July 25, 2006

The Honorable Chris Cannon
Chair
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Hearing on “The 60th Anniversary of the Administrative Procedure Act (P.L. 79-404): Where Do We Go From Here?”

Dear Mr. Chairman:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members, I write to advise your subcommittee of the great interest that the ABA, particularly its Section of Administrative Law and Regulatory Practice (the “Section”) and its Judicial Division’s National Conference of the Administrative Law Judiciary (“NCALJ”), has in the subject of today’s scheduled hearing on “The 60th Anniversary of the Administrative Procedure Act (P.L. 79-404): Where Do We Go From Here?” The 60th anniversary of the Administrative Procedure Act (“APA”) is indeed an important milestone and we are most grateful for the opportunity to participate in this celebration. It is our hope that we can work with you and your Subcommittee on possible administrative law reforms. As the Chair of the Section, I have been authorized to express the ABA’s views on this important subject and request that this letter be included in the official record of today’s Subcommittee hearing.

The ABA, including the Section of Administrative Law and Regulatory Practice and NCALJ, has a longstanding interest in the APA and its improvement. Accordingly, the ABA has adopted policy on a host of issues regarding the APA over the years, including reforms in rulemaking, public information and judicial review. In 2001, the Section completed a comprehensive review of the APA culminating in a restatement of administrative law.1 The most recent ABA policy pertaining to the APA is a resolution proposing amendments to some sections of the APA relating to adjudication. We request that your Subcommittee give due consideration to this proposed amendment during your reexamination of the APA.

---

Below we have highlighted some issues of pressing concern to the ABA. These include: amendment of the adjudication provisions of the APA, reauthorization and appropriation of funds for the Administrative Conference of the United States, and creation of the “Administrative Law Judge Conference of the United States.”

1. Proposed Changes in APA Adjudication

The rulemaking, public information, and judicial review provisions of the APA apply to all federal agencies (with specific exceptions). However, this is not the case with the adjudication sections of the APA (primarily sections 554, 556 and 557). These sections presently apply only to a small subset of the subject matter of federal agency adjudications: Social Security Act disability, old-age and survivors benefits claims, Medicare claims, labor law cases, and certain hearings conducted by about 20 other independent regulatory agencies and other Executive Branch agencies. We call these Type A hearings.

These APA provisions guarantee basic, fundamental fairness. They provide for the right to present evidence and confront the opponent’s evidence; require an impartial decision-maker; prohibit ex parte contacts; require separation of adjudicatory from advocacy functions within the agency; and require a statement of findings and reasons. Unfortunately, however, the APA adjudication provisions do not apply under present law to a vast number of adjudications in which an evidentiary hearing is required by federal statutes. Some of the excluded hearings are cases involving immigration and asylum, veterans’ benefits, government contract disputes, civil money penalties, security clearances, IRS collection disputes, and about 80 other hearing schemes. We call these Type B hearings. There is no logical reason for the distinction between Type A and Type B hearings. Yet the number of statutes calling for Type B hearings is steadily increasing while the number of statutes calling for Type A hearings remains relatively constant. The APA should apply to all adjudicatory hearings required by statute that are conducted by federal agencies.

In 2005, the ABA adopted a resolution urging Congress to apply the adjudication provisions of the APA to Type B adjudication for the first time. This ABA policy, attached as Appendix A, includes draft legislative language as well as a detailed explanatory report. The ABA strongly urges the Subcommittee to support the APA reforms outlined in this resolution.

Although the ABA’s proposal would subject Type B hearings to the adjudication provisions of the APA, one important part of the existing APA would not be applied to Type B hearings under our proposal. Specifically, these hearings would not be conducted by administrative law judges (“ALJs”). In an ideal world, ALJs would preside in all hearings required by federal statutes, but this does not appear to be feasible at this time. Nonetheless, these proposed reforms would offer vastly more protection to persons litigating against federal agencies than is provided by existing law.

In addition to expanding the APA adjudication provisions to Type B hearings, the ABA’s policy proposal calls for a number of other significant changes in these provisions. In particular, it: (1) mandates the adoption of a code of ethics for all administrative presiding officers, whether they serve in Type A or Type B hearings; (2) provides protection for full-time Type B presiding officers against dismissal without good cause; (3) expands the opportunity to seek a declaratory order; and
(4) clarifies various definitions in the existing Act that have caused confusion – in particular, the definition of a “rule.”

The drafters of the APA wanted to achieve uniformity of procedure in federal administrative law. They achieved that goal with respect to rulemaking, judicial review, and freedom of information, but they did not achieve it with respect to adjudication. Since 1946, a vast number of Type B hearing schemes have emerged that fall outside the APA’s protective umbrella. The ABA’s recommended reforms would bring Type B hearings under the APA umbrella, which in turn would, assure fair administrative procedures to generations of future litigants who find themselves in disputes with federal agencies.

2. Administrative Conference of the United States

In the Federal Regulatory Improvement Act of 2004, P. L. 108–401, Congress reauthorized the Administrative Conference of the United States (“ACUS”) for fiscal years 2005, 2006, and 2007. This reauthorization comports with long-standing ABA policy supporting ACUS and its reauthorization. Specifically, the ABA adopted policy in February 1989 that calls for reauthorization of ACUS with funding sufficient to permit the agency to continue its role as the government’s coordinator of administrative procedural reform. A copy of this ABA policy statement is attached as Appendix B. In our view, a revitalized ACUS could play a crucial role in the future development of the federal APA. Indeed, ACUS would be an ideal forum for exploring just the sort of comprehensive reevaluation of the APA that the Subcommittee has initiated. It could provide a vital, inclusive and prestigious adjunct to the Subcommittee’s work.

ACUS was originally established in 1964 as a permanent body to serve as the federal government’s in-house advisor, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1995. Through the years, ACUS was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist.

The ABA and its Section of Administrative Law and Regulatory Practice strongly supported the reauthorization of ACUS in 2004 and we applaud your strong leadership in both sponsoring and facilitating the passage of the legislation that made this possible. Since ACUS was reauthorized in 2004, the ABA has been honored to work with you and your staff in an effort to secure adequate funding for the reconstituted agency from Congress. As part of that effort, the ABA sent a letter to the Senate Appropriations Committee on July 18, 2006, urging them to provide funding for ACUS for fiscal year 2007 at the fully authorized level of $3.2 million. A copy of that letter is attached as Appendix C.

As the ABA explained in its correspondence to the Senate Appropriations Committee, now that Congress has enacted bipartisan legislation reauthorizing ACUS, the agency should be provided with the very modest resources that it needs to restart its operations without unnecessary delay. Unfortunately, neither the Senate nor the House Appropriations Committees have approved the funding that ACUS needs to reconstitute its staff, secure office space and supplies, and resume its critical work. Therefore, the ABA urges you and the Subcommittee to continue your efforts to
secure funding for ACUS for fiscal year 2007. In addition, whether or not ACUS receives this critical funding this year, we urge you to support legislation in the new 110th Congress that would reauthorize ACUS for fiscal year 2008 and beyond so that it can continue its vital mission.

3. Administrative Law Judge Conference of the United States

The ABA also encourages Congress to establish the proposed Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management ("OPM") with respect to Administrative Law Judges ("ALJs"), including their testing, selection, and appointment. The ABA’s proposal, adopted by the ABA House of Delegates in August 2005 and attached as Appendix D, would maximize administrative efficiency by consolidating services, promoting professionalism, promoting public confidence in administrative decision-making, ensuring high ethical standards for administrative law judges, and providing necessary Congressional oversight. Therefore, the ABA strongly urges the Subcommittee to support this proposal by approving legislation that would formally establish the ALJ Conference of the United States.

Thank you for considering the views of the ABA, the Section of Administrative Law and Regulatory Practice, and NCALJ on these critical issues. We stand ready to assist you and the Subcommittee in a reexamination of the APA at its 60th anniversary. We will be contacting your staff shortly to consider next steps. In the meantime, if you would like to discuss the ABA’s views in greater detail, please feel free to contact me at 317/274-4091 or the ABA’s senior legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098.

Sincerely,

[Signature]

Eleanor D. Kinney, Chair
ABA Section of Administrative Law and Regulatory Practice

cc: Members of the Subcommittee on Commercial and Administrative Law
The Honorable Jodi B. Levine, ABA Judicial Division
RECOMMENDATION 114

ADOPTED BY THE

HOUSE OF DELEGATES

OF THE

AMERICAN BAR ASSOCIATION

February 14, 2005

RESOLVED, That the American Bar Association urges Congress to amend and modernize the adjudication provisions of the Administrative Procedure Act and to expand certain fundamental fair hearings provisions of that Act by enacting legislation consistent with the attached draft bill entitled “Federal Administrative Adjudication in the 21st Century,” dated February 2005, recognizing the administrative law judge adjudication as the preferred type of adjudication for evidentiary proceedings conducted under the Administrative Procedure Act.

*Note: The “Recommendation,” but not the attached “Report,” constitutes official ABA policy.
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";
   (B) by inserting "or in a Type A or Type B adjudication" at the end
       of paragraph (1); and
   (C) by striking paragraph (2) and redesigning paragraphs (3), (4),
       (5), and (6) as paragraphs (2), (3), (4), and (5), respectively;
(2) in subsection (b), by inserting "in a Type A or Type B adjudication"
       after "an agency hearing" in the matter preceding paragraph (1);
(3) in subsection (c),
   (A) by inserting "In a Type A or Type B adjudication," at the
       beginning of the subsection; and
   (B) by striking "on notice and in accordance with sections 556 and
       557 of this title" and inserting "in accordance with the procedures for Type
       A adjudication specified in subsection (d) or Type B adjudication
       specified in subsection (e)";
(4) in subsection (d),
   (A) by designating the first sentence as paragraph (2) and by striking "he"
       in that sentence and inserting "he or she";
   (B) by designating the second sentence as paragraph (3) and redesigning
       the existing paragraphs (1) and (2) in that sentence as subparagraphs (A) and (B),
       respectively;
   (C) by designating the third and fourth sentences as paragraph (4) and, in
       the first sentence as so redesignated, by striking all after "agency in a" and
       inserting "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 except as witness or counsel in public proceedings"; and
   (D) by inserting the following at the beginning of the subsection:
       "(1) A Type A adjudication shall be conducted in accordance with sections 556 and 557 of
       this title."; and
(5) by striking subsection (e) and inserting the following:
       "(e)(1) A Type B adjudication shall be conducted in accordance with the procedures
       specified in this subsection.
       (2) 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) The functions of a presiding officer or an officer who reviews the decision of
       a presiding officer shall be conducted in an impartial manner.
       (4)(A) A presiding officer shall make the recommended or initial decision in the
       adjudication 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 with 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

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

"(F) 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.

"(G) 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.

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

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

(g) Nothing in this section shall affect the requirements relating to agency or judicial review that are presently provided by statute.

SEC. 4. SUNSHINE ACT EXCEPTION.

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

SEC. 5. DECLARATORY ORDERS.

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

"(f) 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.".
SEC. 6. ISSUES RELATING TO EVIDENCE.

Section 556(d) of title 5, United States Code, is amended--
(1) by inserting "and may be entirely based on evidence that would be
inadmissible in a civil trial" at the end of the third sentence; and
(2) by adding the following after the second sentence: "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."

SEC. 7. ALJ AND PO ETHICAL STANDARDS; REMOVAL AND DISCIPLINE
OF PRESIDING OFFICERS.

(a) Title 5, United States Code, is amended by inserting after section 559 the
following:
"§ 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 section 553(b) and (c)
of this title.

"§ 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 the discipline or removal of a
presiding officer."

(b) The analysis for chapter 5 of title 5, United States Code, is amended by
inserting the following after the item relating to section 559:
560b. Removal and discipline of presiding officers."

SEC. 9. SUPERSEDING CONTRARY STATUTORY PROVISIONS.

The provisions of this act supersede existing contrary statutory provisions.
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 Act\(^3\) 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 the procedural 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).

---

\(^1\) 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).
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).
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

II. 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.⁷ We propose to extend certain procedural protections that are presently applicable to Type A adjudication to Type B adjudication.⁸

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

---

⁷ The proposals discussed in Parts II to VII apply to Type A adjudication but do not involve fundamental changes.
⁸ These recommendations relate only to “adjudication” which, as discussed in part III below, means action of particular rather than general applicability. Thus, proceedings for rulemaking 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 treated as Type B adjudication.
⁹ 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.
⁸ 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.
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

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.\(^\text{10}\) Type B adjudication covers a wide range of evidentiary proceedings that are conducted by presiding officers (POs) who are not ALJs.\(^\text{11}\)

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.\(^\text{12}\) 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.\(^\text{13}\) 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.\(^\text{14}\) 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.\(^\text{15}\)

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.\(^\text{16}\) Frye identified 2,692

\(^{10}\) 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.


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,\textsuperscript{17} as well as passport 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.\textsuperscript{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).\textsuperscript{19} Frye reported 393,800 Type B proceedings each year; Limon reported 556,000 (a 41% increase).\textsuperscript{20}

POs may be full-time decisionmakers or may be agency staff members who engage in part-time judging along with other tasks.\textsuperscript{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).\textsuperscript{22} Most of the full-time POs are lawyers but most of the part-time POs are not lawyers.\textsuperscript{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

\textsuperscript{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 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).


\textsuperscript{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 Frey and Limon reports, the hiring of ALJs was frozen. But for the freeze, the number of ALJs would undoubtedly have expanded more rapidly.

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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.

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

---

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).

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.
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. Some statutes use terms other than “hearing” to describe such proceedings but the intention of the statute is to call for an “evidentiary proceeding.” 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).

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. 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), 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).

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).

28 In immigration cases, the statute states that an Immigration Judge (IJ) “shall conduct proceedings for deciding the admissibility 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, expedient, 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
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 evidentiary proceeding. Due process cases use an ad hoc balancing test to decide what procedures are applicable 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. 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.

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;
- 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;

(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).

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).


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 29 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
• Decisionmaker impartiality;\textsuperscript{39}
• Decisionmaker independence and separation of functions;\textsuperscript{40}
• Prohibition on ex parte contacts with decisionmakers;\textsuperscript{41}
• The exclusive record and official notice provisions;\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{45}

\textsuperscript{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.

\textsuperscript{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.

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

\textsuperscript{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.

\textsuperscript{43} Proposed APA §554(e)(6) requires a PO’s decision to include

\textquotedblleft 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.

\textsuperscript{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.

\textsuperscript{45} 5 USC §552b(c)(10).
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.\(^{46}\)
- 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.\(^{50}\)

---


\(^{47}\) 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."
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. Section 559b is also based on ABA Resolution 101B. POs should be protected 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. 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.”

The statute should be amended so that agency action of general applicability is a rule and agency application of particular applicability is adjudication. 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. This

---

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 U.S.C. §7521(b)(A) and (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.


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 therefore 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.
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, 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 appropriate notice and comment procedures. 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.

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.

---

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.

58 See ABA House of Delegates 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.
c. Whether the adjudication would be one in which adjudicators ought to be lawyers.\textsuperscript{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.\textsuperscript{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...”\textsuperscript{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 Type A or Type B. The case law is conflicting.\textsuperscript{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.\textsuperscript{64}

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

\textsuperscript{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.

\textsuperscript{62} APA §554(a).

\textsuperscript{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).

\textsuperscript{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.
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 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).

\(^66\) APA §556(d).
\(^69\) The ellision in this quotation is for the words “or misleading the jury” and “danger of unfair prejudice,” which seem inapplicable to the administrative process.
VI. Declaratory orders

Existing §554(c) 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 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,
Randolph J. May
Chair, Section of Administrative Law and
Regulatory Practice

February 2005

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 536 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
(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;

---

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.
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.
(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 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

(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

75 The provision for declaratory orders is moved from §554 to §555. See VI. below.
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.
RECOMMENDATION 126A

ADOPTED BY THE

HOUSE OF DELEGATES

OF THE

AMERICAN BAR ASSOCIATION

February 1989

BE IT RESOLVED, that the American Bar Association supports the reauthorization of the Administrative Conference of the United States (ACUS) and the provision of funds sufficient to permit ACUS to continue its role as the government's in-house advisor and coordinator of administrative procedural reform.
July 18, 2006

The Honorable Thad Cochran
Chairman
Committee on Appropriations
United States Senate
Washington, D.C. 20510

The Honorable Robert C. Byrd
Ranking Member
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Re: Funding the Newly Reauthorized Administrative Conference of the United States for Fiscal Year 2007

Dear Chairman Cochran and Ranking Member Byrd:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members nationwide, I write to express our strong support for funding the Administrative Conference of the United States ("ACUS") for fiscal year 2007 at the fully authorized level of $3.2 million. As your Committee prepares to mark up the Transportation, Treasury Appropriations Bill later this week, we urge you to provide full funding for ACUS, which was just reconstituted in the last Congress by the enactment of the "Federal Regulatory Improvement Act of 2004" (P.L. 108-401, formerly, H.R. 4917). Once it is provided with this modest funding, the agency will be able to restart its operations and then begin addressing the many important tasks that may be assigned to it by Congress, including, for example, assisting the Department of Homeland Security to consolidate the administrative processes from the more than 20 federal agencies that were included in the new Department.

ACUS was originally established in 1964 as a permanent body to serve as the federal government's in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1995. In 2004, Congress held several hearings on ACUS reauthorization, and during those hearings, all six witnesses, including Supreme Court Justices Antonin Scalia and Stephen Breyer, praised the work of the agency. The written testimony of Justices Scalia and Breyer is available on the ABA's website at http://www.abanet.org/poladv/ACUSreauthorization.html.
Following these hearings, H.R. 4917 was introduced by Rep. Chris Cannon (R-UT), Chairman of the House Judiciary Subcommittee on Commercial and Administrative Law, for the purpose of reauthorizing and resurrecting the agency. That bipartisan legislation ultimately garnered 34 cosponsors—including 18 Republicans and 16 Democrats—before being approved unanimously by the House and Senate at the end of the 108th Congress. President Bush then signed the measure into law on October 30, 2004.

At the request of Chairman Cannon, the Congressional Research Service ("CRS") prepared a short study describing the many benefits of ACUS, and a copy of the CRS Memorandum of October 7, 2004 is also available at http://www.abanet.org/poladv/ACUSreauthorization.html. As outlined by CRS, ACUS has many virtues, including the following:

- **A newly-reconstituted ACUS would provide urgently needed resources and expertise to assist with difficult administrative process issues arising from the 9/11 terrorist attacks against the United States as well as other new administrative issues.** The CRS Memorandum concludes that “[ACUS’s] reactivation would fill the current urgent need for an expert independent entity to render relevant, cost-beneficial assistance with respect to complex and sensitive administrative process issues raised by 9/11 restructuring and reorganization efforts,” including the creation of the Department of Homeland Security by consolidating parts of 22 existing agencies and the 9/11 Commission’s recommendations to establish a new intelligence structure. In addition, CRS noted that ACUS could provide valuable analysis and guidance on a host of other administrative issues, including public participation in electronic rulemaking, early challenges to the quality of scientific data used by agencies in the rulemaking process, and possible refinements to the Congressional Review Act. A fully-funded ACUS could effectively address these and myriad other issues involving administrative process, procedure, and practice at a cost that is minimal when compared to the benefits that are likely to result.

- **ACUS enjoys strong bipartisan support and all observers agree that it has been extremely cost-effective.** As CRS also noted in its Memorandum, all six of the witnesses who testified before the House Judiciary Subcommittee on Commercial and Administrative Law agreed that during the more than 25 years of its existence, “...the Conference was a valuable resource providing information and guidance on the efficiency, adequacy and fairness of the administrative procedures used by agencies in carrying out their missions.” ACUS was unique in that it brought together senior representatives of the federal government with leading practitioners and scholars of the private sector to work together to improve how our government functions. That collaboration has been sorely missed in many ways, as was so clearly brought out in the hearings. As CRS explained, ACUS produced over 180 recommendations for agency, judicial, and congressional actions over the years, and approximately three-quarters of these reforms were adopted in whole or in part. Because ACUS achieved these impressive reforms with a budget of just a few million dollars per year, CRS noted that “all observers, both before and after the demise of ACUS in 1995, have acknowledged that the Conference was a cost-effective operation.”

- **Before it was terminated in 1995, ACUS brought about many significant achievements.** In addition to providing a valuable source of expert and nonpartisan advice to the federal government, ACUS also played an important facilitative role for agencies in implementing changes or carrying out recommendations. In particular, Congress gave ACUS facilitative statutory responsibilities for implementing a number of statutes, including, for example, the Equal Access to Justice Act, the
Congressional Accountability Act, the Government in the Sunshine Act, the Administrative Dispute Resolution Act, and the Negotiated Rulemaking Act. In addition, ACUS’ recommendations often resulted in huge monetary savings for agencies, private parties, and practitioners. For example, CRS cited testimony from the President of the American Arbitration Association which stated that "ACUS’s encouragement of administrative dispute resolution had saved ‘millions of dollars’ that would otherwise have been spent for litigation costs.” CRS also noted that in 1994, the FDIC estimated that “its pilot mediation program, modeled after an ACUS recommendation, had already saved it $9 million.” The CRS Memorandum provides numerous additional examples of ACUS’ prior successes as well.

ACUS’ role in the regulatory process is totally separate and distinct from that of OIRA. In the past, some have suggested that ACUS’ activities perhaps may duplicate some of the activities of OMB’s Office of Information and Regulatory Affairs ("OIRA"). This reflects a misunderstanding of ACUS’ fundamental role in the regulatory process. By virtue of its history and institutional design, ACUS is uniquely in a position to achieve bi-partisan consensus on administrative and regulatory improvements; to provide a forum for executive and independent agencies to exchange “best practices” ideas; and to bring private sector lawyers and academics together with political and career government officials to address ways to improve government operations.

OIRA is a very different type of entity that is neither inclined nor equipped to address many of the issues that ACUS has focused on. For example, there is no way that OIRA could have devoted so much time and attention to developing the ADR techniques that so many government agencies adopted. Nor does OIRA play any role in agency adjudication or judicial review issues. OIRA’s principal role is to represent the President in making sure that the Administration’s regulatory policy is followed. ACUS’s role, on the other hand, is to be an independent catalyst for seeking to reform and improve administrative and procedural issues that necessarily tend to receive less attention in Congress or the White House in the face of what are deemed more pressing day-to-day matters.

In sum, now that Congress has enacted bipartisan legislation reauthorizing ACUS, the agency should be provided with the very modest resources that it needs to restart its operations without unnecessary delay. To accomplish this goal, we urge you to provide $3.2 million in funding for ACUS for fiscal year 2007 during your Committee’s markup of the Transportation Treasury Appropriations Bill later this week.

Thank you for considering the views of the ABA on this important issue. If you would like to discuss the ABA’s views in greater detail, please feel free to contact the ABA’s senior legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098, or the Chair of the ACUS Task Force of the ABA Administrative Law Section, Warren Belmar, at 202/586-6758.

Sincerely,

Robert D. Evans

Robert D. Evans
cc: The Honorable Christopher S. Bond
    The Honorable Patty Murray
    All other members of the Senate Committee on Appropriations
    The Honorable Arlen Specter
    The Honorable Orrin G. Hatch
    The Honorable Patrick J. Leahy
    The Honorable Jeff Sessions
    The Honorable Charles E. Schumer
    The Honorable Jerry Lewis
    The Honorable David R. Obey
    The Honorable Joseph Knollenberg
    The Honorable John W. Olver
    The Honorable Chris Cannon
RECOMMENDATION 106A

ADOPTED BY THE

HOUSE OF DELEGATES

OF THE

AMERICAN BAR ASSOCIATION

August 9, 2005*

RESOLVED, that the American Bar Association encourages Congress to establish the Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management with respect to Administrative Law Judges including their testing, selection, and appointment.

*Note: The "Recommendation," but not the attached "Report," constitutes official ABA policy.
REPORT

Federal administrative law judges ("ALJ") have been members of the American Bar Association, Judicial Division, National Conference of the Administrative Law Judiciary, since 1971; this resolution renews and extends existing American Bar Association policy.¹

The Office of Personnel Management ("OPM") is mandated to administer the ALJ program and to maintain a register of qualified applicants and test and evaluate prospective applicants.² However, OPM recently closed its Office of Administrative Law Judges and has otherwise failed to adequately service the agencies and the judges under its mandate. In 2003, the functions were dispersed to other OPM divisions, without notice to the agencies or to ALJs regarding the terms of transfer. Thus, there is no central administrative office to administer the administrative law judge program at OPM, and there is no agency that provides suggestions to Congress to improve the administrative adjudication process.

The Administrative Law Judge Conference of the United States will perform those functions and enhance the independence of decision-making and the quality of adjudications of administrative law judge hearings under the Administrative Procedure Act ("APA"). The Administrative Law Judge Conference of the United States would be similar to the Judicial Conference of the United States, which provides administrative functions for Federal Article III judges, but its creation would effect no change in the current relationship between ALJs and the agencies where they serve. Rather the new Conference would assume the current responsibilities of OPM with respect to administrative law judges, including their testing, selection, and appointment.

Federal administrative law judges are appointed under 5 U.S.C.§ 3105.³ Their powers emanate

¹ The American Bar Association has adopted policy supporting the independence and integrity of the administrative judiciary in 1983, 1989, 1998, 2000 and 2001. Indeed, the Association’s commitment to the independence of the administrative judiciary is reflected in the jurisdictional authority of the Standing Committee on Judicial Independence, which is authorized to promote this value.

² The classification of "administrative law judge" is reserved by OPM for the specific class of appointments made under 5 U.S.C. § 3105 and applies to all agencies:

“The title 'administrative law judge' is the official class title for an administrative law judge position. Each agency will use only this official class title for personnel, budget, and fiscal purposes.” 5 C.F.R. § 930.203b.

5 C.F.R. § 930.201 requires OPM to conduct competitive examinations for administrative law judge positions and defines an ALJ position as one in which any portion of the duties includes those which require the appointment of an administrative law judge under 5 U.S.C. 3105. ALJs can only be appointed after certification by OPM:

An agency may make an appointment to an administrative law judge position only with the prior approval of OPM, except when it makes its appointment from a certificate of eligibles furnished by OPM. 5 C.F.R. § 930.203a. Id. § 930.203a; see also 5 U.S.C. § 5372 (2000) (providing for pay for administrative law judges, also subject to OPM approval).

³ See also, 5 U.S.C. sec. 5372 (a) ("For the purposes of this section, the term ‘administrative law judge’ means an administrative law judge appointed under section 3105.")
from the Administrative Procedure Act.\(^4\) Extensive legal experience is necessary for the position, because experience provides maturity, expertise in compiling a reliable record, first-hand knowledge with problems likely to be encountered as an administrative law judge, and intimacy with rules of evidence and procedure similar to those used in administrative hearings.\(^5\) After reviewing the duties of the office, the Supreme Court has declared that federal administrative law judges are like other federal trial judges for tenure and compensation\(^6\) and that ALJs are functionally equivalent to other Federal trial judges: \(^7\)

Cases heard and decided by ALJs involve billions of dollars and have considerable impact on the national economy. In fact, a single ALJ may handle a single case that may affect millions of people and involve billions of dollars. ALJs adjudicate cases involving a wide range of regulatory matters...

**The Office of Personnel Management**

The need for a separate agency to manage the ALJ program is prompted by longstanding problems with OPM’s administration of the program. The APA contemplated that the Civil Service Commission (now OPM)\(^8\) would oversee merit selection and appointment of ALJs and would also act as an ombudsman for the ALJ program but OPM has essentially abandoned that role. Section 1305 provides that for the purpose of sections 3105 (appointment), §3344 (loans), and §5372 (pay) OPM “may... investigate, require reports by agencies, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees.” Although the OPM Program Handbook, p. 4, affirms those responsibilities, OPM has seldom exercised them, except for regulations, including sometimes less-than-benevolent changes in selection and RIF regulations.\(^9\)

On May 21, 1991, the National Conference of Administrative Law Judges (NCALJ)\(^10\), in the Judicial Division of the American Bar Association, wrote to OPM, pointing out that:

\(^4\) See, A Guide to Federal Agency Adjudication, Michael Asimow, ed., 164 (American Bar Association Administrative Law Section, 2003). For example, subject to published rules of the agency, administrative law judges are empowered to administer oaths, issue subpoenas, receive relevant evidence, take depositions, and regulate the course of the hearing. These fundamental powers arise from the Administrative Procedures Act “without the necessity of express agency delegation” and “an agency is without the power to withhold such powers” from its administrative law judges. Id. The Administrative Procedure Act seeks to affirm and protect the role of the administrative law judge, whose “impartiality,” in the words of the Supreme Court in Marshall v. Jerrico, 446 U.S. 238, 250 (1980), “serves as the ultimate guarantee of fair and meaningful proceedings in our constitutional regime.”


\(^7\) Federal Maritime Comm’n v. South Carolina State Ports Authority, 535 U.S. 743 (2002); see also, Rhode Island Dept. of Environmental Management v. United States, 304 F.3d 31 (1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges).

\(^8\) Administration of the ALJ program was originally placed in the Civil Service Commission and was subsequently bifurcated to OPM and the Merit Systems Protection Board (“MSPB”).


\(^10\) Now the National Conference of the Administrative Judiciary.
OPM has not taken a leadership role in the education of either ALJs or the agencies as to the nature of their relationship or the judge’s function, or in the supervision or investigation of problems related to that relationship and function. OPM has not conducted or sponsored orientation programs for ALJs or their administrators, has not monitored the appointment of sufficient numbers of ALJs by agencies (although traditionally it has carefully monitored appointments to prevent the appointment of too many), has not adopted or proposed uniform rules for conduct, procedure, robes, support staff, office or hearing space, and has not investigated or made recommendations on any of these questions, or the long-standing strife between the SSA and its ALJs, or, most recently, the apparent due process breakdown at MSPB in connection with projected furlough of ALJs in fiscal 1991.

That letter suggested 10 items that OPM should undertake to improve relationships between ALJs and their agencies and the lot of ALJs generally, including education for ALJs and their reviewing authorities, administrative leave for education, guidelines for offices, staff support, robes and perks, model procedural rules, standards of conduct, appointment of sufficient judges by agencies, a mini-corps, and an investigation of the SSA and furlough situations and pay issues. In June 1991 OPM forwarded that letter to the Administrative Conference of the United States (ACUS) for consideration in connection with its study of the federal administrative judiciary. That study was completed in 1992 and recognized the importance of continuing and improving the position of ALJs and the ALJ program. However, OPM neither referenced nor dealt with any of the NCALJ concerns, and OPM undertook no action on the report even though it sponsored it.

In August 1994 NCALJ again sought a response to its letter and was told by OPM in a September 8, 1994, letter that “several of your concerns appear to be more appropriately identified as agency matters” and that “other concerns appear to involve matters which conflict with this agency’s evolving policy of returning greater responsibility for personnel management to the agencies.” The letter did not address the fact that such a policy might conflict with OPM’s responsibilities under the APA. In short, while OPM has responsibility to study and report to Congress concerning the ALJ program, it has not done so and has proclaimed an interest in returning its function to the agencies.

From 1998 to 2004, agencies were generally unable to hire new judges from the OPM register. While *Azdeff* was pending, OPM suspended the examination process for administrative law judges (ALJ). Therefore, the ALJ register became dated. With one exception, agencies could not hire judges from the ALJ Register during this period. In *Bush v. Office of Personnel Management*, 315 F.3d 1358 (Fed. Cir. 2003), after an applicant was rejected in his request to be given part of the ALJ examination, the Federal Circuit determined that the suspension of testing was a reviewable employment practice. On

11 1 C.F.R. § 305.92-7. [57 FR 61760, Dec. 29, 1992].


13 In August, SSA was granted a waiver by OPM to hire 126 judges who would have qualified under any scoring formula. See *Hearing Before the Subcommittee on Social Security Of the Committee on Ways and Means House of Representatives*, One Hundred Seventh Congress, Second Session (MAY 2, 2002).

14 Sunsetting American Bar Association policy establishes that with respect to the recruitment and selection of administrative law judges (ALJs) employed by federal agencies, OPM, and Congress, where necessary, are to develop strategies to increase the percentages of women and minority candidates, eliminate veterans' preferences from this process, allow selection by agencies from a broader range of candidates for ALJ positions, and enhance
February 27, 2004, the United States Supreme Court finally dismissed the requests for certiorari.

OPM has also failed to follow its own regulations concerning priority placement from the ALJ priority referral list (PRL), resulting in irreparable harm to an ALJ on the PRL and a preliminary injunction against its continued improper administration of the PRL.

Various other questions have arisen concerning the appropriate administration of the ALJ program, including the adoption of a Code of Judicial Conduct for ALJs, which OPM has refused to consider as part of its responsibility under present law. While OPM has met periodically with ALJ representatives, it has refused requests to establish an advisory committee or to meet with ALJ representatives on a regular basis to discuss these and other problems concerning the ALJ program.

Administration of the ALJ program by OPM has been inadequate, and OPM has repeatedly indicated by words and deeds that it does not want to continue responsibility for the administration of operational programs such as the ALJ program. Indeed, until 1998 the OPM long-range plan did not recognize the ALJ program as one of its responsibilities. From 1994-95 the Office of Administrative Law Judges was upgraded by placing an administrative law judge in charge of the office, but since that time the office director has been a personnel specialist rather than a judge and the office has been subordinated under other testing functions. For many years OPM refused to maintain a continuously open examination for ALJ applicants, and when it finally opened the register continuously, it applied illegal criteria, as noted above, in examining and scoring applicants. As a result of OPM inaction, agencies have not been able to address hiring needs.

Maximize Administrative Efficiency

The Administrative Law Judge Conference of the United States will assume all duties with respect to administrative law judges currently mandated to OPM. The budget currently dedicated to administration of an administrative law judges’ program by OPM will be transferred to the Administrative Law Judge Conference. Agencies will continue to select ALJs but the selection process and ALJ register will be managed by the Administrative Law Judge Conference of the United States.

It is also anticipated that the office of the Chief Judge will have the capacity to review rules of procedure, rules of evidence, peer review, and where appropriate, make suggestions for to promote administrative uniformity.

Ensure High Standards

The Administrative Law Judge Conference of the United States will assure high standards for

---

OPM's Office of Administrative Law Judges. Although OPM facially adhered to these requests, it failed to administer the system during the period when it was involved in the Azdel litigation.

15 Under 5 CFR §930.215, an ALJ who is separated from service because of a reduction in force (RIF) is entitled to priority referral for any ALJ vacancy ahead of others on the ALI register of eligibles maintained by OPM.


17 In 1998 and 1999, OPM advised ALJs that they are required to maintain active bar status to retain their status as ALJs, although there is no provision in the OPM regulations granting authority to do so. Unlike attorneys, ALJs are barred from the practice of law by the Code of Judicial Conduct (Canon 5F)(ABA, 1990), which has been applied to ALJs by the Merit Systems Protection Board (In re Choccallo, 1 MSPBR 612, 651 (1978) and by some agency regulations. In some states, Federal ALJs like other judges, cannot be members of the state bar. E.g. Alabama.
Federal Administrative Law Judges. It will permit the chief judge to adopt and issue rules of judicial conduct for administrative law judges. This is consistent with ABA policy, which states in part, that members of the administrative judiciary should be held accountable under appropriate ethical standards adapted from the ABA Model Code of Judicial Conduct in light of the unique characteristics of particular positions in the administrative judiciary.  

*Promote Professionalism*

The Conference can be used as a resource for continuing judicial education, consistent with ABA policy. ABA policy also encourages governmental entities at all levels to permit government lawyers, including those in judicial administrative positions, to serve in leadership capacities within professional associations and societies.

*Promote Public Confidence*

Establishment of the Administrative Law Judge Conference of the United States will significantly increase public trust and confidence in the integrity and independence of decision making by administrative law judges throughout the Federal Government.

*Congressional Oversight*

Congress needs a new organization to assure independent review of agency compliance with the APA and reporting to Congress on these important public safeguards for fundamental due process and the fair hearing process before administrative agencies. The Administrative Law Judge Conference of the United States will provide regular reports to the Congress on agency compliance with the APA and the provisions relating to ALJ utilization, management and compensation. This process will assist the Congress in its oversight of agency compliance with the APA. This reform permits Congress to maintain oversight on constitutional safeguards such as the right to an impartial and independent decision maker, notice and opportunity to appear at a hearing, a written explanation for the decision and the issuance of a timely hearing decision. This is consistent with ABA policy that Congress provide a practical process for agency matters.

Respectfully Submitted,

Louraine Arkfeld, Chair, Judicial Division
August, 2005

---


20 Policy 99-A-112. It also encourages governmental entities to adopt standards that would authorize government lawyers, including those in judicial administrative positions, to (1) make reasonable use of government law office and library resources and facilities for certain activities sponsored or conducted by bar associations and similar legal organizations, and (2) utilize reasonable amounts of official time for participation in such activities.