330. The IRS now conducts about 30,000 CDP hearings annually and the number is rising steadily. CDP hearings appear to be Type B adjudication although numerous issues about the nature of CDP hearings and judicial review thereof are at present unresolved. See Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 Florida L. Rev. 1, 117-28 (2004); Leslie Book, *The Collection Due Process Rights: A Misstep or Step in the Right Direction*, 41 Houston L. Rev. — (2004).

²¹ Some part-time POs are not agency staff members; they may be retired judges or academics who are called upon by the agency from time to time as their particular expertise is needed.

²² Frye found that there were 601 full-time POs and 2130 part-time POs. However, full-time POs decided about 90% of the Type B cases. Frye 349-50.

²³ Frye 349. Limon found that of 3370 POs, only 1370 were lawyers. However, of the 601 full-time POs, 438 were lawyers.

²⁴ New provisions in California's APA that were enacted in 1995 call for a scheme similar to this proposal. The California statute preserved a system of Type A adjudication that relies on central panel ALJs. It then provides for an “administrative adjudication bill of rights” for Type B adjudication. See generally Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 Tulsa L. J. 297 (1996).

and accessible APA provisions, instead of the existing maze of due process requirements and situation-specific statutes and procedural regulations.

D. Meaning of “evidentiary proceeding”

Our proposal recognizes and distinguishes three types of federal adjudication. Type A adjudication refers to the set of evidentiary hearings usually conducted by ALJs and is unaffected by our proposal.²⁵ Type B adjudication refers to evidentiary hearings required by statute that are conducted by POs. Our proposal would impose a set of procedural requirements on Type B adjudication. Informal adjudication entails decisions by federal agencies with respect to which no statute calls for a hearing. Our proposal does not affect informal adjudication (except to make clear that it is possible to issue a declaratory order through informal adjudication—see Part VI).

As discussed in Part IV, there is considerable case law that distinguishes Type A from Type B adjudication. Unfortunately, this case law is in conflict. Our proposal does not attempt to resolve this conflict but assumes that the line between Type A and Type B would continue to be drawn under existing law. (Part IV of our proposal would clarify the Type A/Type B distinction for statutes adopted in the future). We discuss here the problem of distinguishing Type B adjudication from informal adjudication.

Type B adjudication, as defined in proposed §551(16), means “an agency evidentiary proceeding required by statute, other than Type A adjudication.”²⁶ Under proposed §551(17), the term “agency evidentiary proceeding” means “a proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing.” As provided in new §551(18), a “presiding officer” conducts Type B adjudication. Thus a Type B proceeding will always be identified by the presence of a federal statute (other than the APA) that calls for an evidentiary proceeding.

Federal statutes frequently call for evidentiary “hearings” that are not Type A adjudication. The definition of Type B adjudication captures these proceedings.²⁷ Some statutes use terms other than “hearing” to describe such proceedings but the intention of

²⁵ See note 16 which observes that a few classes of Type A adjudication are not heard by ALJs.

²⁶ The definition excludes from Type B adjudication the types of cases already excepted from Type A adjudication by §554(a) with some modifications: (1) a matter subject to a subsequent trial of the law and the facts de novo in a court or in a Type A or Type B adjudication; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; or (6) the certification of worker representatives.

We strike out an existing exemption: “~~(2) the selection or tenure of an employee other than an ALJ.~~” Hearings required by statute that concern the tenure of government employees would normally be classified as Type B adjudication. If any statute provides for evidentiary hearings relating to selection of employees, these would generally be Type B hearings also. Hearings relating to the tenure of ALJs would continue to be Type A adjudication. We propose that disputes concerning the tenure of Type B POs should also be Type A adjudication. We propose to strike out the existing exemption because hearings relating to selection and tenure of federal employees should be included in the APA’s provisions for Type A or B adjudication. See Part II.

²⁷ For example, in railroad unemployment insurance cases, an employee “shall be granted an opportunity for a hearing before a referee.” 35 USC §355. A federal government employee claiming workers compensation “is entitled to a hearing on his claim before a representative of the Secretary.” 5 USC §8124(b)(1). In Agriculture Department disputes, there is a “right to appeal an adverse decision for an evidentiary hearing of a hearing officer.” 7 USC §6996(a). Persons who are subject to IRS collection activities have “a right to a hearing.” IRC §6330(a)(1).

the statute is to call for an “evidentiary proceeding.”²⁸ The term “evidentiary proceeding” covers hearings required by statute even if all of the evidence is submitted in writing rather than orally, so long as the decisionmaker is limited to considering only record evidence. The term includes non-adversarial, inquisitorial hearings in which the Government is not represented, such as the hearings conducted by the Board of Veterans’ Appeals (just as Type A adjudication includes non-adversarial Social Security hearings).²⁹

The term “evidentiary proceeding” does *not* include statutory provisions calling for notice and comment-type procedures (even if applicable to adjudication) where such procedures do not limit the decisionmaker to consideration only of the evidence in the record.³⁰ Nor does it include so-called “hearings” in which the public is invited to appear and make statements (such as often occurs with respect to various forms of land use decisions),³¹ informal inquiries, or investigatory or settlement-oriented hearings (meaning hearings that can be followed by another *de novo* administrative review or *de novo* judicial review to finally resolve the matter).³²

It would be possible to extend Type B adjudication to evidentiary proceedings called for by the Due Process clause of the 5th Amendment. We do not propose this because it would be difficult to decide which due process cases call for evidentiary proceedings and which ones call for some sort of interaction that is less formal than an

²⁸ In immigration cases, the statute states that an Immigration Judge (IJ) “shall conduct proceedings for deciding the inadmissibility or deportability of an alien.” In context, it is clear that the IJ is to conduct an evidentiary proceeding. For example, an alien “shall have reasonable opportunity to present evidence and cross examine witnesses presented by the government.” The IJ is authorized to administer oaths, receive evidence, and issue subpoenas; the IJ must rule on evidentiary objections and provide findings and reasons for decisions. 8 USC §1229a(1)(a)(1), (b)(1), (4)(B); 8 CFR §240.1(c). The Contract Disputes Act provides that a board of contract appeals shall “provide to the fullest extent practicable informal, expeditious, and inexpensive resolution of disputes and shall issue decisions in writing.” A member may administer oaths, authorize depositions, and subpoena witnesses for taking of testimony. Again, the context makes clear that an evidentiary hearing is intended. 41 USC §§607(e), 610. We understand that the existing system of public contract dispute resolution already meets all requirements of Type B adjudication.

²⁹ 38 USC §§7104(a), 7107(b). BVA hearings are informal and non-adversarial. See 38 CFR §20.700(c).

³⁰ See 16 USC §1456(c)(3)(A) concerning licensing decisions for activities within the coastal zone. The Secretary of Commerce can override a state’s objection to the issuance of a federal license or permit after finding the activity consistent with goals and objectives of the Coastal Zone Management Act or necessary in the interests of national security. The Secretary must first provide an opportunity for the state and permit applicant to submit detailed comments. Though the regulations implementing this provision establish detailed appellate-like procedures for the conduct of the Secretary’s inquiry, the statute indicates no requirement for an evidentiary proceeding as the Secretary is not limited to considering only the data contained in the written comments submitted by the parties.

³¹ See, e.g., *Buttrey v. United States*, 690 F.2d 1170, 1174-83 (5th Cir. 1982) (“opportunity for public hearing” does not trigger APA formal adjudication).

³² Present section 554(a)(1) contains an exception for “a matter subject to a subsequent trial of the law and the facts *de novo* in a court.” We propose to add the words “or in a type A or Type B adjudication.” We intend thereby to make clear that the requirements for Type B adjudication will not apply where a “hearing” required by statute can be followed by another *de novo* trial of the law and facts, whether it takes place in an Article III court or before some administrative tribunal or Article I court. In short, a litigant gets only one Type B or Type A administrative proceeding, not two. (For this purpose, we do not consider the remote likelihood that the agency heads or other reviewing authority can call for a *de novo* hearing after the decision of an ALJ or a PO as constituting a subsequent *de novo* trial).

evidentiary proceeding.³³ Due process cases use an ad hoc balancing test to decide what procedures are applicable³⁴ and thus resist the sort of rigidity that the proposed statutory test would entail.

It would also be possible to extend the Type B adjudication concept to evidentiary proceedings called for by *agency procedural regulations* rather than by statutes.³⁵ We do not propose this, however, because it would create perverse incentives. It might discourage agencies from voluntarily adopting hearing procedures through their regulations when they are not required to do so. Also, it might encourage agencies to dispense with hearing procedures now called for by regulations. Agencies should not be discouraged from providing procedural protections that they are not required to provide.³⁶

E. APA provisions applicable to Type B adjudication

Under proposed APA §554(e), certain provisions of the existing APA will apply to Type B adjudication:

- Timely notice and right to submit settlement offers;³⁷
- The right to present a case by oral or documentary evidence and to conduct cross examination when required for a full and true disclosure of the facts;³⁸
- Decisionmaker impartiality;³⁹

³³ See, e.g., *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) (procedures required before public employee is discharged); *Goss v. Lopez*, 419 U.S. 565 (1975) (procedures required before suspending child from school for ten days or less).

³⁴ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

³⁵ The VA regulations (but not a statute) provide for a hearing in connection with benefits disputes (so-called “regional office hearings”). 38 CFR §3.103(c). Such hearings are not Type B adjudication for two reasons: i) they are provided for in regulations rather than by statute, and ii) they are followed by a subsequent de novo administrative hearing provided by the Board of Veterans’ Appeals. Similarly, the Equal Employment Opportunities Commission provides hearings for federal employees who allege prohibited discrimination but such hearings are authorized by regulation rather than by statute. See 42 U.S.C. §2000e-16(b); 29 CFR §1614.109(a) (2003).

³⁶ Of course, agencies might choose to incorporate the principles applicable to Type B adjudication in their procedural regulations calling for evidentiary proceedings. It seems likely that many would choose to do so (or have already done so).

³⁷ Proposed APA §554 (b) and (c) apply the existing APA provisions for notice and submission of settlement proposals to Type B proceedings. See *Guidebook* ¶4.02.

³⁸ Proposed APA §554(e)(2) adapts language from APA §556(d): “A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts.” See *Guidebook* ¶5.07, 5.08. As in Type A adjudication, a PO would have discretion as to whether evidence should be presented orally or in writing. Similarly, a PO would have discretion whether to allow cross-examination. A PO may decide that cross-examination is not needed for a “full and true disclosure of the facts” where the issue to be resolved is not a disputed factual question that turns on credibility. As in Type A adjudication, a PO may decide that evidence that has been received in written form need not be subject to cross-examination.

Under VA regulations, no cross-examination is allowed in BVA hearings. However, the parties (presumably including the PO) may ask “follow-up questions” of the witnesses. 38 CFR §20.700(c) (“Parties to the hearing will be permitted to ask questions, including follow-up questions, of all witnesses but cross-examination will not be permitted”). Because of the non-adversarial format of BVA hearings (meaning that the VA is not represented), there may be little occasion for cross-examination. The provision for follow-up questions should be sufficient to meet the requirements of proposed §554(e)(1). Similarly, IRS collection due process (CDP) hearings do not include cross-examination. Reg. §301.6330-1(d)(1) A-D6 (“the taxpayer or the taxpayer’s representative do not have the right to subpoena and examine witnesses at a CDP hearing”). The issues in a CDP hearing would not ordinarily involve credibility conflicts so cross-examination should not be necessary.

- Decisionmaker independence and separation of functions;⁴⁰
- Prohibition on ex parte contacts with decisionmakers;⁴¹
- The exclusive record and official notice provisions;⁴² and
- the requirement of a written or oral decision containing findings and reasons. In the event that the POs decision is reviewed at a higher agency level, the POs decision must be disclosed to the parties who have an opportunity to comment on it prior to the higher-level decision.⁴³

It is intended that the provisions for notice and hearing, decisionmaker independence, and written or oral decisions, would apply only to the initial proceeding.⁴⁴ The requirements of impartiality, separation of functions, ex parte contact, and exclusive record would apply both to the initial decision stage and to the agency review stage. We also believe that the exception from the Government in the Sunshine Act that applies to the “initiation, conduct, or disposition” of Type A adjudication should be extended to include Type B adjudication.⁴⁵

Numerous provisions of the existing APA will *not* apply to Type B adjudication unless required by statute (or by agency rule). These include:

- The various provisions relating to the hiring, compensation, rotation, evaluation and discharge applicable to ALJs.⁴⁶

³⁹ Proposed APA §554(e)(3) adapts language drawn from §556(b): “The functions of a presiding officer or an officer who reviews the decisions of a presiding officer shall be conducted in an impartial manner.” See *Guidebook* ¶7.02.

⁴⁰ Proposed §554(e)(4)(A) provides that a PO shall make the recommended or initial decision unless he or she becomes unavailable. This parallels existing §554(d). Proposed §554(e)(4)(B) provides that a PO shall not consult any person or party ex parte on a fact in issue. This parallels existing §554(d)(1). Proposed §554(e)(4)(C) prohibits command influence. It parallels existing §554(d)(2). The proposed command influence provision applies only to full-time POs. It would be impracticable to prohibit command influence in the case of part-time POs who engage in investigation or prosecution functions in other cases and are supervised by staff members who engage in such functions. Instead, we propose that a part-time PO not be supervised by a person serving as prosecutor or investigator in the same adjudication that the PO is deciding. We seek to avoid extra costs or disruption of existing structures, and we do not wish to compel agencies to reorganize themselves. Finally, §554(e)(4)(D) parallels the existing provision for separation of functions; it prohibits agency prosecutors or investigators in a case from participating or advising in the decision of that case. See *Guidebook* ¶7.06.

⁴¹ Proposed APA §554(e)(5) incorporates the provisions of existing APA §557(d). See *Guidebook* ¶7.04.

⁴² Proposed APA §554(e)(5) also incorporates APA §556(e): “The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision. . . . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.” See *Guidebook* ¶7.08.

⁴³ Proposed APA §554(e)(6) requires a PO’s decision to include “a statement of findings, conclusions, and reasons, on material issues of fact, law, or discretion presented on the record. The decision may be delivered orally or in writing in the discretion of the” PO. This provision modifies language in existing APA §557(c). See *Guidebook* ¶6.02. We understand that some POs deliver oral decisions. We did not wish to compel a change in this practice by requiring written decisions. We also understand that in some Type B proceedings, POs write recommended decisions that are not disclosed to the parties until after the agency review phase is completed. Our proposal would change this practice.

⁴⁴ Normally the initial proceeding would be conducted by a PO but these requirements should also apply if the initial proceeding is conducted by the agency heads or other officials.

⁴⁵ 5 USC §552b(c)(10).

⁴⁶ 5 U.S.C. §§3105, 7521, 5372, 3344, 1305. See *Guidebook* Chapter 10.

- Provisions relating to evidence and burden of proof.⁴⁷
- Various provisions relating to review of initial decisions.⁴⁸
- The right to an award of attorney's fees under the Equal Access to Justice Act.⁴⁹

Judge Frye's report confirms that Type B adjudication is already conducted in accordance with the requirements of proposed section 554(e) in almost all cases. Therefore, the adoption of these baseline procedural protections should not significantly change the way that federal agencies conduct Type B adjudication. These provisions will not increase the costs of conducting Type B adjudication or cause delays or confusion or require costly agency reorganizations. Our intention is to assure that litigants will receive fundamental procedural protections in Type B adjudication without requiring restructuring of existing hearing schemes.

II. Ethical standards and protection against reprisal

Proposed §559a requires the Office of Government Ethics to adopt ethical standards for all federal ALJs and POs. This proposal implements Resolution 101B, adopted August 6, 2001, in which the ABA recommended that members of the administrative judiciary be held accountable under appropriate ethical standards adapted from the ABA's Model Code of Judicial Conduct in light of the unique characteristics of particular positions in the administrative judiciary.

The objective of Resolution 101B, and of proposed §559a, is to assure that both ALJs and POs be held accountable to appropriate ethical standards. These rules should be based on the ABA Model Code of Judicial Conduct as a starting point, taking account of the unique characteristics of particular positions of ALJs and POs. The rules should also consider the codes of ethics adopted by groups such as NCALJ and the 1989 Code of Conduct for Administrative Law Judges, and might include particular standards adapted to the unique characteristics of various positions held by ALJs and POs, for part-time and full-time POs, or for lawyers and non-lawyers.⁵⁰

Also in keeping with Resolution 101B, proposed section 559b provides that full-time POs shall be removed or disciplined only for good cause and only after a hearing to be provided by MSPB under the standards of Type A adjudication, subject to judicial review.⁵¹ Section 559b is also based on ABA Resolution 101B.⁵² POs should be protected

⁴⁷ §556(d). See *Guidebook* ¶5.03 to 5.05. In our view, it is not necessary to incorporate the APAs provisions relating to evidence and burden of proof in order to insure fair procedure in Type B adjudication. In particular, we did not wish to impose the *Greenwich Collieries* decision on agencies conducting Type B adjudication unless they choose to adopt it. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994); *Guidebook* ¶5.033.

⁴⁸ APA §§557(b), (c). See *Guidebook* ¶6.03. Again, we did not believe it necessary to incorporate these detailed provisions to achieve fair procedures in Type B adjudication.

⁴⁹ See *Guidebook*, chapter 11. We would not be opposed to extending EAJA to Type B adjudication but do not recommend it at this time in the interests of minimizing the budgetary impact of our proposal.

⁵⁰ The ABA's Model Code of Judicial Conduct stresses that "anyone, whether or not a lawyer, who is an officer of a judicial system and performs judicial functions...is a judge within the meaning of this Code."

⁵¹ As provided in Recommendation IV, newly enacted hearing schemes should be Type A rather than Type B adjudication unless Congress specifically provides to the contrary. Consistent with the spirit of Recommendation IV, we recommend here that adjudication arising out of the discipline or discharge of POs should be Type A adjudication, meaning that such cases would be heard by the MSPB's ALJs rather than its POs. Of course, the same exceptions presently applicable to hearings to remove ALJs (relating to national security or to reductions in force) would also apply to removal of POs. 5 USC §7521(b)(A) and

from negative consequences for engaging in ethical and independent decisionmaking. Good cause should include violation of the ethical rules referred to in the preceding paragraph. POs should also be entitled to judicial review of such decisions.

III. Clarifying the definition of rule

At present, the APA's definition of "rule" is defective.⁵³ Rulemaking is the process for formulating a "rule." A "rule" is a "statement of *general or particular applicability and future effect* designed to implement, interpret or prescribe law or policy...and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing." Adjudication is the process for formulating an "order" and an "order" means a "final disposition . . . in a matter *other than rule making* but including licensing."⁵⁴

The statute should be amended so that agency action of *general applicability* is a rule and agency application of *particular applicability* is adjudication.⁵⁵ Under the existing definitions, for example, an FTC cease and desist order would be a rule (since it is agency action of particular applicability and future effect), but everyone treats case and desist orders as "orders" rather than as "rules" and agrees that they should be subject to adjudicatory procedure.⁵⁶ This proposal is already ABA policy. It was part of a set of recommendations approved in 1970 by the HOD.

A further clarifying amendment removes the words "and future effect" from the definition of "rule." This revision would make clear that the APA applies to retroactive rules. Under Supreme Court case law,⁵⁷ an agency may not adopt a retroactive rule that has the force of law unless Congress explicitly authorizes the agency to do so. When agencies do adopt retroactive rules with the force of law, they should be adopted with

(B), referring to §7532 and §3502. A full-time PO would be treated as such even if the official had limited incidental duties in addition to judicial responsibilities in evidentiary hearings.

⁵² The 2001 resolution made clear that, for this purpose, the administrative judiciary includes all individuals whose exclusive role in the administrative process is to preside and make decisions in a judicial capacity in evidentiary proceedings, but does not include agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of an agency head.

⁵³ See *Guidebook* ¶1.04; Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 Admin. L. Rev. – (2004).

⁵⁴ APA §§551(4) to (7).

⁵⁵ The recommendation also deletes the words "and includes the approval or prescription for the future of rates, wages, corporate or financial structure or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." The effect of the latter change is that ratemaking of general applicability would be rulemaking but ratemaking of particular applicability would be adjudication. See *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973) (holding that setting of industry-wide railway rate should be treated as informal rulemaking under the APA).

⁵⁶ As under existing law, a rule that in practice would apply to only a single person is still a rule (rather than an adjudication) as long as it is stated in general terms and it is theoretically possible that it could apply to additional persons. An agency's grant of exemption from a rule to a particular person would be an adjudication.

⁵⁷ *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). We do not propose to change the rule of the *Georgetown* case but only to provide that the APA's definition of rule applies when an agency is authorized to adopt a retroactive rule or when it adopts a retroactive interpretive rule.

appropriate notice and comment procedures.⁵⁸ In addition, interpretive rules often have retroactive effect; the APA's definition of "rule" should also cover retroactive interpretive rules.

IV. Type A Adjudication: Guidelines for Congress and a Default Provision When Statute is Unclear

In June, 2000, the ABA House of Delegates adopted Resolution 113, a recommendation sponsored by the Judicial Division, that set forth criteria Congress should consider in deciding whether a new adjudicatory scheme should employ Type A adjudication. A second part of the resolution created a default provision that would sweep newly adopted adjudicatory schemes into Type A unless Congress provided otherwise. This 2000 resolution is germane to the present set of recommendations. If Congress takes up the issues of Type A and B adjudication, it would naturally consider this recommendation at the same time.⁵⁹

A. Criteria for deciding whether new program should employ Type A adjudication

When Congress sets up a new program involving adjudications with opportunity for hearing, it should consider and explicitly determine whether the new program will be Type A adjudication.

Congress should consider the following factors (each of which points toward Type A rather than Type B adjudication):

- a. Whether the adjudication is likely to involve a substantial impact on personal liberties or freedom, whether the orders carry with them a finding of criminal-like culpability or would have substantial economic effect, or whether the orders involve determinations of discrimination under civil rights or analogous laws.
- b. Whether the adjudication would be similar to, or the functional equivalent of, a current type of Type A adjudication.
- c. Whether the adjudication would be one in which adjudicators ought to be lawyers.⁶⁰

B. Default provision

Congress should amend the APA to provide prospectively that absent a statutory requirement to the contrary, in any future legislation that creates opportunity for an adjudicatory evidentiary hearing, such hearing shall be Type A adjudication.⁶¹

C. Rationale

Under the existing APA, Type A adjudication exists only when "adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing..."⁶² Where a statute calls for an evidentiary hearing but does not use the magic words "on the record," it has been difficult to decide whether the resulting adjudication is

⁵⁸ See ABA House of Delegations Resolution (Feb. 1992) stating that "retroactive rules are and should be subject to the notice and comment requirements of Section 553 of the Administrative Procedure Act."

⁵⁹ Because of the various changes in statutory nomenclature embodied in this recommendation and report (such as adoption of the terms Type A and B adjudication), we propose non-substantive changes in the 2000 recommendation.

⁶⁰ These factors are substantially the same as those in ACUS Recommendation 92-7, 57 Fed. Reg. 61760 (Dec. 29, 1992).

⁶¹ Resolution 113 states that such hearings "shall be subject to 5 USC §§554, 556, and 557." The present Recommendation used the term Type A adjudication which embodies the sections of the APA referred to in Resolution 113. No change in meaning is intended.

⁶² APA §554(a).

Type A or Type B. The case law is conflicting.⁶³ ABA Resolution 113, already adopted by the HOD, calls for Congress to carefully consider this issue when it adopts future legislation that creates opportunity for an adjudicatory evidentiary hearing. The Resolution provides a useful list of factors that Congress should consider when it makes that decision. The resolution also calls for a prospective-only default rule. Under that rule, future legislation that creates opportunity for an adjudicatory evidentiary hearing will require Type A adjudication unless Congress provides the contrary.

This default rule will nudge federal administrative law in the direction of greater use of ALJs and Type A adjudication. This will result in enhancement in the impartiality and skill of adjudicatory decisionmakers and an accompanying improvement in the fairness and quality of decisions. Generally, agencies are well aware of legislation that affects them and the burden should be on the agencies to inform Congress at the time it considers a new adjudicatory scheme if the agency believes that Type A is inappropriate.⁶⁴

V. Issues relating to evidence

A. Residuum rule

The “residuum rule” (followed in some states) requires that a decision must be supported by at least some non-hearsay evidence. This rule creates many problems, such as requiring the judge to make constant hair-splitting rulings about hearsay and its many exceptions, and requiring the parties to object at some appropriate time that the residuum rule applies in order to preserve the issue on appeal. It is generally believed that *Richardson v. Perales*⁶⁵ rejected the residuum rule at the federal level but this should be made clear in the statute.

The proposed amendment to APA section 556(d) accomplishes this result by adding the italicized language: “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 may be entirely based on evidence that would be inadmissible in a civil trial.*”

B. Evidence—FRE 403

In general, the Federal Rules of Evidence are not applicable to administrative agencies. The existing APA provides that an agency “as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.”⁶⁶ An ACUS study indicated that this provision was inadequate because it did not give ALJs adequate

⁶³ See *Guidebook* ¶3.01; Gary Edles, “An APA-Default Presumption for Administrative Hearings: Some Thoughts on ‘Ossifying’ the Adjudication Process,” 55 *Admin. L. Rev.* 787, 796-804 (2003); Cooley R. Howarth, *Federal Licensing and the APA: When Must Formal Adjudicative Procedures Be Used?* 37 *Admin. L. Rev.* 317 (1985); Cooley R. Howarth, *Restoring the Applicability of the APA’s Adjudicatory Procedures*, 56 *Admin. L. Rev.* – (2004). Three distinct lines of cases have emerged. Some cases conclude that Type A adjudication is intended despite absence of the words “on the record.” *Steadman v. SEC*, 450 U.S. 91, 96 n.13 (1981); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 875-78 (1st Cir. 1978); *Lane v. USDA*, 120 F.3d 106 (8th Cir. 1997). Other cases require the use of the words “on the record” or some other clear statement of Congressional intention. *City of West Chicago v. NRC*, 701 F.2d 632, 644-45 (7th Cir. 1983); *RR Comm’n of Texas v. United States*, 765 F.2d 221, 227-29 (D.C. Cir. 1985). And still others accord *Chevron* deference to the agency’s determination that the statute does not call for Type A adjudication. *Chemical Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1480-83 (D.C. Cir. 1989).

⁶⁴ According to the Report accompanying Resolution 113, the default rule would apply to “any new adjudication that Congress creates with an opportunity for a hearing.” See Edles, 812-14.

⁶⁵ 402 U.S. 389 (1971).

⁶⁶ APA §556(d).

case management tools. The consultant's survey of ALJs indicated that they believed they lacked power to exclude evidence that was patently unreliable or whose probative value was so low that it would not justify the amount of hearing time it would require.

The ACUS study declared: “This is a serious disadvantage. The delay and high cost of the administrative process poses a severe threat to the quality of justice available in our modern administrative state. Admission and cross-examination of a large volume of low quality evidence contributes significantly to the extraordinary length and attendant high cost of many agency adjudications.”⁶⁷

As a result, ACUS recommended that agencies adopt evidentiary rules allowing decisionmakers to exclude evidence under Federal Rule of Evidence 403.⁶⁸ That rule provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”⁶⁹ We agree and recommend that section 556(d) of the APA be amended to specifically permit ALJs to exclude evidence based on the FRE 403 standard (as modified slightly to take account of the differences between administrative and judicial proceedings).

VI. Declaratory orders

Existing §554(e) empowers an agency to issue a declaratory order to terminate a controversy or remove uncertainty. The placement of this subsection in the existing statute implies that only an agency authorized to conduct Type A adjudication can issue a declaratory order. We believe that any agency, whether conducting Type A, Type B, or informal adjudication, should be authorized to issue a declaratory order. Therefore, we propose moving this provision to §555, which applies to agency proceedings generally.⁷⁰

VII. Transcripts

The APA should provide that transcripts of agency proceedings (if they exist) should be available to private parties at cost of duplication. This is probably already required by §11 of the Federal Advisory Committee Act which provides: “Except where prohibited by contractual agreements entered into prior to the effective date of this act, agencies shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings (as defined in §551(12).” It would be useful to incorporate this provision in the APA itself where it would not be overlooked. As a result, we recommend that section 556(e) be amended by adding the italicized language and deleting the stricken out language:

“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 ~~and on payment of lawfully prescribed costs, shall be made available to the parties.~~ *Agencies shall make such transcripts available to the parties at the actual cost of duplication.* When an agency decision rests on official notice of a

⁶⁷ Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 Admin. L. Rev. 1, 23 (1987).

⁶⁸ ACUS Recommendation 86-2, 51 Fed. Reg. 25642 (July 16, 1986).

⁶⁹ The elision in this quotation is for the words “or misleading the jury” and “danger of unfair prejudice,” which seem inapplicable to the administrative process.

⁷⁰ See Jeffrey S. Lubbers & Blake D. Morant, *A Reexamination of Federal Agency Use of Declaratory Orders*, 56 Admin. L. Rev. – (2004).

material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

VIII. Superseding contrary statutory provisions

Legislation adopted pursuant to these recommendations will supersede existing contrary statutory provisions.

Respectfully submitted,
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**APPENDIX
(Ramseyer Rule)**

I. Extending APA procedural protections to Type B adjudication

A. Definitions

Add to APA § 551 (definitions), 5 U.S.C. §551:⁷¹

- (15) “Type A” adjudication means adjudication required by statute to be—
 (A) determined on the record after opportunity for an agency hearing; or
 (B) conducted in accordance with sections 556 and 557 of this

title;

(16) “Type B adjudication” means an agency evidentiary proceeding required by statute, other than a Type A adjudication;⁷²

(17) “agency evidentiary proceeding” means an agency proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing; and

(18) “presiding officer” means the initial decisionmaker in a Type B adjudication.

B. Type B adjudication

Amend existing APA §554 so that it reads as follows:

Sec. 554. - Adjudications

(a) General principles. This section applies, according to the provisions thereof, in every case of *Type A adjudication and Type B adjudication* ~~adjudication required by statute to be determined on the record after opportunity for an agency hearing~~, except to the extent that there is involved—

- (1) a matter subject to a subsequent trial of the law and the facts de novo in a court or in a *Type A or Type B adjudication*;⁷³

⁷¹ Subsequent references to the APA will exclude the prefatory 5 U.S.C.

⁷² The problem of distinguishing Type A, Type B, and informal adjudication is discussed in Parts I.A. and I.B. of the Report that follows these recommendations.

⁷³ In some agencies, the agency heads or a superior reviewing authority can, in theory, require a new de novo hearing of a case already heard by an ALJ or a PO to be conducted before the agency heads. We understand that this virtually never occurs in practice. The unlikely possibility of a de novo rehearing at the agency head level should not be taken into account in applying this subsection. Thus the rules relating to Type A and Type B adjudication apply to the hearing provided by an ALJ or a PO despite the remote possibility that the case could be heard anew at a higher level. For further discussion, see note 32 of the Report.

- ~~(2) the selection or tenure of an employee, except an administrative law judge appointed under section 3105 of this title.~~⁷⁴
- (2) proceedings in which decisions rest solely on inspections, tests, or elections;
- (3) the conduct of military or foreign affairs functions;
- (4) cases in which an agency is acting as an agent for a court; or
- (5) the certification of worker representatives.

(b) Notice. Persons entitled to notice of an agency hearing in a *Type A or Type B adjudication* shall be timely informed of —

- (1) the time, place, and nature of the hearing;
- (2) the legal authority and jurisdiction under which the hearing is to be held; and
- (3) the matters of fact and law asserted. ... [balance of subsection remains the same]

(c) Settlement proposals. In a *Type A or Type B adjudication*, the agency shall give all interested parties opportunity for—

- (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
- (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision ~~on notice and in accordance with sections 556 and 557 of this title.~~ *in accordance with the procedures for Type A adjudication specified in subsection (d) or Type B adjudication specified in subsection (e).*

(d) Procedures for Type A adjudication.

- (1) *A Type A adjudication shall be conducted pursuant to sections 556 and 557 of this title.*
- (2) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he *or she* becomes unavailable to the agency.
- (3) Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —
 - (A) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
 - (B) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.
- (4) 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.~~ *Type A adjudication may not, in that or a factually related adjudication, participate or advise in the initial or recommended decision or any review of such decision, decision, recommended decision, or agency review*

⁷⁴ This exception in the existing act becomes inappropriate in light of the adoption of the provisions relating to Type B adjudication. For further discussion, see note 26 of the Report.

~~pursuant to section 557 of this title, except as witness or counsel in public proceedings.~~ This subsection does not apply —

- (A) in determining applications for initial licenses;
- (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
- (C) to the agency or a member or members of the body comprising the agency.

~~(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.~~⁷⁵

(e) Procedures for Type B adjudication.

(1) General rule. A Type B adjudication shall be conducted in accordance with the procedures specified in this subsection.

(2) Presentation of evidence. A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts. 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.

(3) Impartiality of presiding officers and reviewing officers. The functions of a presiding officer or an officer who reviews the decisions of a presiding officer shall be conducted in an impartial manner.

(4) Agency decisional process

(A) A presiding officer shall make the recommended or initial decision unless he or she becomes unavailable to the agency.

(B) Except to the extent required for the disposition of ex parte matters as authorized by law, the presiding officer shall not consult any person or party on a fact in issue, unless on notice and with an opportunity for all parties to participate.

(C) A full-time presiding officer shall not be responsible to or subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions. A part-time presiding officer in an adjudication shall not be subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions in the same adjudication.

(D) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in an adjudication may not, in that or a factually related adjudication, participate or advise in an initial or recommended decision or any review of such decision, except as witness or counsel in public proceedings.

(E) The requirements of this paragraph do not apply—

- (i) in determining applications for initial licenses;*
- (ii) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or*

⁷⁵ The provision for declaratory orders is moved from §554 to §555. See VI. below.

(iii) to the agency or a member or members of the body comprising the agency.

(5) **Ex parte communications.** *The requirements of sections 556(e) and 557(d) shall apply to the proceeding and, in particular, the requirements that apply to an administrative law judge under section 557(d) shall apply to the presiding officer in the proceeding.*

(6) **Decision.** *The decision of a presiding officer shall include a statement of findings, conclusions, and reasons, on material issues of fact, law, and discretion presented on the record. The decision may be delivered orally or in writing in the discretion of the presiding officer. In the event the decision is reviewed at a higher agency level, the parties shall have an opportunity to submit comments on the decision before the review process is completed.*

(7) **Additional protections.** *An agency engaged in Type B adjudications may adopt rules that provide greater procedural protections than are provided in this section.*

C. Sunshine Act exception.

Section 552b(c)(10) in the Government in the Sunshine Act provides an exception to the Sunshine Act requirements for the “initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.” This section should be amended to make clear that the exception applies also to Type B adjudication.

II. Ethical standards and protection against reprisal

A. Ethical standards

Add new section 559a:

559a. Ethics and independence of presiding officers and administrative law judges

(a) *The Office of Government Ethics shall prescribe regulations providing for appropriate ethical standards for administrative law judges and presiding officers who conduct adjudications under section 554 of this title.*

(b) *The regulations shall be prescribed in accordance with sections 553(b) and (c) of this title. .*

B. Removal and discipline of presiding officers

Add a new section 559b:

559b. Removal and discipline of presiding officers

(a) *A presiding officer, as defined in section 551 of this title and who is full-time, may be disciplined or removed from his or her position as presiding officer only for good cause and only after a hearing before the Merit Systems Protection Board, subject to judicial review. The hearing shall be a Type A adjudication.*

(b) The exceptions applicable to administrative law judges, relating to national security or reductions in force, shall be applicable to discipline or removal of a presiding officer.

III. Clarification of the definition of rule

APA section 551(4) should be amended to read as follows:

(4) “rule” means the whole or a part of an agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency;

~~—————“rule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing;~~

IV. Type A adjudication: guidelines for Congress and a default provision when statute is unclear

A. Criteria for deciding whether new programs should be Type A adjudication.

When Congress creates a new program involving adjudication with opportunity for an evidentiary hearing, it should consider and explicitly determine whether the new program will be Type A or Type B adjudication.

Congress should consider the following factors (the presence of which would weigh in favor of the use of Type A rather than Type B adjudication):

a. Whether the adjudication is likely to involve a substantial impact on personal liberties or freedom, whether the orders carry with them a finding of criminal-like culpability or would have substantial economic effect, or whether the orders involve determinations of discrimination under civil rights or analogous laws.

b. Whether the adjudication would be similar to, or the functional equivalent of, a current type of Type A adjudication.

c. Whether the adjudication would be one in which adjudicators ought to be lawyers.

Please note that this provision relating to criteria for choosing between Type A and Type B adjudication is not included in the Bill language above since it is not intended to be a statutory provision.

B. Default provision.

Congress should amend the APA to provide prospectively that, absent a statutory requirement to the contrary, in any future legislation that creates an opportunity for hearing in an adjudication, such hearing shall be Type A adjudication.

V. Issues relating to evidence

Section 556(d) should be amended by adding the italicized language:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. 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. *Evidence may be excluded, although relevant, if its probative value is substantially outweighed by the danger of confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative 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 may be entirely based on evidence that would be inadmissible in a civil trial.* [The remainder of §556(d) remains the same]

VI. Declaratory orders

Section 555 should be amended by adding thereto the following subsection:

(f) Declaratory orders. *The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.*

VII. Transcripts

Section 556(e) should be amended by adding the italicized language and striking the crossed-out language:

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. ~~and, on payment of lawfully prescribed costs, shall be made available to the parties.~~ *Agencies shall make such transcripts available to the parties at the actual cost of duplication.* When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

VIII. Superseding contrary statutory provisions

The provisions of this act supersede existing contrary statutory provisions.

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Section on Administrative Law and Regulatory Practice

Submitted By: Randolph J. May, Section Chair

1. Summary of Recommendation.

This recommendation urges Congress to amend the adjudication sections of the Administrative Procedure Act (APA). At present these provisions apply only to certain hearings presided over by administrative law judges (ALJs) (Type A adjudication). A large number of federal statutes provide for evidentiary hearings that are not presided over by ALJs (Type B adjudication). This recommendation urges Congress to extend certain fundamental fair hearing provisions presently applicable to Type A adjudication to Type B adjudication. It also proposes a number of other provisions that would modernize the adjudication provisions of the APA.

2. Approval by Submitting Entity.

The recommendation was unanimously approved by the Council of the Section on Administrative Law and Regulatory Practice (Section) on August 7, 2004.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

Because the recommendation proposes a package of recommendations relating to federal administrative adjudication, it includes two related recommendations that were previously approved by the House of Delegates: Resolution 101B (August, 2001) calling for adoption of ethical codes for the administrative judiciary and Resolution 113 (July 2000) concerning the factors Congress should consider when adopting new adjudicatory schemes. These prior recommendations have not been substantively altered but have been slightly modified to make their language consistent with the recommendation summarized in item 1. above.

5. What urgency exists which requires action at this meeting of the House?

The recommendation is not urgent.

6. Status of Legislation. (If applicable.)

None pending.

7. Cost to the Association. (Both direct and indirect costs.)

The recommendation does not call for the ABA to incur costs other than the normal costs relating to lobbying in favor of a legislative proposal.

8. Disclosure of Interest. (If applicable.)

The proponents of this recommendation have no conflicts of interest. No Section members abstained because of a conflict of interest.

9. Referrals.

This recommendation will be submitted to all Sections, Divisions, and Forums.

10. Contact Person. (Prior to the meeting.)

Questions should be referred to Michael Asimow, UCLA Law School, Los Angeles, CA 90095-1476. Asimow's phone number is (310) 825-1086. His email address is asimow@law.ucla.edu. Questions can also be referred to Section delegates Thomas M. Susman or Judith S. Kaleta. Mr. Susman's address is 1301 K St. NW, Suite 800 East, Washington DC 20005. His phone number is (202) 626-3920 and his email address is Tsusman@Ropesgray.com. Ms. Kaleta's address is Department of Transportation, 400 7th St. SW, Room 10428, Washington DC 20590. Her phone number is (202) 493-0992 and her email address is judy.kaleta@ost.dot.gov.

11. Contact Person. (Who will present the report to the House.)

Section delegates Thomas M. Susman will present the recommendation to the House.

