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Informal Administrative Adjudication: An Overview

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SUMMARY

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Informal Administrative Adjudication: An Overview

Federal agencies adjudicate a wide variety of matters, from applications for public benefits to enforcement actions against persons who have allegedly violated federal laws. Although the formal adjudication requirements of the Administrative Procedure Act (APA) establish an adversarial, trial-type process for federal agency adjudication, the vast majority of federal agency adjudications deviate from this formal model. The great number and diversity of schemes that federal agencies use to adjudicate disputes outside of the formal APA framework have, in recent years, attracted significant scholarly attention and raised legislative issues.

The term "agency adjudication" is generally understood to mean an agency action with the force of law that resolves a claim or dispute between specific individuals in a specific case. Adjudicative decisions can be contrasted with agency actions taken through *rulemaking*, which typically are forwarding-looking actions that affect the rights of broad classes of unspecified individuals.

Traditionally, federal agency adjudication is categorized as either formal or informal. "Formal adjudication" describes adjudicative proceedings that are governed by the APA's formal hearing provisions, contained in 5 U.S.C. §§ 554, 556–557. "Informal adjudication" is a residual term for all other adjudicative proceedings. The formal hearing provisions apply if a statute explicitly states that they apply or explicitly requires a hearing "on the record." Otherwise, courts often defer to reasonable agency interpretations of whether the formal hearing provisions govern an adjudicative proceeding.

The formal hearing provisions establish detailed specifications for oral, trial-type proceedings. Parties may present evidence and cross-examine witnesses, and the adjudicator must issue a decision with findings and conclusions. In addition, formal adjudications must be presided over by "administrative law judges" (ALJs), a special class of adjudicators who enjoy a unique level of independence from their employing agencies.

For informal adjudication, no uniform set of detailed statutory parameters applies. Procedural rules for informal adjudication come mostly from program-specific sources, such as the provisions of a statute that authorizes the adjudication system in question or, more often, agency-made rules and guidance. In addition, the Due Process Clause of the Fifth Amendment supplies a minimum threshold for procedural protections in agency adjudications that infringe life, liberty, or property interests. The due process analysis is flexible and does not always lead to the conclusion that an agency must provide additional procedures. While *agencies* are free to craft procedures for informal adjudication consistent with authority conferred by Congress, *courts* may not require additional procedures beyond those mandated by the APA, other relevant statutes, or the Constitution.

Recent studies published by the Administrative Conference of the United States, along with other scholarship, have surveyed and analyzed a range of informal adjudication schemes. Many informal adjudication schemes, such as Department of Justice immigration court proceedings, are "formal-like," in the sense that they consist of trial-type, adversarial evidentiary hearings but are not governed by the APA's formal hearing requirements. Other schemes, such as the Department of Veterans Affairs system for adjudicating applications for benefits, are non-adversarial: no government counsel appears at the evidentiary hearing, and the adjudicator must proactively develop facts and claims in the case. Still other schemes, such as the Department of State's process for adjudicating millions of visa applications annually, involve interviews or similar streamlined interactions, with few procedural protections. "Formal-like" schemes typically do not raise procedural due process issues, and the Supreme Court has upheld the use of non-adversarial schemes in benefits administration contexts. The streamlined interview model, however, is typically constitutional only where due process does not apply or applies with reduced force.

A small number of APA provisions apply by default to informal adjudication. The APA creates a presumption that final agency decisions made through informal adjudication, like other types of final agency action, are subject to judicial review. The APA also establishes "ancillary" protections—such as the right to retain counsel, to appear before the agency, and to receive notice of the grounds for an agency's denial of a request—that typically apply to formal and informal adjudication alike.

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Introduction

Trial procedure in the United States traditionally follows an adversarial model: opposing parties dispute claims and present evidence in court before a mostly passive referee (the judge) and finder of fact (judge or jury).[1] Congress adopted this adversarial model from the judiciary for federal agency adjudication in 1946 by enacting the Administrative Procedure Act (APA).[2] Federal agencies adjudicate a wide variety of matters, from applications for public benefits to enforcement actions against persons for alleged violations of federal law.[3] The APA formal adjudication requirements provide for adversarial proceedings in federal agency adjudication that in many respects resemble American civil trials.[4]

Congress and agencies often deviate from the APA's formal adjudication requirements, however, for a range of reasons, including administrative convenience,[5] the need to address high caseloads,[6] and the desire to craft more protective procedures for specific populations appearing before federal agencies.[7] While the APA's formal adjudication requirements may represent the paramount model of federal agency adjudication, they do not govern most federal agency adjudications.[8] Some of the so-called "informal" agency adjudication systems that fall outside the reach of the APA's formal adjudication requirements still resemble adversarial court trials.[9] Others are similar to inquisitorial proceedings from the civil law tradition, in which a proactive

[1] Herring v. New York, 422 U.S. 853, 862 (1975) ("[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."); Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 743 (1976) ("As a matter of Anglo-American culture, the historically favored system for dispute resolution is the adversary system, where control is reserved to the litigants, and the decision maker assumes a passive role."); Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749, 1761-62 (2020) [hereinafter Bremer, *Reckoning with Exceptionalism*] ("Although adversarial hearings are a hallmark feature of the American legal system, courts have held that an inquisitorial hearing in the administrative context can satisfy the Constitution's Due Process Clause.").

[2] 5 U.S.C. §§ 551 *et seq*.

[3] *See* Bremer, *Reckoning with Exceptionalism*, *supra* note 1, at 1763 (table of "top ten largest" federal administrative adjudication schemes).

[4] *Id*. §§ 554, 556-57; Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 149 (2019); *see infra* "Formal Adjudication."

[5] *See* Aaron L. Nielson, *Three Wrong Turns in Agency Adjudication*, 28 GEO. MASON L. REV. 657, 678 (2021) (arguing that "regulators sometimes may be tempted to take shortcuts" and that "agencies gradually persuaded courts to grant them greater discretion over the issue" of when formal adjudication requirements apply).

[6] Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963-64 (2020) (describing immigration legislation that "crafted a system for weeding out patently meritless claims" through the use of "more expedited procedures").

[7] Henderson v. Shinseki, 562 U.S. 428, 440 (2011) (noting that the "solicitude of Congress for veterans is [] long standing" and "plainly reflected" in procedural laws for the adjudication of veterans benefits that "place a thumb on the scale in the veteran's favor") (internal quotation marks omitted).

[8] Walker & Wasserman, *supra* note 4, at 153 ("Despite administrative law's fixation on APA-governed formal adjudication, the vast majority of agency adjudications and federal regulatory actions do not involve APA-governed formal adjudications . . . .").

[9] *See infra* "Adversarial Trial-Type Proceedings Not Governed by Formal APA Requirements."

decision maker "is free to seek evidence and to control the nature and objectives of the inquiry."[10] Still others consist of interviews or other streamlined interactions.[11]

This report offers a basic primer on informal federal agency adjudication. It reviews fundamental principles of agency adjudication and explains the APA's formal adjudication model. It then explores alternative types of agency adjudication that differ from the formal APA model and assesses some constitutional considerations relevant to Congress. The report concludes by reviewing the few procedural requirements that the APA imposes on all agency adjudications, including informal adjudications.

What Is Agency Adjudication?

Federal agencies perform their legislatively prescribed functions in a variety of manners.[12] In particular, a proceeding that produces a federal agency action of substantive, binding effect may take the form of a *rulemaking* or an *adjudication*.[13] Many agency proceedings may be difficult to classify precisely as either rulemaking or adjudication, but as a general matter "adjudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals."[14] Further, adjudications impose "immediate effect[s]" on parties in a proceeding, while rulemakings are "prospective" in nature and have "a definitive effect on individuals only after the rule subsequently is applied."[15] Thus, the products of rulemaking proceedings (in particular, legislative rulemaking proceedings)[16] typically are

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[10] JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 128 (3d ed. 2007); *see infra* "Non-Adversarial Evidentiary Hearings."

[11] *See infra* "Non-Adversarial Interviews or Inspections."

[12] CRS Legal Sidebar LSB10182, *D.C. Circuit Rules FTC Opinion Letter Not "Final Agency Action" Subject to Judicial Review*, by Daniel J. Sheffner, at 2 ("In addition to promulgating binding regulations and orders, agencies carry out their statutorily prescribed activities in countless other ways, including by gathering information and input from stakeholders and the public through public hearings and other formal and informal formats; issuing non-binding oral or written guidance detailing how they understand or interpret their statutory authority or obligations; and determining whether and how to utilize their discretion to enforce regulations and statutes they administer.").

[13] *See* United States v. Fla. East Coast R. Co., 410 U.S. 224, 245 (1973) (explaining that there is "a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards . . . and proceedings designed to adjudicate disputed facts in particular cases"). Under the APA, agency rules that bear the force of law generally must be promulgated in accordance with the statute's "informal rulemaking," or notice-and-comment, procedures. 5 U.S.C. § 553. However, where "rules are required by statute to be made on the record after opportunity for an agency hearing," an agency may issue a rule only after engaging in a trial-type, evidentiary proceeding governed by the formal procedures contained in 5 U.S.C. §§ 556 and 557. *Id.* § 553(c). This is known as "formal rulemaking." *See* CRS Report R46673, *Agency Rescissions of Legislative Rules*, by Kate R. Bowers and Daniel J. Sheffner, at 5. While the APA applies to rulemakings by default, Congress can impose additional or alternative rulemaking procedures on agencies. *Cf.* 5 U.S.C. § 559 (providing that a "[s]ubsequent statute may . . . supersede or modify" the APA if "it does so expressly"). Procedures, both from the APA and other sources, that govern adjudications are discussed throughout this report. *See infra*, *passim.*

In addition to issuing rules and adjudicative orders, agencies often also perform investigations. *See* Appeal of FTC Line of Business Report Litigation, 595 F.2d 685, 695 (D.C. Cir. 1978) ("The language and legislative history of the APA suggest a classification of agency activity into three basic categories: rulemaking, adjudication and investigation."). The APA contains provisions applicable to agency investigations at 5 U.S.C. § 555.

[14] Yesler Terrace Cmty. Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994); *see also* MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 62 (3d ed. 2009) [hereinafter ASIMOW & LEVIN (writing that an adjudication "affects *specific persons*" and that a rulemaking "affects a *class of persons*")].

[15] *Yesler Terrace Cmty*, 37 F.3d at 448.

[16] Bowers & Sheffner, *supra* note 13, at 1.

generally applicable, forward looking actions (commonly known as "regulations") bearing the force of law, whereas legally binding, backward looking actions determining the rights or obligations of specific parties based on facts specific to those parties are adjudicative decisions.[17] Agencies generally have flexibility to carry out their delegated responsibilities through the exercise of both rulemaking and adjudicatory authority.[18]

The APA defines "adjudication" with reference to interlocking definitions of related terms.[19] Taken together, in the words of one federal court of appeals, the definitions provide that "[a]n adjudication . . . is virtually any agency action that is not rulemaking."[20] While the APA defines a "rule" to include statements of "particular applicability,"[21] courts often adhere to the specific/general (and prospective/retroactive) dichotomy when determining if an action is an order or rule.[22]

Although an action's classification as "adjudicative" generally derives from its focus on individualized interests, adjudications often "serve as vehicles for the formulation of agency policies" and "generally provide a guide to action that the agency may be expected to take in

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[17] *See* Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 418 (1942). Note that, in some instances, an action of particular—as opposed to general—applicability may be classified as a rule. *See* 5 U.S.C. § 551(4) (definition of "rule" in the APA); *see infra* note 19.

[18] SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.").

[19] The APA states that an adjudication is the "agency process for the formulation of an order." 5 U.S.C. § 551(7). An order is defined as "the whole or a part of a final disposition . . . of an agency in a matter *other than rule making* but including licensing." *Id.* § 551(6) (emphasis added). A "rule making" under the APA is the "agency process for formulating, amending or repealing a rule," and a "rule," in turn, is "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. *Id.* § 551(4) (definition of "rule"), (5) (definition of "rule making"). The APA's definition of rule includes agency statements that do not carry the force of law or that are procedural in nature. *See* Bowers & Sheffner, *supra* note 13, at 6, 7–9

[20] Yesler Terrace Cmty. Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994). That said, agencies also engage in investigative acts, in addition to adjudications and rulemakings. *See supra* note 13.

[21] 5 U.S.C. § 551(4). *See supra* note 19.

[22] *See, e.g.*, Neustar, Inc. v. FCC, 857 F.3d 886, 895 (D.C. Cir. 2017); *see* MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 10–11 (2019) [hereinafter ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION]; *see also* Safari Club Int'l v. Zinke, 878 F.3d 316, 333 (D.C. Cir. 2017) ("[R]ules generally have only 'future effect' while adjudications immediately bind parties by retroactively applying law to their past actions.").

In *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 244 (1973), the Supreme Court explained that "[t]he basic distinction between rulemaking and adjudication is illustrated by" the Court's earlier decisions in *Londoner v. Denver*, 210 U.S. 373 (1908), and *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915). In *Londoner*, the Court held that a city ordinance that assessed a particular tax against the residents of a district but that did not allow the residents an opportunity for an oral hearing deprived the plaintiff of due process. 210 U.S. at 374, 385–86. However, in *Bi-Metallic*, the Court held that an order from two state boards that raised the tax value of all taxable properties in Denver, Colorado, but which did not afford residents an opportunity for a hearing, did not violate due process. 239 U.S. at 443, 445–46. The *Bi-Metallic* Court distinguished its earlier decision in *Londoner* by explaining that, in the former case, a "relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds." *Id.* (citing *Londoner*, 210 U.S. at 385). These cases stand for the traditional proposition that, while procedural due process may protect parties' rights in certain administrative adjudications, *see infra* "Due Process and Other Sources of Adjudication Procedures," procedural due process concerns are not present in the rulemaking context. *See* ASIMOW & LEVIN, *supra* note 14, at 62 (writing that "[p]rocedural due process does not apply to rulemaking"); *but see* Ass'n of Am. R.R. v. Dep't of Transp., 821 F.3d 19, 34 (D.C. Cir. 2016) (holding that "[b]ecause [the Passenger Rail Investment and Improvement Act of 2008] endows Amtrak with regulatory authority over its competitors, that delegation violates due process").

future cases."[23] Courts, however, have determined that adjudications were actually improper rules where they "had no immediate, concrete effect on anyone."[24] Further, that only one party is affected by an agency's action does not necessarily render that action an adjudication rather than a rulemaking.[25] In *Anaconda Co. v. Ruckelshaus*,[26] for example, the U.S. Court of Appeals for the Tenth Circuit held that the Environmental Protection Agency was not required to provide a "trial type adjudicatory hearing" before issuing a regulation that "would apply to [one entity] alone," as "there [were] many other interested parties and groups who [would be] affected" by the agency's action.[27]

As discussed in more detail below, administrative adjudications take a variety of forms ranging from fairly judicialized and procedurally complex to highly informal and procedurally minimal.[28] Many proceedings, including adversarial proceedings governed by the APA's formal hearing provisions,[29] may resemble civil bench trials in federal district court.[30] Others, governed by substantive statutes, such as tariff classification rulings, lack robust procedural rules and protections.[31] In addition to adversarial proceedings—which are characterized by "partisan advocacy on both sides of a case" and in which "control is reserved to the litigants"[32]—many federal adjudication proceedings are inquisitorial in nature, whereby an agency's adjudicator, not the parties to the proceedings, bears primary responsibility for developing the issues in a case.[33]

"Formal" and "Informal" Adjudications

Courts, commentators, and practitioners often characterize federal administrative adjudications either as "formal adjudications," which are adjudicative proceedings that are statutorily governed

[23] NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765-66 (1969) (plurality); *see* Neustar, Inc. v. FCC, 857 F.3d 886, 894 (D.C. Cir. 2017) ("The fact that an order rendered in an adjudication may affect agency policy and have general prospective application[] does not make it rulemaking subject to APA section 553 notice and comment.") (internal quotation marks and citations omitted).

[24] *Yesler Terrace Cmty*, 37 F.3d at 448 (explaining that a determination by the Department of Housing and Urban Development had "all the hallmarks of a rule" because it "had no immediate, concrete effect on anyone, but merely permitted [public housing authorities] to evict tenants in the future without providing them with informal grievance hearings," and "affected the rights of a broad category of individuals not yet identified"); *see* Safari Club Int'l v. Zinke, 878 F.3d 316, 333–34 (D.C. Cir. 2017) (explaining that bans on importation of sport-hunted elephants from Zimbabwe by the U.S. Fish and Wildlife Service "were not retroactive [adjudications] because their issuance resulted in no immediate legal consequences for any specific parties").

[25] *See* Law Motor Freight, Inc. v. Civil Aeronautics Bd., 364 F.2d 139, 143 n.4 (1st Cir. 1966) ("'[W]hat is otherwise rule making [under the APA] does not become adjudication merely because it applies only to particular parties or to a particular situation.'") (quoting KENNETH CULP DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 5.02, at 296 (1958)).

[26] 482 F.2d 1301 (10th Cir. 1973).

[27] *Id.* at 1303, 1306.

[28] Daniel J. Sheffner, *Access to Adjudication Materials on Federal Agency Websites*, 51 AKRON L. REV. 447, 451 (2017); *see infra* "Brief Survey of Informal Adjudication."

[29] 5 U.S.C. §§ 554, 556–557.

[30] *See* Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1053 (2005).

[31] *See infra* "Non-Adversarial Interviews or Inspections."

[32] Herring v. New York, 422 U.S. 853, 862 (1975); Verkuil, *supra* note 1, at 743.

[33] As the Supreme Court has explained in the context of a federal administrative adjudication scheme, "[t]he critical feature that distinguishes adversarial proceedings from inquisitorial ones is whether" parties "bear the responsibility to develop issues for adjudicators' consideration." Carr v. Saul, 141 S. Ct. 1352, 1358 (2021).

by APA's formal hearing provisions,[34] or "informal adjudications,"[35] which embrace *all* administrative agency adjudications that are not formal adjudications.[36] Although a small number of APA provisions apply to informal adjudications,[37] their procedural components come primarily from other sources of law.[38]

Recently, some commentators have proposed categorizing adjudications based on whether an evidentiary hearing requirement governs the proceeding, and, if so, the source of such requirement.[39] These three categories embrace, respectively: (1) adjudications subject to the APA's formal hearing provisions; (2) adjudications governed by legally required evidentiary proceedings *other than* those established by the APA's formal hearing provisions; and (3) adjudications that are *not* subject to legally required evidentiary hearings.[40] The first category embraces formal adjudication,[41] while the second and third categories are coextensive with informal adjudication as traditionally defined.[42]

Formal Adjudication

Formal adjudications are proceedings that, under statute, must be conducted in accordance with the formal hearing provisions of the APA contained in 5 U.S.C. §§ 554, 556, and 557.[43] Those

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[34] Ass'n of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1160 (D.C. Cir. 1979); *see* 5 U.S.C. §§ 554, 556–557.

[35] *See Ass'n of Nat'l Advertisers*, 627 F.2d at 1161 n.17.

[36] *See* Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (explaining that "[t]he challenged action is an 'informal adjudication' which is the administrative law term for agency action that is neither the product of formal adjudication or a rulemaking").

[37] *See* 5 U.S.C. §§ 555, 558.

[38] *See* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION, *supra* note 22, at 2–3; *see infra* "Due Process and Other Sources of Adjudication Procedures."

[39] *See, e.g.*, Emily S. Bremer, *Designing the Decider*, 16 GEO. J.L. & PUB. POL'Y 67, 69 (2018) [hereinafter Bremer, *Designing the Decider*] (refusing to use "the traditional formal-informal dichotomy in favor of [the more recent] classification scheme"). An "evidentiary hearing," for purposes of this framework, is an oral or written proceeding for the submission of evidence that produces an exclusive record, meaning that the adjudicator may not consider other evidence. ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION, *supra* note 22, at 10.

[40] *See* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 3–4. This scheme was developed by Professor Michael Asimow. *See, e.g.*, Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1005-06 (2004). Asimow refers to the three types of adjudication as Type A adjudications, Type B adjudications, and Type C adjudications, respectively. *See* MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 2 (2016). The Administrative Conference of the United States (ACUS) referred to Types A, B, and C adjudications by those names in the preamble of a formal recommendation that was based on Asimow's 2016 research report (which ACUS had commissioned). *See* Adoption of Recommendations, 81 Fed. Reg. 94312, 94314-315 (Dec. 23, 2016). The agency has adhered or referred to the classification in subsequent recommendations. *See, e.g.*, Adoption of Recommendations, 84 Fed. Reg. 2139, 2140 n.4 (Feb. 6, 2019) ("This Recommendation addresses both Type A and Type B adjudications but does not apply to adjudications that do not involve a legally required evidentiary hearing (known as 'Type C' adjudications.).").

[41] 81 Fed. Reg. at 94314 n.4 (clarifying that "[t]raditionally, [the first category of] adjudication has been referred to as 'formal adjudication'"); *but see* Bremer, *Reckoning with Exceptionalism*, *supra* note 1, at 1760 n.51 (2020) (asserting that the first category "includes proceedings that would not be considered 'formal' under the traditional approach because they are not required by *statute* to be conducted under the APA's adjudication provisions," but rather by regulation) (emphasis added).

[42] ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION, *supra* note 22, at 5 (explaining that "[t]he word 'informal' is commonly used in practice and in scholarship to cover [the second and third categories of] adjudication" mentioned above).

[43] 5 U.S.C. §§ 554, 556–557. Section 554 exempts the following from the APA's formal adjudication provisions:

provisions apply when a statute explicitly states that a hearing is required "on the record" in relation to an adjudicative decision[44] or explicitly makes the provisions applicable to adjudicative proceedings even if it does not use the "on the record" language.[45] However, if a statute does neither, courts typically defer to an agency's reasonable interpretation of the governing statute that §§ 554, 556, and 557 do not apply to the proceedings.[46]

The APA's formal hearing provisions establish trial-type, adversarial hearing procedures.[47] They "were designed to ensure fairness, impartiality, and due process in administrative adjudications."[48] Under the APA, agencies must give parties timely notice of "the time, place, and nature of the hearing," "the legal authority and jurisdiction under which the hearing is to be held," and "the matters of fact and law asserted."[49] A party may "present his case or defense by oral or documentary evidence," present "rebuttal evidence," and "conduct such cross-examination as may be required for a full and true disclosure of the facts."[50] Filings, exhibits, and the transcript of testimony of a proceeding comprise "the exclusive record" on which a decision may be based.[51] The adjudicator, at the conclusion of a hearing, issues a decision that must contain his or her "findings and conclusions."[52]

A special class of adjudicator called an "administrative law judge" (ALJ) generally preside over formal adjudication proceedings. The APA directs "[e]ach agency" to "appoint as many" ALJs "as are necessary for proceedings required to be conducted in accordance with" the adjudication provisions of the APA.[53] As of March 2017, there were 1,931 ALJs employed by the federal government.[54] The APA establishes ALJs' powers, stating that, subject to an agency's published

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> (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
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> (2) the selection or tenure of an employee, except a[n] administrative law judge appointed under section 3105 of this title;
>
> (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.

Id. § 554(a).

[44] *Id.* § 554(a); *see* Crestview Parke Care Ctr. v. Thompson, 373 F.3d 743, 748 (6th Cir. 2004) ("Lower courts have explicitly held that a formal adjudication featuring an oral evidentiary hearing is required by the APA only when a statute explicitly calls for a hearing 'on the record.").

[45] *See* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION, *supra* note 22, at, 15.

[46] *See, e.g.*, Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 16–18 (1st Cir. 2006).

[47] *See Crestview Parke Care*, 373 F.3d at 748 (explaining that the APA's formal hearing provisions establish "procedures [that] mirror the elements of a judicial trial").

[48] MATTHEW LEE WIENER ET AL., ADMIN. CONF. OF THE U.S., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EVALUATING THE STATUS AND PLACEMENT OF ADJUDICATORS IN THE FEDERAL SECTOR HEARING PROGRAM 6 (2014).

[49] 5 U.S.C. § 554(b)(1)–(3).

[50] *Id.* § 556(d).

[51] *Id.* § 556(e).

[52] *Id.* § 557(b), (c)(3). Under the APA, if an "agency did not preside at the reception of the evidence" in a proceeding, the presiding adjudicator will issue an initial decision following a hearing, "unless the agency requires . . . the entire record to be certified to it for decision." *Id.* § 557(b). An initial decision becomes the agency's decision "unless there is an appeal to, or review on motion of, the agency within time provided by rule." *Id.* However, "[w]hen the agency makes the decision without having presided at the reception of the evidence, the presiding [adjudicator generally] shall first recommend a decision." *Id.*

[53] *Id.* § 3105.

[54] *ALJs by Agency*, OFFICE OF PERSONNEL MGMT. (last accessed July 7, 2021), https://www.opm.gov/services-for-

rules, an ALJ may administer oaths to witnesses; issue subpoenas (if subpoenas are otherwise authorized); determine evidentiary disputes and "receive relevant evidence"; conduct depositions or authorize the taking of depositions; generally "regulate the course of the hearing"; hold settlement conferences; issue initial or recommended decisions at the conclusion of proceedings; and "take other action as authorized by agency rule consistent with" the APA.[55]

Several provisions of the APA ensure that ALJs enjoy a level of independence from the agencies for which they work.[56] For example, the APA promotes the "separation of functions"[57] between agency adjudicators on one side and agency prosecutors and investigators on the other by prohibiting prosecutors and investigators from supervising ALJs.[58] The APA also generally prohibits them from participating or advising in an agency's decision in a case (or "factually related" one) in which they are serving as prosecutors or investigators.[59] ALJs also are statutorily required to carry out their responsibilities impartially,[60] and typically are prohibited from engaging in off-the-record communications pertaining to the merits of a proceeding with interested parties who are not part of the agency.[61] The latter requirement is known as the APA's prohibition of "ex parte communications" or "ex parte contacts."[62] Lastly, ALJs benefit from protections from at-will removal by the agency for which they are employed. Per the APA, ALJs may only be removed from their positions "for good cause established and determined by the Merit Systems Protection Board."[63] The members of the MSPB, in turn, also are protected from at-will removal.[64]

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agencies/administrative-law-judges/#url=ALJs-by-Agency. The vast majority of ALJs during this period (1,655) were employed by SSA. *Id.* Of the ALJs employed by other agencies during the same period, significant numbers worked for the Department of Health and Human Services (101) and the Department of Labor (41). *Id.*

[55] 5 U.S.C. § 556(c).

[56] *See* Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 15-16 (2018).

[57] AM. BAR ASS'N, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 12 –13 (2d ed. 2013); *see* Kent H. Barnett, *Some Kind of Hearing Officer*, 94 WASH. L. REV. 515, 533 (2019) (explaining that "the APA requires a separation of functions, for which ALJs cannot investigate or prosecute or report to an agency official who does").

[58] 5 U.S.C. § 554(d)(2).

[59] *Id.* § 557(d); Admin. Conf. of the U.S. & Am. Bar Ass'n, *Administrative Procedure Act*, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, https://sourcebook.acus.gov/wiki/Administrative_Procedure_Act/view (last visited Sept. 24, 2021) (explaining that the APA "addresses 'separation of functions' by restricting agency employees engaged in investigation or prosecution of a case from supervising the presiding officer or participating or advising in the decision in that or a factually related case (with certain exceptions)"); *see* 5 U.S.C. § 3105 (ALJs "may not perform duties inconsistent with their duties and responsibilities as ALJs"). *Cf.* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION, *supra* note 22, at 64 n.280 (referring to the supervision limitation as a "command-influence rule" and the participation restriction as the separation of functions rule).

[60] 5 U.S.C. § 556(b).

[61] *Id.* §§ 551(14), 557(d)(1). The APA also generally prohibits ALJs from "consult[ing] a person or party on a fact in issue." *Id.* § 554(d)(1).

[62] *See* Portland Audubon Soc. v. Endangered Species Comm., 984 F.2d 1534, 1539 (9th Cir. 1993).

[63] 5 U.S.C. § 7521(a). Agencies are also, pursuant to Office of Personnel Management regulation, prohibited from evaluating the performance of ALJs and awarding them bonuses. 5 C.F.R. § 930.206. Additionally, ALJs are subject to an ALJ-specific pay scale. *Id.* § 930.205.

[64] *See Id.* § 1202(d) (providing that Merit Systems Protection Board (MSPB) members "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office"); *see also* CRS Report R45630, *Merit Systems Protection Board (MSPB): A Legal Overview*, by Jon O. Shimabukuro and Jennifer A. Staman, at 3; Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1698 (2020) (explaining, in addition, that ALJs may derive protections from any possible removal protections enjoyed by "the head of the ALJs' employing department"). Agencies are also, pursuant to Office of Personnel Management regulation, prohibited from evaluating

Relatively recent Supreme Court decisions and executive branch actions have significantly altered or raised questions about the appointment, hiring, and removal of ALJs by the executive branch.[65] Discussion of these ALJ developments is outside the scope of this report, but can be found in other CRS products.[66]

Informal Adjudication

Informal adjudication is a catch-all category covering all types of administrative adjudication proceedings that are not governed by the APA's formal hearing provisions.[67] Adjudications may fall into this category regardless of their level of procedural formality (or lack thereof).[68] Thus, for example, EEOC's federal sector equal employment opportunity adjudicative program—which consists of adversarial hearings that provide for discovery, permit the submission of oral and documentary evidence, and contain other trial-type attributes[69]—are informal adjudication proceedings under the traditional formal/informal dichotomy even if they would be considered "formal" in a colloquial understanding.[70] On the other hand, the category of informal adjudication also embraces adjudicative proceedings that are procedurally minimal, such as tariff classification rulings.[71] In between the two poles of trial-like and procedurally bare are a variety of adjudicative programs that differ from formal APA adjudications and from each other to various degrees.[72] This report examines the variety of informal adjudicative programs more closely below.[73]

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the performance of ALJs and awarding them bonuses. 5 C.F.R. § 930.206. Additionally, ALJs are subject to an ALJ-specific pay scale. *Id.* § 930.205.

[65] *See* Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) (holding that ALJs of the Securities and Exchange Commission are "Officers of the United States" under the Appointments Clause of the Constitution, U.S. CONST. art. II, § 2, cl. 2); Exec. Order, 13843, 83 Fed. Reg. 32755 (July 13, 2018) (removing ALJs from competitive civil service and placing control over ALJ hiring in agency heads); Petition for Writ of Certiorari at 29–32, Axon Enter. v. FTC, No. 21-86 (U.S. July 20, 2021) (asking Supreme Court to determine that the removal protections afforded ALJs of the Federal Trade Commission are unconstitutional).

[66] *See, e.g.*, CRS Legal Sidebar LSB10615, *Supreme Court Preserves Patent Trial and Appeal Board, but with Greater Executive Oversight*, by Kevin J. Hickey and Victoria L. Killion; CRS Legal Sidebar LSB10153, *Supreme Court Holds That SEC Administrative Law Judges Are "Officers" Subject to the Appointments Clause*, by Victoria L. Killion.

[67] *See* Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 747 (2021) (explaining that "informal adjudication" is a "residual category that encompasses any agency adjudication not subject to" the APA's formal hearing provisions); Nielson, *supra* note 5, at 665 (writing that "'informal adjudications are essentially the default form of agency decisionmaking'" (quoting 2 THE FUNDAMENTALS OF ADMINISTRATIVE LAW FOR NATURAL RESOURCES PRACTICE 1, 1-4 (2019)).

[68] Bremer, *Designing the Decider*, *supra* note 39, at 69 (observing that "so-called informal adjudication is often conducted according to procedures that are as or more formal (in the colloquial sense of 'trial-like') than the procedures specified by the APA's 'formal' adjudication provisions").

[69] *See* 29 C.F.R. § 1614.109.

[70] *See* Bremer, *Designing the Decider*, *supra* note 39, at 69 ("[S]o-called informal adjudication is often conducted according to procedures that are as or more formal (in the colloquial sense of 'trial-like') than the procedures specified by the APA's 'formal' adjudication provisions.").

[71] ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION, *supra* note 22, at 96–96; *see* 19 C.F.R. § 177.4(a) (permitting oral discussions between agency personnel and parties who have submitted requests for a letter ruling only when "a conference will be helpful in deciding the issue or issues involved or when a determination or conclusion contrary to that advocated in the ruling request is contemplated").

[72] *See* Sheffner, *supra* note 28, at 450–51 ("Non-APA adjudication schemes vary substantially, ranging from 'semi-formal' proceedings that, like APA hearings, are conducted pursuant to procedurally robust evidentiary procedures, to those, like tariff classification rulings, that are non-adversarial and procedurally bare.") (footnote omitted).

[73] *See infra* "Brief Survey of Informal Adjudication."

Unlike ALJs in formal adjudicatory proceedings, who share a uniform title and uniform protections and limitations, the titles, protections, and limitations of non-ALJ adjudicators who preside over informal adjudication proceedings vary.[74] A 2018 study reported that agencies employed "at least 10,831" non-ALJ adjudicators, over 7,000 of whom were patent examiners in the Department of Commerce's Patent & Trademark Office.[75]

Due Process and Other Sources of Adjudication Procedures

The procedures that govern an agency adjudication proceeding and provide protections for parties may stem from a variety of sources. As discussed above, the APA's formal hearing provisions contain specific procedural requirements for covered adjudications.[76] The APA also contains a small number of procedures applicable to all adjudications.[77] Other potential sources of procedure include statutes (other than the APA), agency procedural rules, and agency sub-regulatory guidance.[78] While agencies are free to craft procedures applicable to adjudicative proceedings consistent with authority conferred by Congress, courts may not require additional procedures that are not required by the APA, other relevant statutes, or the Constitution.[79]

The Due Process Clause of the Fifth Amendment supplies flexible procedural parameters that apply to some federal administrative adjudication proceedings.[80] The Clause states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[81] Several principles and considerations govern whether a party in a given situation is entitled to due process and, if so, the procedural protections afforded by the Clause.[82] Most relevant to the federal agency

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[74] *See* Barnett & Wheeler, *supra* note 56, at 5. Such adjudicators are known by many titles, including "administrative judge," "immigration judge," "hearing examiner," and other similar titles. *See id.*

[75] *Id.* at 32. Many commentators conceptualize patent adjudication proceedings conducted by the Patent Trial and Appeal Board (PTAB, within the Patent & Trademark Office) as informal adjudication, in part because non-ALJ adjudicators preside. *See generally* Bremer, *Reckoning with Exceptionalism*, *supra* note 1, at 1766-67. The U.S. Court of Appeals for the Federal Circuit, however, has applied the APA's formal hearing requirements to PTAB proceedings. *See, e.g.*, Novartis AG v. Torrent Pharms. Ltd., 853 F.3d 1316, 1324 (Fed. Cir. 2017); Belden Inc. v. Berk-Tek LLC, 805 F.3d 1064, 1080 (Fed. Cir. 2015).

[76] 5 U.S.C. §§ 554, 556–557; *see supra* "Formal Adjudication."

[77] 5 U.S.C. §§ 555, 558; *see infra* "Statutory Defaults for Informal Adjudication."

[78] *See* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION, *supra* note 22, at 3.

[79] *See* Pension Benefit Guar Corp. v. LTV Corp., 496 U.S. 633, 653–56 (1990).

[80] *See* U.S. CONST. amend. V.

[81] *Id.*

[82] In addition to the principles discussed *infra* notes 83–88, a party alleging a due process violation must establish that the *government* infringed a protected interest. *See* Na'l Collegiate Ath. Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988). This is known as the "state action" requirement. *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 508 & n.15 (1985). The Fifth Amendment's Due Process Clause specifically applies to the federal government. Farrington v. Tokushige, 273 U.S. 284, 299 (1927). (The Due Process Clause of the Fourteenth Amendment applies to state and local governments. *See* U.S. CONST. amend. XIV, § 1.) However, in some instances, a private entity may be required to comply with due process, such as when the government transferred a "public function" to the entity, or when "the government controlled or was excessively intertwined with a nominally private actor." W. State Univ. of S. Cal. v. Am. Bar Ass'n, 301 F. Supp. 2d 1129, 1133-34 (C.D. Cal. 2004); *see* Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 296 (2001) (writing, in the context of the Fourteenth Amendment Due Process Clause, that "[w]e have . . . held that a challenged activity may be state action when it results from the State's exercise of 'coercive power,' when the State provides 'significant encouragement, either overt or covert,' or when a private actor operates as a 'willful participant in joint activity with the State or its agents[.]' We have treated a nominally private entity as a state actor when it is controlled by an 'agency of the State,' when it has been delegated a public function by the State, when it is 'entwined with governmental policies' or when government is 'entwined in [its] management or control[.]'") (citations omitted) (third alteration in original).

adjudication context, for the Clause to apply, an agency must deprive a person of a "life," "liberty," or "property" interest.[83] In addition, where the federal government is depriving a person of life, liberty, or property, the due process analysis requires determinating *what* procedures are "due," as well as *when* the government must provide such procedures.[84]

The Supreme Court has instructed courts to determine the timing and content of the procedures required by the Due Process Clause on a case-by-case basis after balancing three factors: (1) the relevant "private interest"; (2) the risk that applying existing procedures will result in an "erroneous deprivation of such interest," along with the "probable value" of providing "additional or substitute procedural safeguards"; and (3) the government's interest, which includes "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[85]

An assessment of these factors does not always lead to the conclusion that additional procedures are needed beyond what the agency has provided, nor that a hearing must be provided prior to the government's deprivation of a protected interest.[86] Notice of the nature of the government action and an opportunity to be heard are generally the minimum procedural requirements whenever due process applies; beyond that baseline, however, the nature of the procedures that are due varies by

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Further, a due process violation only arises if the infringing action constitutes a "deprivation" as defined by the courts. Harm to a protected interest must be more than *de minimis* to trigger the protections of the Due Process Clause. *See* Goss v. Lopez, 419 U.S. 565, 576 (1975). And negligent conduct that infringes a protected right is not a "deprivation." *See* Daniels v. Williams, 474 U.S. 327, 330-31 (1986).

[83] U.S. CONST. amend. V. In the context of federal administrative adjudication, claims under the Due Process Clause concerning deprivations of life are rare. *See* AM. BAR ASS'N, A GUIDE TO FEDERAL AGENCY ADJUDICATION 13 (2d ed. 2012, Jeffrey B. Litwak ed.) [hereinafter GUIDE TO FEDERAL AGENCY ADJUDICATION].

The right to liberty protected by the Due Process Clause stems from many sources. The Supreme Court has explained that a "liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,'" as well as "from an expectation or interest created by state laws or policies." Wilkinson v. Austin, 545 U.S. 209, 221 (2005). Liberty interests may also flow from federal statutes and regulations. *See* GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 83, at 13. The Court has interpreted the liberty guaranteed by due process broadly, instructing that "liberty" not only encompasses one's "freedom from bodily restraint," but also a panoply of other rights, including:

> the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)) (ellipses in original).

Property interests protected by the Due Process Clause are derived from sources of positive law outside the Constitution. *Roth*, 480 U.S. at 577. In *Board of Regents v. Roth*, the Supreme Court explained that interests in property "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577. Property interests may lie in traditional types of property, such as "real estate, chattels, or money." *Id.*; ASIMOW & LEVIN, *supra* note 14, at 32. They also attach to a party's legal entitlement to a benefit, such as disability benefits, licenses to practice certain jobs or professions, or rights to government employment. *See* Mathews v. Eldridge, 424 U.S. 319 (1976); Barry v. Barchi, 443 U.S. 55 (1979); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). The Court has explained that "[t]o have a property interest in a benefit, a person . . . . must . . . have a legitimate claim of entitlement to it," as opposed "an abstract need or desire for it" or "unilateral expectation of it." *Roth*, 408 U.S. at 577.

[84] *See* GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 83, at 12.

[85] *Mathews*, 424 U.S. at 335.

[86] *See id.* at 349.

context under the flexible three-factor analysis.[87] While agency adjudication procedures can exceed those required by the Due Process Clause, they may not fall below the minimum threshold it establishes.[88]

Brief Survey of Informal Adjudication

As mentioned above, most federal agency adjudication is "informal" in the sense that the formal adjudication requirements contained in 5 U.S.C. §§ 554, 556, and 557 do not apply.[89] This section of the report provides a general overview of major categories of informal adjudication schemes that federal agencies currently employ, focusing on the distinction between adversarial trial-type proceedings (often used in enforcement actions) and single-party inquisitorial proceedings (often used for benefits administration).[90] The section also mentions major due process constraints that restrict Congress's ability to employ each category.[91] The discussion in this section draws from the detailed examination and statistical analysis of informal adjudication schemes contained in two studies published by the Administrative Conference of the United States (ACUS), a federal agency responsible for studying and recommending improvements to federal administrative procedure.[92]

[87] *See, e.g.*, Gibson v. Texas Dep't of Ins., 700 F.3d 227, 239 (5th Cir. 2012). Due process constraints concerning certain informal adjudication themes are discussed below. *See infra* "Brief Survey of Informal Adjudication."

[88] *See* 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.1, at 728 (6th ed. 2019).

[89] Walker & Wasserman, *supra* note 4, at 153 ("Some experts estimate that as much as 90 percent of all agency adjudication occurs outside of APA formal adjudication proceedings."); *see supra* text at note 75 (discussing number of informal adjudicators employed by federal agencies).

[90] *See* Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1301 (1997) ("While federal regulatory agencies have largely chosen adversarial adjudicative systems, federal benefactory agencies typically employ inquisitorial models."); *cf.* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 3–4 (categorizing agency adjudication schemes according to the "Type A," "Type B," and "Type C" formulation mentioned previously); Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts-Except When They're Not*, 59 ADMIN. L. REV. 79, 99 (2007) (categorizing "non-APA based proceedings" as "semi-formal adjudications" and "truly informal adjudications").

[91] The due process discussion in this section generally assumes, unless noted otherwise, that *de novo* review is not available in federal court unless noted otherwise; the availability of *de novo* judicial review of agency adjudication mitigates procedural due process issues. *See* Kim v. United States, 121 F.3d 1269, 1274 (9th Cir. 1997) ("A trial de novo, in which the existence of a violation is examined afresh, and the parties are not limited in their arguments to the contents of the administrative record, satisfies the strictures of procedural due process."); William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1577–78 (2020) ("The standard case of agency adjudication is one where the agency adjudicates a dispute on some topic in public law or public regulation; applies some procedures now associated with due process; and receives review, but not de novo review, from an Article III court."); *see infra* text at note 186 (discussing the use of procedurally bare informal adjudication systems where *de novo* review is available in federal court).

[92] KENT BARNETT ET AL., ADMIN. CONF. OF THE U.S., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL (2018) [hereinafter BARNETT ET AL., NON-ALJ ADJUDICATORS]; ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22. For brevity, this section of the report refers to these studies as "ACUS publications," although they were written by outside adjudication scholars.

Adversarial Trial-Type Proceedings Not Governed by Formal APA Requirements

Category Overview

Concept: Agency adjudication schemes that follow the APA's adversarial trial-type model but are not governed by 5 U.S.C. §§ 554, 556, and 557.

Examples: Immigration court proceedings; Equal Employment Opportunity Commission (EEOC) adjudication of discrimination claims.

Notable Features:

- Instead of ALJs, other categories of adjudicators preside. Most often, they are less insulated from agency control than ALJs are.
- With the APA requirements for formal adjudication inapplicable, the governing statutory parameters typically do not address specific procedural issues (e.g., the rules for ex parte contacts), leaving agencies to fill in the gaps.

Due Process Concerns: Minimal, because these proceedings typically confer the basic rights associated with trial-type evidentiary hearings.

Concept. One widespread type of informal adjudication employs evidentiary hearings that are adversarial but not governed by the APA's formal adjudication requirements. These informal adversarial hearings are instead governed by program-specific enabling statutes, agency regulations, or other agency sources.[93] Such hearings resemble civil trials, but are not subject to the APA's default specifications for how adversarial hearings should function.[94] Some commentary calls these adjudication schemes "formal-like" proceedings to convey that, while "informal" in the APA sense, the proceedings generally conform to the judicial model.[95]

Examples. Major examples of administrative adjudication schemes that fall into this category include immigration court proceedings within the Department of Justice's Executive Office of Immigration Review (EOIR)[96] and EEOC proceedings to adjudicate discrimination claims.[97] Other federal agencies that conduct informal, trial-type adversarial adjudications in significant numbers include the Merit Systems Protection Board and the Department of Health and Human Services.[98] Although these and other adjudication schemes in this category have unique features, they are all adversarial proceedings in which the exclusive record principle applies and in which two parties contest a dispute before a mostly passive adjudicator.[99] Often the dispute is between

[93] *See* Bremer, *Designing the Decider*, *supra* note 39, at 69; Verkuil, *supra* note 1, at 796 (concluding that in informal adjudication, "the ability to get the right fit between program and procedure lies primarily with the agencies").

[94] *See, e.g.*, Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 539 (2015) (explaining that "immigration courts are not subject to the Administrative Procedure Act's formal adjudication requirement" but that immigration court procedure "has gradually evolved to more closely resemble formal adjudication").

[95] Walker, *supra* note 67, at 749.

[96] See 8 U.S.C. § 1229a; *see generally* CRS In Focus IF11536, *Formal Removal Proceedings: An Introduction*, by Hillel R. Smith. EOIR removal proceedings are often called "formal" in the colloquial sense—because they resemble bench trials—not in the APA sense. *See* Gomez-Velazco v. Sessions, 879 F.3d 989, 991 (9th Cir. 2018) (distinguishing the "formal" EOIR process from other "streamlined" removal proceedings that are "summary in nature").

[97] 29 C.F.R. § 1614.109; *see* U.S. Equal Emp. Opportunity Comm'n, Management Directive 110, at ch. 7 (Hearings) (2015), https://www.eeoc.gov/federal-sector/management-directive/management-directive-110.

[98] *See* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 23-24 (table listing caseloads for informal adjudication schemes that require evidentiary hearings). Note that the ACUS table includes some agencies that provide inquisitorial rather than adversarial hearings, including most notably the Department of Veterans Affairs. *Id*.

[99] *See, e.g.*, U.S. Equal Emp. Opportunity Comm'n, Hearing Process ("Parties generally are permitted to make opening

the government and an individual (as in the case of EOIR and EEOC proceedings), although some of these adjudication schemes provide a forum for contests between private parties.[100]

Of the major schemes in this category, the EOIR immigration court system has the largest caseload, with over 300,000 cases received annually in fiscal years 2018-2020 and a backlog of more than 1.2 million pending cases.[101]

Key Features. Although adjudication schemes in this category share a trial-type format with formal APA adjudication, they may depart from the APA's formal adjudication requirements in significant respects. Typically, the salient area of departure concerns the adjudicator.[102] Whereas, as explained above,[103] the APA generally requires that ALJs preside over formal adjudications (unless the agency heads preside or another statutory provision overrides this requirement),[104] informal adversarial hearing schemes employ different types of adjudicators subject to different (and often reduced) protections from agency control.[105] In immigration court, adjudicators are called "immigration judges" or "IJs."[106] In EEOC proceedings, they are called "administrative judges" or "AJs."[107] According to an ACUS publication, non-ALJ adjudicators rarely enjoy the level of protection from agency influence—such as restrictions on termination, salary adjustments, and agency performance appraisals—that ALJs enjoy.[108] Constitutional law questions, however, bear upon legislative efforts to confer substantial independence on administrative adjudicators. Under recent Supreme Court precedent, statutory provisions that insulate administrative adjudicators—whether ALJs or not—from agency supervision may raise thorny issues under the Appointments Clause of Article II of the Constitution.[109] Certain

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and closing statements, offer into evidence witness testimony and documents, examine and cross-examine witnesses and raise objections and obtain rulings on objections from the AJ [administrative judge]."), https://www.eeoc.gov/federal-sector/hearing-process (last visited Sept. 9, 2021); CRS In Focus IF11536, *Formal Removal Proceedings: An Introduction*, by Hillel R. Smith (explaining that in formal removal proceedings before EOIR "an alien may present testimony and evidence in support of an application for relief. The IJ [immigration judge] may direct the parties to present opening or closing statements. The alien's counsel (or the IJ if the alien is unrepresented) may conduct direct examination of the alien, and DHS counsel conducts cross-examination. The IJ may question the alien and any witnesses.").

[100] *See, e.g.*, ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 60, 110 (discussing U.S. Department of Agriculture dispute resolution under the Perishable Agricultural Commodities Act).

[101] EOIR, *Pending Cases, New Cases, and Total Completions* (July 8, 2021), https://www.justice.gov/eoir/workload-and-adjudication-statistics; *see* CRS In Focus IF11690, *Pending Cases in U.S. Immigration Courts, FY2008-FY2020*, by Holly Straut-Eppsteiner. An ACUS publication describes each of the major adjudication schemes in this category in detail. *See* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at Appendix A.

[102] BARNETT ET AL., NON-ALJ ADJUDICATORS, *supra* note 92, at 8-9 (explaining that agency adjudication schemes "that do not qualify as formal adjudication under the APA" are "often similar in formality and procedure to formal adjudication" but differ "in one key respect: non-ALJs preside over them").

[103] *See supra* "Formal and Informal Adjudications."

[104] 5 U.S.C. § 556(b).

[105] BARNETT ET AL., NON-ALJ ADJUDICATORS, *supra* note 92, at 1.

[106] *See* 8 U.S.C. § 1229a(a)(1).

[107] *See* 29 C.F.R. § 1614.109(a).

[108] BARNETT ET AL., NON-ALJ ADJUDICATORS, *supra* note 92, at 8-9 ("Except for extremely rare exceptions, non-ALJs, who go by different titles at different agencies, do not have ALJs' statutory protections as to their independence."). This ACUS publication describes the universe of non-ALJ adjudicators and their various protections in depth.

[109] United States v. Arthrex, 141 S. Ct. 1970, 1983 (2021) ("[T]he unreviewable executive power exercised by [Administrative Patent Judges] is incompatible with their status as inferior officers."); Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) (holding that ALJs of the Securities and Exchange Commission are "Officers of the United States" under the Appointments Clause of the Constitution, U.S. CONST. art. II, § 2, cl. 2, and that their appointment by agency staff violated the Clause); *see* CRS Legal Sidebar LSB10615, *Supreme Court Preserves Patent Trial and Appeal Board, but*

restrictions on removing administrative adjudicators, in turn, may raise separation of powers issues.[110]

Beyond differences in adjudicators, informal trial-type hearings also commonly deviate from the APA by lacking specific statutory parameters for certain issues.[111] The APA's formal adjudication provisions establish rules for a range of procedural issues, including limitations on ex parte contacts, promotion of the separation of investigative and adjudicatory functions, and the right to an oral hearing (not merely a written one).[112] Formal agency adjudication schemes thus have a built-in code that addresses major procedural questions.[113] Where Congress opts not to apply the APA to a scheme of adversarial evidentiary hearings, it does not always supply a full suite of alternative procedural rules in the relevant statute.[114] For example, an ACUS study found that, while most adjudicators in informal proceedings are prohibited from engaging in ex parte communications, the prohibition arises most often from "internal guidance or custom," rather than clear statutory mandate.[115] Statutory silence on such issues requires agency action to fill gaps that, for formal adjudication proceedings, would be covered by the APA.[116] The resulting variation in procedures prompts some to argue that evidentiary hearings should generally follow APA rules for formal adjudication.[117] Many commentators make this argument, although it does not appear to have gained traction with Congress.[118]

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with Greater Executive Oversight, by Kevin J. Hickey and Victoria L. Killion.

[110] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd. (PCAOB), 561 U.S. 477, 491-98 (2010) (invalidating on separation-of-powers grounds statutory provisions providing that members of the PCAOB could be removed only for cause by the Securities and Exchange Commission, whose members were also protected from removal by for cause removal protections); *see* Linda D. Jellum, *"You're Fired!" Why the ALJ Multi-Track Dual Removal Provisions Violate the Constitution and Possible Fixes*, 26 GEO. MASON L. REV. 705, 741 (2019) (opining that "ALJ multi-track removal provisions violate the Constitution, even though each provision would be constitutional independently"); *cf.* Decker Coal Co. v. Pehringer, No. 20-71449, 2021 WL 3612787, at *10 (9th Cir. Aug. 16, 2021) ("[S]ome tenure restrictions do not violate separation of powers, particularly in the case of inferior officers with sufficient accountability.").

[111] *See* Butte Cty., Cal. v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010) (explaining that in informal adjudication, "[g]overning procedural rules, derived mainly from . . . 5 U.S.C. § 555, and the Due Process Clause, are few").

[112] 5 U.S.C. §§ 554(d), 556(b), 557(d)(1), 3105; *see supra* "Formal Adjudication." *See generally* Walker & Wasserman, *supra* note 4, at 149 (Table 1). Section 554(d) addresses separation of functions. *See* Grolier Inc. v. FTC, 615 F.2d 1215, 1220 (1980) ("[B]y forbidding adjudication by persons 'engaged in the performance of investigative or prosecuting functions,' [quoting 5 U.S.C. § 554(d),] Congress intended to preclude from decisionmaking in a particular case not only individuals with the title of 'investigator' or 'prosecutor,' but all persons who had, in that or a factually related case, been involved with ex parte information, or who had developed, by prior involvement with the case, a 'will to win.' "); BARNETT ET AL., NON-ALJ ADJUDICATORS, *supra* note 92, at 7 ("[ALJs] cannot perform duties inconsistent with their adjudicatory function, such as investigating or prosecuting, or by reporting to an official with these duties. These provisions provide a separation of functions between adjudication and prosecution within the agency.").

[113] *See* Walker & Wasserman, *supra* note 4, at 149.

[114] *See Hogen*, 613 F.3d at 194; Walker, *supra* note 67, at 749 (explaining that informal adjudication procedure is sometimes "set by the respective agency's organic statute but most" often is "set by regulation or subregulatory guidance").

[115] BARNETT ET AL., NON-ALJ ADJUDICATORS, *supra* note 92, at 47.

[116] *See id*.

[117] *See* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 60 ("[M]y judgment is that procedures in Type B adjudication should resemble those in Type A adjudication unless there is a good reason for the contrary conclusion."); Bremer, *Reckoning with Exceptionalism*, *supra* note 1, at 1792 ("Congress should enact a statute clarifying that the APA's requirements--potentially with amendments--apply to all evidentiary hearings conducted in agency adjudication programs.").

[118] *See* Bremer, *Reckoning with Exceptionalism*, *supra* note 1, at 1757-59 (describing the lack of default procedures for

Due Process Concerns. Because adjudication schemes in this category include a trial-type evidentiary hearing, their basic framework generally does not raise the type of procedural due process issues that the streamlined, non-adversarial decision making discussed later in this report typically trigger.[119] Evidentiary hearings that are adversarial in nature generally satisfy "[t]he fundamental requirement of due process" of an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[120] Still, even adversarial evidentiary hearings occasionally trigger due process problems, depending on how the hearings operate. Examples of procedural due process violations that may occur in connection with trial-type evidentiary hearings include the denial of the right to retained counsel in enforcement proceedings that implicate a liberty interest;[121] lack of "fair notice of conduct that is forbidden" before enforcement;[122] or biased adjudicators.[123]

Non-Adversarial Evidentiary Hearings

Category Overview

Concept: Non-adversarial proceedings in which one private party (usually an applicant for benefits) appears before a proactive adjudicator; no government counsel or opposing party.

Examples: Disability benefits adjudication within the Social Security Administration (SSA) and Department of Veterans Affairs (VA). (SSA disability hearings are included here due to their non-adversarial nature, although there is disagreement about whether they constitute formal adjudication under the APA.[124])

Notable Features:

- A "multiple hats" inquisitorial adjudicator proactively investigates facts and develops claims without the benefit of opposing counsel.
- The use of legal counsel may be disfavored, with an emphasis on non-attorney or "lay representation" instead.

Due Process Concerns: Low, at least for benefits adjudication systems that do not involve terminating welfare benefits that constitute entitlements.

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informal adjudication as a "hole" in the APA that bucks the consensus around the value of uniformity in informal rulemaking, but noting that Congress has opted not to draw from uniform APA requirements in recent efforts to craft agency adjudication schemes); Nielson, *supra* note 5, at 665 (arguing that the lack of uniform procedure for informal adjudication is "a significant problem—both as a policy matter (procedural rigor may help create better, more legitimate outcomes) and doctrinally"); *but see* Gary J. Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on 'Ossifying' the Adjudication Process*, 55 ADMIN. L. REV. 787, 789 (2003) (criticizing an American Bar Association proposal to have the formal adjudication requirements apply by default to any legislation that calls for a "hearing," on the ground that the proposal "elevates doctrinal or formalistic considerations over . . . contemporary needs and practical experience").

[119] *See* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 26 ("Due process can apply to such adjudication, but it seldom does because the procedural regulations defining the requirements for a legally required evidentiary hearing generally guarantee private parties more protection than due process would require.").

[120] Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

[121] *See* Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005) ("One way we ensure that the 'standards of fairness' are met is by guaranteeing that aliens have the opportunity to be represented by counsel. The high stakes of a removal proceeding and the maze of immigration rules and regulations make evident the necessity of the right to counsel.").

[122] FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).

[123] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.' "); *see* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 35 (collecting cases).

[124] *See infra* note 136 for sources that address this debate.

Concept. Agency adjudication schemes that determine eligibility for public benefits tend to be non-adversarial, designed to protect the interests of the applicant.[125] Only one party—typically, the applicant for benefits—participates in a written or oral evidentiary hearing before an adjudicator tasked with making an eligibility determination.[126] No counsel appears for the government during the evidentiary hearing.[127] Proceedings in this category are often described as "informal" in a colloquial sense, because their non-adversarial nature may lead to more relaxed interactions between adjudicator and applicant.[128] In the APA sense, the proceedings may have "formal" elements—i.e., some requirements of formal APA adjudication (such as the use of ALJs as adjudicators) may apply.[129] But notwithstanding the applicability of some APA requirements, the single-party, non-adversarial nature of these proceedings contrasts sharply with the paradigm of the adversarial trial on which formal APA adjudication is modeled.[130]

Examples. This category includes two enormous benefits-adjudication systems: those of the Social Security Administration (SSA) and the Department of Veterans Affairs (VA).

The SSA system is the largest federal administrative adjudication system and is sometimes called the largest adjudication system in the Western world.[131] SSA adjudicates applications for an array of social security benefits, but most of the complex adjudications concern applications for disability benefits under one of two programs: Supplemental Security Income (SSI) and Old Age Survivors and Disability Insurance (OASDI).[132] The administrative adjudication process provides for an evidentiary hearing before an ALJ.[133] The applicant for benefits is the only party that

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[125] *See* Dubin, *supra* note 90, at 1290-91.

[126] *See, e.g.*, Carr v. Saul, 141 S. Ct. 1352, 1359 (2021) (no government counsel appears before in proceedings before ALJ to adjudicate social security disability claims); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 333-34 (1985) (no government counsel appears in proceedings to adjudicate veterans benefits claims).

[127] *Carr*, 141 S. Ct. at 1359; *Walters*, 473 U.S. at 333-34; *cf. Carr*, 141 S. Ct. at 1359 (government counsel appears at appellate phase of SSA proceedings, but only as an adviser, not as opposing counsel). Judicial review of these non-adversarial adjudication schemes is commonly adversarial, whether before an Article I court (as occurs for veterans disability benefits) or Article III court (as occurs for social security disability benefits and, at a higher level, veterans benefits). *See* CRS In Focus IF11365, *U.S. Court of Appeals for Veterans Claims: A Brief Introduction*, by Jonathan M. Gaffney (explaining that the Court of Appeals for Veterans Claims (CAVC) "has exclusive jurisdiction to hear appeals of decisions from the" BVA and that "[p]roceedings before the CAVC are adversarial"); Nowling v. Colvin, 813 F.3d 1110, 1119-20 (11th Cir. 2016) (describing standards for federal court review of social security disability determinations); Soc. Sec. Admin., *Federal Court Review Process*, https://www.ssa.gov/appeals/court_process.html (last visited Sept. 24, 2021). The CAVC is an Article I court. *See* CRS Report R43746, *Congressional Power to Create Federal Courts: A Legal Overview*, by Andrew Nolan and Richard M. Thompson II ("There are two main categories of non-Article III courts. The first is commonly referred to as 'legislative courts' or 'Article I courts.' These are standalone courts, created under Congress's Article I power, which have similar authority as Article III courts, such as entering their own judgments and issuing contempt orders. Examples of legislative courts include the U.S. Tax Court; the Court of Federal Claims; the Court of Appeals for Veterans Claims . . . .").

[128] *See Carr*, 141 S. Ct. at 1359 (describing SSA regulations as ensuring "informal, nonadversarial proceedings").

[129] *See* Bremer, *Reckoning with Exceptionalism*, *supra* note 1, at 1764-65 (describing controversy as to whether the APA formal adjudication requirements apply to inquisitorial schemes of social security adjudication).

[130] *See Carr*, 141 S. Ct. at 1363 (Thomas, J., concurring) ("This decidedly pro-claimant, inquisitorial process is quite unlike an adversarial suit in which parties are expected to identify, argue, and preserve all issues.").

[131] Dubin, *supra* note 90, at 1299; *See also* Smith v. Berryhill, 139 S. Ct. 1765, 1776 (2019) ("[T]he SSA is a massive enterprise . . . ."); Richardson v. Perales, 402 U.S. 389, 399 (1971) (describing the SSA adjudication scheme as "of a size and extent difficult to comprehend").

[132] Dubin, *supra* note 90, at 1292 ("OASDI and SSI disability cases account for much of the agency's caseload in administrative adjudication and under judicial review."). Adjudication procedure for disability claims under the two programs is the same. *Id*. at 1292 n.18; *see* Smith v. Berryhill, 139 S. Ct. 1765, 1772 (2019) ("The regulations that govern the two programs are, for today's purposes, equivalent.").

[133] *Smith*, 139 S. Ct. at 1775 ("[A] primary application for benefits may not be denied without an ALJ hearing

presents evidence at this hearing, which is conducted in an "informal" manner.[134] However, the exclusive evidence principle applies: the ALJ may not consider evidence to which the applicant does not have an opportunity to respond.[135] The Supreme Court has left open the question whether the APA's program of formal adjudication requirements applies to SSA adjudications.[136] One particular APA requirement, however, does not apply: there is no required separation of investigatory and adjudicative functions.[137] The ALJ who presides over the evidentiary hearing must investigate, develop the record, and even raise claims for the applicant where appropriate before reaching a decision.[138]

The VA adjudicates a "vast number of benefit claims"—with a caseload of more than one million new claims per year, the most common of which are claims for service-connected disability.[139] The adjudication scheme provides benefits applicants with an opportunity for a non-adversarial evidentiary hearing before an administrative judge known as a Veterans Law Judge or "VLJ," within an entity called the Board of Veterans' Appeals (BVA).[140] The applicant is the only party that presents evidence before the VLJ.[141] The hearing is meant to resemble a "conversation" between the applicant and the VLJ.[142]

(assuming the claimant timely requests one . . .).").

[134] Carr v. Saul, 141 S. Ct. 1352, 1359 (2021). Witnesses may testify, whether called by the claimant or the ALJ. 20 C.F.R. § 404.950(e).

[135] *See* 20 C.F.R. § 404.1529(a) ("In determining whether you are disabled, we consider all your symptoms, including pain, and the extent to which your symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence."); Yount v. Barnhart, 416 F.3d 1233, 1236 (10th Cir. 2005) (invalidating SSA determination on due process grounds where ALJ considered post-hearing exam without giving benefits applicant an opportunity to address it).

[136] Richardson v. Perales, 402 U.S. 389, 409 (1971) ("We need not decide whether the APA has general application to social security disability claims . . . ."); *see* Dubin, *supra* note 90, at 1306 ("[W]hile the [*Perales*] Court upheld the SSA's adjudicative model—including the dual investigative and decisional roles of the SSA ALJ—it failed to consider the applicability of § 554(d) of the APA [requiring separation of functions]."); *cf.* Final Rule, Hearings Held by Administrative Appeals Judges of the Appeals Council, 83 Fed. Reg. 73,138, 73,140 (2020) (arguing that "in light of the significant differences between [SSA's] informal, inquisitorial hearings process and the type of hearings process to which the APA applies, [SSA's] hearings process is properly viewed as comparable to the APA's process, but governed only by the requirements of the [Social Security] Act and procedural due process").

[137] *See* Dubin, *supra* note 90, at 1306.

[138] *See* Carr v. Saul, at 1359 ("'It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits . . . .'") (quoting Sims v. Apfel, 530 U.S. 103, 111 (2020)); Higbee v. Sullivan, 975 F.2d 558, 561 (9th Cir. 1992) ("[T]he ALJ is not a mere umpire at such a proceeding, but has an independent duty to fully develop the record, especially where the claimant is not represented.").

[139] *See* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 177.

[140] *See* 38 U.S.C. § 7113(b); 38 C.F.R. § 20.101(b). VLJ is the regulatory term; the statutory term is "member of the Board of Veterans' Appeals." 38 U.S.C. § 7101(a).

[141] *See* 38 C.F.R. § 20.302 (discussing participation of benefits applicant and representative in BVA hearing, with no provision for government counsel); ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 178. As in the SSA context, witnesses may testify. Whether the representative for a benefits applicant may appear without the personal appearance of the applicant remains unresolved. Atilano v. McDonough, -- F. 4th --, 2021 WL 4168221, at *5 (Sept. 14, 2021).

[142] Johanna Selberg, Note, *Truth and Trauma: Exploring the Merits of Non-Adversarial Asylum Hearings*, 35 GEO. IMMIGR. L.J. 929, 943 (2021) (quoting BVA website); Daniel L. Nagin, *The Credibility Trap: Notes on a VA Evidentiary Hearing*, 45 U. MEM. L. REV. 887, 902 (2015) (discussing the "informal, non-adversarial nature of a VLJ hearing").

Both the SSA and VA adjudication systems are designed to be protective of the applicant, although both have been criticized for not achieving this goal effectively and for slow adjudications.[143]

Key Features. The aim to protect the interests of the applicant for benefits in these single-party evidentiary hearings manifests itself in the unique role that the adjudicator plays in them. Unlike adjudicators in adversarial proceedings, who rely primarily upon the parties to advance claims and present evidence, adjudicators in these non-adversarial schemes proactively develop the record and the legal theories in the case.[144] They are, in other words, inquisitorial adjudicators: they develop the very matters over which they preside.[145] Although adversarial adjudicators sometimes bear a measure of responsibility for developing the record—immigration judges must develop evidence of persecution in asylum cases in some circumstances, and even federal district judges have some responsibility to theorize legal claims for *pro se* litigants—they typically do so only as a backstop where the adversarial process breaks down (often because one party is not represented).[146] The inquisitorial adjudicators in these single-party proceedings without government counsel, in contrast, bear more primary responsibility for developing evidence in the case.[147]

In an effort to keep proceedings as "informal and nonadversarial as possible," the evidentiary hearing schemes in this category also tend to limit or de-emphasize the role of legal representation.[148] As mentioned already, the government is not represented by counsel in the evidentiary hearings.[149] Even for the private parties involved, legal representation does not play the central role that it does in adversarial proceedings. Lay representation (i.e., representation by non-lawyers) and, to a lesser extent, self-representation are common. The VA system goes furthest in this regard: it prohibits compensating attorneys before issuance of an initial decision in the case (this occurs before BVA proceedings commence).[150] Free lay representation is widely available

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[143] *See* Smith v. Berryhill, 139 S. Ct. 1765, 1776 (2019) ("The four steps preceding judicial review" in SSA adjudication "can drag on for years."); FRANK BLOCH, BLOCH ON SOCIAL SECURITY § 4:1 (2021) ("Although relatively simple cases tend to move through the [SSA] process with few problems, they often do so at a painfully slow pace."); Selberg, *supra* note 142, at 943 ("[S]ome scholars have pointed out that this outwardly non-adversarial, veteran-friendly system [for adjudicating VA benefits] actually leads to fewer procedural protections for applicants.").

[144] *See, e.g.,* 38 U.S.C. § 5103A (imposing a duty to assist claimants upon the VA); Carr v. Saul, 141 S. Ct. 1352, 1359 (2021) (describing the SSA ALJ's obligation to develop the record); Comer v. Peake, 552 F.3d 1362, 1368 (Fed. Cir. 2009) ("Because of the paternalistic nature of the proceedings, the [BVA] . . . is required 'to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.'") (quoting McGee v. Peake, 511 F.3d 1352, 1357 (Fed. Cir. 2008)).

[145] *Carr*, 141 S. Ct. at 1358 ("The critical feature that distinguishes adversarial proceedings from inquisitorial ones is whether claimants bear the responsibility to develop issues for adjudicators' consideration.").

[146] *See* Erickson v. Pardus, 551 U.S. 89, 94 (2007) ("A document filed *pro se* [in federal court] is 'to be liberally construed,' and 'a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'") (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)); Quintero v. Garland, 998 F.3d 612, 627 (4th Cir. 2021) ("[W]e hold that immigration judges' duty to fully develop the record—while applicable in all cases—becomes especially crucial in cases involving unrepresented noncitizens.").

[147] *See, e.g., Comer,* 552 F.3d at 1368.

[148] *See* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 324 (1985) (describing Congress's long-standing interest in limiting legal representation in veterans benefits adjudication as being motivated by the view that "the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer").

[149] *See supra* note 127.

[150] 38 U.S.C. § 5904(c)(1); *see* Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1017 (9th Cir 2012) (en banc) (explaining that adjudication of veterans' claims for disability compensation "begins at one of the VA's 57 Regional

through outside organizations.[151] Even during a BVA evidentiary hearing, when the bar on attorney compensation does not apply, most applicants use lay representation.[152] The SSA does not limit attorney compensation, but, like the VA, it authorizes the use of lay representation.[153] It is common for claimants to appear before the SSA ALJ without a lawyer.[154]

Due Process Concerns. Applications for benefits not yet conferred on an individual do not implicate property interests protected by due process unless the benefits constitute an "entitlement," meaning that the government has no discretion to deny the benefits to eligible applicants.[155] Courts have held that VA disability and social security disability benefits are "entitlements" under this analysis—not discretionary benefits—and therefore give rise to protected property interests.[156]

In those situations where due process applies, the Supreme Court has upheld the use of inquisitorial adjudicators—i.e., adjudicators without a separation of functions—in benefits adjudication schemes.[157] It has even held that a lack of separation of functions comports with due process in professional disciplinary proceedings, such as where the same board that investigates a doctor's alleged misconduct decides whether to suspend his medical license.[158] The Court has emphasized, however, that this inquiry is context-specific and that "special facts and circumstances" may trigger due process violations in some instances where adjudicators also act

Offices and proceeds through the [BVA]").

[151] ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 181-82.

[152] Bd. of Veterans' Appeals, *Annual Report Fiscal Year 2020*, at 36 (showing that about 25% of claimants appearing before the BVA used attorneys, 9% appeared pro se, and the rest used lay representatives who came from a variety of sources), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2020AR.pdf.

[153] 20 C.F.R. §§ 404.1705(b), 416.1505(b).

[154] Carr v. Saul, 141 S. Ct. 1352, 1363 (2021) (Thomas, J., concurring) ("[SSA] [h]earings are so informal that lawyers, briefs, and even attendance are often optional."); Brief for Nat'l Ass'n of Soc. Sec. Claimants Reps. et al. as Amicus Curiae Supporting Petitioners, Carr v. Saul, 141 S. Ct. 1352 (2021), 2019 WL 11609432, at *24 ("[A] large number of claimants appear at their ALJ hearings with no representation at all, and a smaller number appear with non-attorney representatives.").

[155] *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) ("Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion."); Kent H. Barnett, *Some Kind of Hearing Officer*, 94 WASH. L. REV. 515, 527 (2019) (explaining that procedural due process does not apply to "most adjudications that deny applications for benefits").

[156] Cushman v. Shinseki, 576 F.3d 1290 (Fed. Cir. 2009) ("A veteran is entitled to disability benefits upon a showing that he meets the eligibility requirements set forth in the governing statutes and regulations. We conclude that such entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.") (collecting cases from other circuits); Gonzalez v. Sullivan, 914 F.2d 1197, 1203 (9th Cir. 1990) ("An applicant for social security benefits has a property interest in those benefits.").

[157] Richardson v. Perales, 402 U.S. 389, 410 (1971) (holding that the SSA ALJ's role as an "advocate-judge-multiple-hat" adjudicator who "acts as an examiner charged with developing the facts" does not violate due process); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 326 (1985) (upholding restrictions on retention of legal counsel for veterans benefits claims and stating that "flexibility of our approach in due process cases is intended in part to allow room for other forms of dispute resolution").

[158] Withrow v. Larkin, 421 U.S. 35, 58 (1975).

as investigators.[159] In the benefits context, the use of inquisitorial adjudicators has not triggered due process concerns.[160]

Similarly, with respect to limitations on the use of legal counsel, the Supreme Court held that a federal statute limiting attorney compensation in VA benefits cases did not violate due process.[161] The Court reasoned that it owed deference to congressional efforts to craft "more informal procedures" for benefits adjudication and that the need for legal counsel is "considerably diminished" in non-adversarial proceedings in which the adjudicator must assist the applicant.[162] Yet the Court also held that due process required the right to retain counsel in a welfare termination case,[163] and the Court has established that restrictions on retained counsel may raise considerable due process concerns in proceedings where liberty interests are at stake.[164]

Non-Adversarial Interviews or Inspections

Category Overview

Concept: A streamlined proceeding in which the adjudicator makes a decision based on whatever information he or she deems relevant.

Examples: Tariff Classification Rulings made by Customs and Border Protection; visas and other streamlined immigration adjudications.

Notable Feature: The exclusive record principle does not apply; the adjudicator is not confined to a closed record or required to offer the parties an opportunity to respond to evidence.

Due Process Concerns: Substantial, given the lack of an evidentiary hearing. Schemes in this category are often employed where no protected property or liberty interests are at stake, where de novo judicial review is available, or in contexts where due process applies with reduced force (e.g., immigration).

Concept. Some extremely "informal" adjudication schemes do not provide an opportunity for an evidentiary hearing. Instead, they empower adjudicators to make rapid decisions based on an interview, inspection, application, or other type of informal interaction.[165] The adjudicator may

[159] *Id.*; *see also* Hess v. Bd. of Trustees of S. Illinois Univ., 839 F.3d 668, 675 (7th Cir. 2016) (in school discipline case, citing *Withrow* for the proposition that "[a]lthough biased decision-making does violate due process, the combination of investigative and adjudicative functions into a single administrator does not, in itself, demonstrate such bias"); *but cf.*, Osuagwu v. Gila Regional Medical Ctr., 938 F. Supp. 2d 1142, 1163-64 (D.N.M. 2012) (distinguishing *Withrow* and holding that joint accusatorial and adjudicative function of members of a professional disciplinary board violated due process where the board members acted "as accuser, prosecutor, investigator, and judge").

[160] *See, e.g.*, Carr v. Saul, 141 S. Ct. 1352, 1359 (2021) (describing with approval the inquisitorial nature of SSA proceedings, including "the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits"); Hepp v. Astrue, 511 F.3d 798, 804-06 (8th Cir. 2008) (reaffirming that "[s]ocial security disability hearings are non-adversarial proceedings and therefore do not require full courtroom procedures" and concluding "that due process under the Fifth Amendment does not require in-person cross-examination in social security disability hearings.").

[161] *Walters*, 473 U.S. at 307.

[162] *Id.* at 333-34; *see also* Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1036 (9th Cir 2012) (en banc) ("[T]he presence of paid attorneys would transform the VA's system of benefits administration into an adversarial system that would tend to reflect the rigorous system of civil litigation that Congress quite plainly intended to preclude. The choice between a vigorously adversarial system and a less adversarial one reflects serious policy considerations and is a permissible one.").

[163] Goldberg v. Kelly, 397 U.S. 254, 270-71 (1970) ("[T]he recipient must be allowed to retain an attorney if he so desires."); *see also infra* note 182 (discussing subsequent statutory developments relevant to *Goldberg*).

[164] *See Walters*, 473 U.S. at 332 (reviewing cases).

[165] *See* 8 C.F.R. § 208.30(e)(ii) (credible fear interviews conducted by asylum officers); 12 C.F.R. § 5.13(a) (review of bank licensing applications by the Office of the Comptroller of the Currency (OCC)); *see generally* ASIMOW, FEDERAL

consider evidence or information acquired from other sources without giving the party to the dispute an opportunity to respond to it.[166] Essentially, the adjudicator makes "[a] unilateral decision . . . on the basis of whatever information he deem[s] it appropriate to take into account."[167]

Examples. Streamlined adjudication schemes in this category occur throughout the federal government and include the Tariff Classification Rulings mentioned above made by Customs and Border Protection;[168] fish inspections by the Department of Commerce;[169] United States Forest Service adjudications of applications to use National Forest land;[170] and bank licensing determinations by the Office of the Comptroller of the Currency.[171]

One particularly high-volume context in which these adjudication systems occur is immigration regulation. The Department of State typically adjudicates more than ten million visa applications annually[172] in U.S. embassies and consulates abroad using this type of adjudication system.[173] In addition, the Department of Homeland Security (DHS) conducts most removals of aliens from the United States through rapid proceedings—called "expedited removal," "reinstatement of removal," and "administrative removal"—that, at least in most cases, do not allow for evidentiary

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ADMINISTRATIVE ADJUDICATION *supra* note 22, at ch. 5 ("Type C Adjudication").

[166] *See, e.g.*, Johnson v. Vilsack, 833 F.3d 948, 955 (2016) (describing a U.S. Dep't of Agriculture (USDA) adjudication procedure in which "there is no procedure for questioning evidence submitted by the opposing party, much less an evidentiary hearing"); Sec. Bank & Trust v. Heimann, 452 F. Supp. 776, 780 n.5 (1978) (reviewing OCC adjudication in which agency considered expert opinion without giving parties opportunity to respond).

[167] *Johnson*, 833 F.3d at 957-58 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 83, cmt. b (1982)); *see* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 90. Adjudication schemes in the other two categories may begin with interviews or inspections of this variety, but they allow parties the opportunity for an evidentiary hearing if they disagree with the initial decision. *See, e.g.*, Smith v. Berryhill, 139 S. Ct. 1765, 1772 (2019) (explaining that SSA disability adjudication involves two preliminary levels of application-and-decision proceedings before there is an opportunity for an ALJ hearing). This category includes only adjudication schemes that do not provide an opportunity for an evidentiary hearing at any stage. *See Johnson*, 833 F.3d at 952 (noting that the streamlined USDA process results in a "final agency determination").

[168] 19 C.F.R. § 177.0; *see* United States v. Mead Corp., 533 U.S. 218, 234 (2001) (holding that these rulings, known as TCRs, are not entitled to *Chevron* deference and describing them as "being churned out at a rate of 10,000 a year at an agency's 46 scattered offices").

[169] *See* 50 C.F.R. § 260.21.

[170] *See* 36 C.F.R. § 251.54(g)(2) (governing the processing of applications for special use permit applications); W. Montana Comm. Partners, Inc. v. Austin, 104 F. Supp. 3d 1076, 1085-86 (D. Mont. 2015) (describing adjudication scheme), *aff'd* 696 F. App'x 789 (9th Cir. 2017).

[171] 12 C.F.R. § 5.13(a); *see generally* Camp v. Pitts, 411 U.S. 138, 141 n.3 (1973) (explaining that the OCC adjudication scheme for bank licensing contemplates "a wide-ranging ex parte investigation"); Sec. Bank & Trust v. Heimann, 452 F. Supp. 776, 780 (1978) (describing OCC adjudication process). An ACUS publication lists many more examples and gives an overview of this universe of adjudication schemes. ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at ch. 5.

[172] Dep't of State, *FY2019 NIV [Nonimmigrant Visa] Workload by Visa Category* (showing 11.7 million nonimmigrant visas adjudicated in FY2019), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html; Dep't of State, Report of the Visa Office 2019, at Table 1 (showing between 8.7 million and 10.8 million immigrant and nonimmigrant visas issued annually between fiscal years (FY) 2015-19, and not including figures for refused visas), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports/report-of-the-visa-office-2019.html. For an overview of nonimmigrant and immigrant visa categories, see CRS Report R45938, *Nonimmigrant and Immigrant Visa Categories: Data Brief*, by Jill H. Wilson.

[173] *See* 22 C.F.R. §§ 41.121 (governing refusal of nonimmigrant visas), 42.81 (governing refusal of immigrant visas); Dep't of State, Foreign Affairs Manual, 9 FAM 301.5 (describing primary sources of information that an adjudicator should consider about an applicant's ineligibility for a visa, including information from "U.S. government sources" and "third parties"), https://fam.state.gov/fam/09FAM/09FAM030105.html#M301_5.

hearings and thus fit into this category.[174] (As mentioned earlier, some removal cases go through adversarial trial-type proceedings in EOIR immigration courts.[175] But DHS may employ the more rapid proceedings for certain categories of aliens, including those encountered at the border without valid travel documents, those with prior removal orders who have reentered unlawfully, and those with aggravated felony convictions.[176] Annually, removals conducted through the rapid proceedings vastly outnumber those conducted through immigration court.[177]).

Key Feature. The exclusive record principle does not apply in these streamlined proceedings. The adjudicators are not limited to considering evidence contained within a closed record that is available to the parties.[178] Instead, the adjudicator's efforts to reach the correct determination generally lack formal structure: he or she may consider not only information given by the parties during interviews or other interactions, but also other information that is "available to" the adjudicator or discovered through independent inquiry.[179] Adjudicators need not give the parties an opportunity to respond to this non-record evidence,[180] although sometimes they are required to disclose the evidence on which they rely in a statement of reasons explaining their decision.[181]

Due Process Concerns. The lack of an evidentiary hearing means that this category of adjudication scheme poses substantial due process considerations when used in contexts where property or liberty interests are at stake. The Supreme Court held, for example, that the government could not terminate an individual's welfare benefits without a pre-termination

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[174] Gomez-Velazco v. Sessions, 879 F.3d 989, 991 (9th Cir. 2018) ("The proceedings are summary in nature and conducted by front-line immigration enforcement officers employed by DHS."); *see also* CRS In Focus IF11357, *Expedited Removal of Aliens: An Introduction*, by Hillel R. Smith. A noncitizen who claims asylum or asserts a fear of persecution abroad and who is ordered removed through these summary procedures can seek immigration judge review of whether the fear of persecution has an adequate basis (i.e., is "credible" or "reasonable"), and it is not entirely clear whether the immigration judge is confined to considering a closed record during this review. *Compare* Dep't of Justice, IMMIGRATION COURT PRACTICE MANUAL 116 (2020) (describing a credible fear review proceeding as a "hearing" at which "[e]vidence may be introduced at the discretion of the Immigration Judge"), *with* 8 C.F.R. §§ 208.12, 208.30(e)(ii) (contemplating that the DHS officials conducting credible fear interviews may consider "additional facts" outside of the interview record); *see* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 20 ("In the end, a certain degree of judgment is called for in deciding whether a legally-required adjudicatory procedure is an evidentiary hearing.").

[175] *See Gomez-Velazco*, 879 F.3d at 991 ("The most formal process involves a hearing in immigration court before an immigration judge . . . .").

[176] 8 U.S.C. §§ 1225(b)(1), 1228(b), 1231(a)(5).

[177] Dep't of Homeland Sec., Immigration Enforcement Actions: 2019, at 10 (2020) (Table 6, showing that expedited removals and reinstatements combined constituted at least 80 percent of all removals in every fiscal year since 2013), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf.

[178] *See, e.g.*, 12 C.F.R. § 5.13(a) (providing that the OCC may "consider information available from any source" when evaluating bank applications); Sec. Bank & Trust v. Heimann, 452 F. Supp. 776, 780 n.5 (1978) (rejecting argument that it was "unfair" for the OCC to request and consider an expert opinion without the knowledge of the parties to a bank license dispute).

[179] *See, e.g.*, 7 C.F.R. § 278.6(c) (providing that USDA officials may consider "any other information available to" them when determining if a vendor participating in the SNAP program has committed a violation); 12 C.F.R. § 5.13(a) (similar, for OCC adjudication).

[180] *See, e.g.*, Johnson v. Vilsack, 833 F.3d 948, 955 (2016) ("no procedure for questioning evidence submitted by the opposing party").

[181] *See, e.g.*, 8 U.S.C. § 1225(b)(1)(B)(iii)(II) (credible fear determinations) ("The officer shall prepare a written record of a determination . . . . Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution.").

evidentiary hearing.[182] The Supreme Court upheld an SSA statutory scheme that did not provide for an evidentiary hearing before the termination of disability benefits, but noted that the scheme did provide for a post-termination evidentiary hearing.[183] Federal courts reviewing due process challenges generally look askance at an adjudicator's reliance on evidence to which a party has no opportunity to respond, which may occur in adjudication schemes of this sort.[184]

It is within Congress's powers to craft administrative adjudication schemes without evidentiary hearings in some contexts. An obvious one is where property or liberty interests are not at stake, meaning that procedural due process does not apply.[185] Another is where, following the adjudication, the unsuccessful party may seek a trial de novo in federal court.[186] Finally, a special

[182] Goldberg v. Kelly, 397 U.S. 254, 264 (1970) ("[W]hen welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process."). The *Goldberg* court reasoned that statutory law at the time created an entitlement to the welfare benefits, but a subsequent provision of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996—sometimes called the Welfare Reform Act—may impact that analysis. *See* 42 U.S.C. 601(b) ("This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part."); State ex. rel. K.M. v. W. Va. Dep't of Health and Human Res., 212 W. Va. 783, 792 (2003) ("*Goldberg* was written before the 1996 Act and concerned rights under the old benefit scheme. . . . [W]e must reject petitioners' argument that a pre-termination hearing is required before ending TANF [i.e., the new scheme] cash assistance due to the expiration of the five-year time limit."); *but see* Weston v. Cassata, 37 P.3d 469, 475 (Colo. App. 2001) ("Although we agree that the 'no entitlement' language modifies the unconditional entitlement to welfare benefits previously available under the [old] program, we do not agree that it vitiates all forms of property rights in welfare benefits.").

[183] Mathews v. Eldridge, 424 U.S. 319, 339-40, 349 (1976) ("We conclude that an evidentiary hearing is not required *prior to the termination of disability benefits* and that the present administrative procedures fully comport with due process.") (emphasis added).

[184] *See* Doe v. Univ. of Cincinnati, 872 F.3d 393, 399–400 (6th Cir. 2017) (explaining that minimum due process requirements for college discipline proceedings include provision of "an explanation of the evidence against the student"); Yount v. Barnhart, 416 F.3d 1233, 1236 (10th Cir. 2005) (holding that SSA ALJ violated due process by considering post-hearing evidence without affording the benefits applicant a "meaningful opportunity" to address it); Ali v. Reno, 829 F. Supp. 1415, 1435 (S.D.N.Y. 1993), aff'd, 22 F.3d 442 (2d Cir. 1994) ("Anytime a judicial or quasi-judicial officer is in possession of information learned secretly, the scope and content of which can only be imagined, a litigant is disadvantaged."); Henry J. Friendly, *Some Kind of Hearing*, U. Pa. L. Rev. 1267 (1975) ("There can . . . be no fair dispute over the right to know the nature of the evidence on which the administrator relies."); *cf.* Kerry v. Din, 576 U.S. 86, 105 (2015) (Kennedy, J., concurring) (concluding, under the narrow "facially legitimate and bona fide" standard of review that governs some visa cases, that the Department of State did not violate due process by denying a visa on terrorism grounds without disclosing the factual basis for the decision); Sw. Airlines Co. v. TSA, 650 F.3d 752, 757 (D.C. Cir. 2011) (reasoning that an "agency conducting an informal adjudication has no statutory obligation to prematurely disclose the materials on which it relies so that affected parties may pre-rebut the agency's ultimate decision" and citing precedent for the proposition that due process "does not require more" where the adjudication concerned an industry-wide inquiry rather than individualized considerations).

[185] *See* Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 655-56 (1990) (holding that an agency's failure to disclose to a party the material on which a decision is based or allow for the introduction of contrary evidence is not unlawful on fairness grounds "where the Due Process Clause itself does not require" such procedures); ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 26 ("[T]he majority of Type C adjudicating schemes involve discretionary decisions that are not covered by due process.").

[186] *See* Broad St. Food Mkt., Inc. v. United States, 720 F.2d 217, 221 (1st Cir. 1983) (reasoning that the USDA's one-year disqualification of a retailer from the food stamp program for a program violation does not violate due process where the retailer is "accorded de novo review by a court of the finding of violation and limited review of the choice of sanction"); 7 C.F.R. § 278.6(c) (establishing that USDA makes determinations of program violations without limiting itself to an exclusive record from an evidentiary hearing); *see generally* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 95 ("There is little need for a more formal adjudication process at the agency level when a court will ultimately retry the case."); *cf.* Ingraham v. Wright, 430 U.S. 651, 675-77 (1977) (holding that the imposition of corporal punishment in public school before allowing any opportunity to respond to accusations of misconduct does not violate due process, in part because of historical limits on the child's liberty interest and also because the state "preserved the traditional judicial proceedings for determining whether the punishment was justified").

doctrine of procedural due process applies to many immigration adjudications, especially those that concern aliens seeking admission to the United States.[187] Essentially, most aliens coming to the United States from abroad do not have procedural due process rights with respect to admission.[188] As such, visa procedures and even expedited removal procedures for recent arrivals at the border are generally not subject to due process analysis, allowing Congress to provide for streamlined adjudications without evidentiary hearings.[189]

Statutory Defaults for Informal Adjudication

As noted above, where the APA's scheme of statutory requirements for formal adjudication does not apply, an agency is generally left to develop its own adjudication procedures consistent with the relevant enabling statute and due process.[190] However, there are some APA procedural requirements that do apply to informal adjudication schemes by default—that is, where a separate statute does not override them.[191] This section explains two major types of default parameters that apply to informal adjudication schemes: (1) the general availability of judicial review under 5 U.S.C. §§ 701–706; and (2) and the minimal requirements of adjudication procedure set out in 5 U.S.C. § 555.

Judicial Review

The APA's judicial review provisions, 5 U.S.C. §§ 701–706, establish a "general presumption" that final agency action is subject to judicial review.[192] As such, a final agency decision made through informal adjudication is, like other types of final agency action, generally subject to review for "arbitrary and capriciousness," statutory or constitutional violations, and other grounds set forth in Section 706.[193] There are exceptions. Judicial review is not available, for instance,

[187] *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1983 (2020) (holding that aliens seeking entry into the United States, including aliens apprehended upon attempting to enter unlawfully, have "only those rights regarding admission that Congress has provided by statute . . . the Due Process Clause provides nothing more").

[188] *Id.*; Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) ("It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise.").

[189] *Thuraissigiam*, 140 S. Ct. at 1983; *cf.* Kerry v. Din, 576 U.S. 86, 102-03 (2015) (Kennedy, J., concurring) (reasoning that a U.S. citizen may obtain limited judicial review of a visa denial that implicates the citizen's due process rights).

[190] *See* Walker, *supra* note 67, at 749 (explaining that most informal adjudication procedure comes from "regulation or subregulatory guidance" rather than "the respective agency's enabling statute").

[191] *See* 5 U.S.C. § 559 (providing that a statute may "supersede or modify" the APA if "it does so expressly"); Asiana Airlines v. FAA, 134 F.3d 393, 397 (D.C. Cir. 1998) ("The question [under Section 559] is whether Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm."); *see also* Marcello v. Bonds, 349 U.S. 302, 309-10 (1955) (holding that a subsequent statute satisfied Section 559's express repeal requirement even though it contained no statement referencing the APA and making it inapplicable, because legislative history and "clear and categorical direction" in the subsequent statute established that Congress did not intend for the APA to apply).

[192] Dep't of Homeland Sec. v. Regents of Univ. of Cal., 140 S. Ct. 1891, 1905 (2020) ("The APA establishes a 'basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'") (quoting Abbott Laboratories v. Gardner, 387 U. S. 136, 140 (1967) (quoting 5 U.S.C. § 702)).

[193] 5 U.S.C. § 706. One ground of review in Section 706—"substantial evidence" review—does not apply to informal adjudication, but arbitrary and capricious review does apply and courts have equated the two standards. *See* Butte Cty., Cal. v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[I]n their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same.").

where precluded by another statute[194] or where the decision in question is "committed to agency discretion by law."[195] Examples of statutory schemes that override the APA presumption and curtail judicial review of informal agency adjudication occur in the areas of immigration[196] and prison administration.[197] Until 1989, a statute sharply curtailed judicial review of VA benefits determinations; the current statutory scheme instead channels judicial review of such determinations to the exclusive jurisdiction of an Article I court, the U.S. Court of Appeals for Veterans Claims (CAVC), and then to the U.S. Court of Appeals for the Federal Circuit.[198] On the other side of the ledger, some statutes allow for more expansive judicial review than is available under Section 706—such as statutes that subject some informal adjudications to de novo review in federal district court.[199] The default rule, however, is that Section 706 authorizes federal courts to review informal agency adjudication for compliance with statutory and constitutional requirements and (under the "arbitrary and capricious" standard) for whether agency determinations are "reasonable and reasonably explained."[200] A CRS Report covers the topic of judicial review of agency action in depth.[201]

What limitations apply to Congress's ability to curtail judicial review of informal agency adjudication? The complex constitutional law that governs this subject is mostly beyond the scope of this report. Briefly, there are two primary issues to consider. First, under Article III of the Constitution, agency adjudication of disputes that implicate so-called "private rights" must be subject to some degree of judicial review.[202] "Private rights" is an amorphous category that

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[194] 5 U.S.C. § 701; *see* Block v. Comm. Nutrition Inst., 467 U.S. 340, 345 (1984) ("Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.").

[195] 5 U.S.C. § 701; *see Regents of Univ. of Cal.*, 140 S. Ct. at 1905.

[196] *See, e.g.*, 8 U.S.C. § 1252(a)(2)(A)-(C), (e) (curtailing judicial review of some immigration determinations); *see* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1983 (2020) (discussing statutory limitation on judicial review of credible fear determinations under § 1252(e)).

[197] 18 U.S.C. § 3625 (rendering the APA judicial review provisions inapplicable to certain determinations by the Bureau of Prisons concerning individual federal prisoners); *see* Martin v. Gerlinski, 133 F.3d 1076, 1079 (8th Cir. 1998) ("[I]t is apparent that § 3625 precludes judicial review of agency adjudicative decisions but not of rulemaking decisions."); Harrison v. Fed. Bureau of Prisons, 248 F. Supp. 3d 172, 182-83 (D.D.C. 2017).

[198] 38 U.S.C. § 7292(c); *see* Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1020-22 (9th Cir. 2012) (en banc) (explaining evolution of judicial review scheme, including current provisions establishing that "decisions of the [Article I] Veterans Court are reviewed exclusively by the Federal Circuit"); CRS In Focus IF11365, *U.S. Court of Appeals for Veterans Claims: A Brief Introduction*, by Jonathan M. Gaffney.

[199] *See, e.g.*, Irobe v. U.S. Dep't of Agric., 890 F.3d 371, 376 (2018) ("A party aggrieved by the USDA's final determination may seek judicial review through 'a trial de novo . . . in which the court shall determine the validity of the questioned administrative action in issue.' ") (quoting 7 U.S.C. § 2023(a)(13), (15)), *see generally* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 95-96 (collecting examples).

[200] Fed. Commc'ns Comm'n v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971); Butte Cty., Cal. v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[A]gency decisions in informal adjudication are subject to judicial review under § 706 of the APA. . . . If the agency decision is arbitrary, capricious or an abuse of discretion it must be set aside."); Ronald J. Krotoszynski, Jr., *Taming the Tail That Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication*, 56 ADMIN. L. REV. 1057, 1060–61 (2004) ("A would-be plaintiff may invoke § 706(2)(A)'s 'arbitrary and capricious' standard of review to obtain general review of an agency's decision in an informal adjudication. A reviewing court will apply 'hard look' review and require an agency to justify its decision on the basis of the record as it existed at the time the agency acted.").

[201] CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

[202] Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S.Ct. 1365, 1373 (2018) ("When determining whether a proceeding involves an exercise of Article III judicial power, this Court's precedents have distinguished between 'public rights' and 'private rights.' Those precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts."); *see* Mila Sohoni, *Agency Adjudication and*

encompasses disputes between private parties as well as government enforcement measures that implicate life, liberty, and the imposition of fines, but not disputes about eligibility for public benefits.[203] Second, even for matters concerning benefits eligibility or other "public rights," it is questionable whether Congress may prohibit judicial review of constitutional issues.[204] The Supreme Court has generally interpreted statutory prohibitions on judicial review of agency action, even when worded broadly, to permit review of constitutional claims in an effort to avoid serious questions about the statutes' constitutionality.[205]

5 U.S.C. § 555

Section 555 of Title 5 of the U.S. Code,[206] entitled "Ancillary matters," contains several rights and limitations that apply to *all* adjudications—formal and informal—as well as other agency matters, unless another statute overrides Section 555.[207] These rights and limitations include the following:

- a right to retain counsel for compelled appearances;[208]

Judicial Nondelegation: An Article III Canon, 107 NW. U. L. REV. 1569, 1593 (2013) ("The cases where agency adjudication cannot be conclusive—where review to an Article III court must be available on a direct appellate basis—are private rights cases. In cases purely involving 'public rights,' the agency adjudication can be conclusive; direct appellate review by Article III courts in public rights cases could be eliminated.").

[203] *Oil States*, 138 S.Ct. at 1373 (2018) ("This Court has not 'definitively explained' the distinction between public and private rights . . . ."); Sohoni, *supra* note 202, at 1585-86.

[204] *See* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J. L. & PUB. POL'Y 187, 228 (2018) ("The Supreme Court has been exceedingly reluctant to construe an act of Congress to deny a party any opportunity to assert a constitutional claim. Reading a law in that manner would pose extraordinarily difficult constitutional issues because it would amount to an attempt by Congress to legislate around the nation's fundamental law by zoning out federal constitutional claims.") (citing Webster v. Doe, 486 U.S. 592, 603 (1988)).

[205] Webster v. Doe, 486 U.S. 592, 603 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."); Johnson v. Robinson, 415 U.S. 361, 366-67 (1974).

[206] 5 U.S.C. § 555. In addition, 5 U.S.C. § 558 provides that an adjudicative "order [may not be] issued except within jurisdiction delegated to the agency and as authorized by law." *Id.* § 558(b). Section 558 also contains provisions applicable to licensing proceedings. *Id.* § 558(c). As explained above, the APA defines "adjudication" as the "agency process for the formulation of an order," *Id.* § 551(7); *see supra* "What Is Agency Adjudication?" And, also mentioned above, an "order" includes "licensing," 5 U.S.C. § 551(6). Therefore, licensing is a form of adjudication under the APA. *See* Marathon Oil Co. v. EPA, 564 F.2d 1253, 1262 (9th Cir. 1977) ("The APA specifically provides that licensing proceedings . . . are adjudications.").

[207] *See* 5 U.S.C. §§ 555(a) ("This section applies, according to the provisions thereof, except as otherwise provided by [5 U.S.C. §§ 551–559]."), 559 (providing that a statute may "supersede or modify" the APA if "it does so expressly"); *compare* Doe v. McAleenan, 415 F. Supp. 3d 971, 978 (S.D. Cal. 2019) (holding that the Section 555 right to counsel likely applies to *non-refoulment* interviews conducted by DHS because no other statute overrides the Section 555 right and therefore "the APA default provisions necessarily apply; to hold otherwise would be to render the default provisions obsolete"); *with* United States v. Quinteros Guzman, No. 3:18-cr-00031, 2019 WL 3220576, at *10 (July 17, 2019) (no right to counsel during expedited removal proceedings under 8 U.S.C. § 1225(b)(1), because that immigration statute overrides the APA provision); *but see* Bollow v. Fed. Reserve Bank, 650 F.2d 1093, 1101 (9th Cir. 1981) (reasoning that Section 555 did not apply because the proceeding at issue was excepted from the APA's formal hearing and judicial review provisions).

[208] 5 U.S.C. § 555(b) ("A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative."); *see* Sartain v. SEC, 601 F.2d 1366, 1375 (9th Cir. 1979) (explaining that § 555(b) creates a "right to retain independent counsel"). For a discussion of the constitutionality of statutory prohibitions on legal counsel during agency proceedings, see *supra* text at notes 161-64.

- a party's right to appear;[209]
- an interested person's right to appear;[210]
- a requirement that a matter must conclude within a reasonable time;[211]
- a witness's right to procure transcripts;[212]
- requirements for issuing subpoenas to parties;[213] and
- required notice and reasons for denial of requests.[214]

Outside sources examine the contours of each of these rights and limitations in more depth.[215] One overarching point warrants mention here. The Supreme Court has explained that Section 555 contains the "minimal requirements" for informal adjudication.[216] That these requirements address "ancillary matters"—not core elements of procedure, such as the format of a hearing—makes plain that informal adjudication, unlike formal adjudication, is not subject to significant, centralized regulation under the APA.[217] If neither Section 555 nor another legally binding source (including the Constitution) requires a certain set of procedures in an informal adjudication, then courts may not impose such procedures on the agency.[218] For example, Section 555 does not create any rights to respond to or rebut unfavorable evidence.[219] As such, an agency may conduct

[209] 5 U.S.C. § 555(b) ("A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding."); *see* AmBuild Co., LLC v. United States, 119 Fed. Cl. 10, 20 (2014).

[210] 5 U.S.C. § 555(b) ("So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function."); *see* Block v. SEC, 50 F.3d 1078, 1085 (D.C. Cir. 1995).

[211] 5 U.S.C. § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."); *see* Pub. Citizen Health Rsch. Grp. v. FDA, 740 F.2d 21, 32 (D.C. Cir. 1984).

[212] 5 U.S.C. § 555(c) ("A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony."); *See* United States v. Murray, 297 F.2d 812, 821 (2d Cir. 1962).

[213] 5 U.S.C. § 555(d) ("Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought.").

[214] *Id.* § 555(e) ("Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial."); Ardila Olivares v. Transp. Sec. Admin., 819 F.3d 454, 463 (D.C. Cir. 2016).

[215] ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION, *supra* note 22, at 40-52; TOM C. CLARK, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947). The Supreme Court often has given the *Manual* some measure of deference due to the fact the Department of Justice "was heavily involved in the legislative process that resulted in the [APA's] enactment in 1946." Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979); *see, e.g.*, Norton v. S. Utah Wilderness All., 542 U.S. 55, 63 (2004) (explaining that the Court has often found the *Manual* "persuasive"); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 546 (1978) (referring to the *Manual* as "a contemporaneous interpretation previously given some deference by this Court").

[216] Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 655 (1990).

[217] *See* Butte Cty., Cal. v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010) ("We have what is known as informal agency adjudication. Governing procedural rules, derived mainly from § 555 of the APA, 5 U.S.C. § 555, and the Due Process Clause, are few.").

[218] *See Pension Benefit Guar. Corp.*, 496 U.S. at 653 ("[W]hen the Due Process Clause is not implicated and an agency's governing statute contains no specific procedural mandates, the APA establishes the maximum procedural requirements a reviewing court may impose on agencies.").

[219] Butte Cty., Cal. v. Chaudhuri, 887 F.3d 501, 506 (D.C. Cir. 2018) ("[I]n an informal adjudication, there is no blanket obligation for an agency to allow the submission of rebuttal evidence at all.").

an informal adjudication without allowing rebuttal evidence unless another statute or due process applies and requires otherwise.[220]

Conclusion

While there is broad consensus about the aims of agency adjudication—fairness, efficiency, and satisfaction to the participants—adversarial and inquisitorial models prioritize these criteria differently, and, as one commentator has observed, "the difficulty is that there is no available theory for deciding which one or ones among the criteria should play a subordinated role."[221] The prevalence and variability of informal adjudication raise an overarching issue for Congress: whether, and to what extent, to "systematize" informal adjudication, either by subjecting more of it to the APA's formal adjudication requirements or by crafting a parallel set of detailed default requirements for informal adjudication.[222] Congress also routinely confronts more discrete policy choices about specific, high-volume informal adjudication systems, including in the fields of immigration and veterans benefits, to name some relatively recent examples.[223] While perhaps no authoritative playbook exists to guide Congress through its adversarial and inquisitorial options on these discrete issues, Congress can use the extensive agency history with almost every type of option to inform its legislative choices.[224]

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[220] *Pension Benefit Guar. Corp.*, 496 U.S. at 653 (rejecting arguments that in an informal adjudication, the agency must notify a party "of the material on which it was to base its decision" and provide "an adequate opportunity to offer contrary evidence"); Jurewicz v. USDA, 741 F.3d 1326, 1334-35 (D.C. Cir. 2014) (no right to a "meaningful opportunity" to respond to agency analysis in reverse-FOIA informal adjudications); Sw. Airlines Co. v. TSA, 650 F.3d 752, 757 (D.C. Cir. 2011) (no right to respond to unfavorable consultant report in informal adjudication of TSA fees).

[221] *Id.* at 742-43.

[222] *See* Bremer, *Reckoning with Exceptionalism*, *supra* note 1, at 1792; ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION *supra* note 22, at 60; Verkuil, supra note 1, at 794 (discussing the concept of an "Informal Administrative Procedure Act").

[223] *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1964-65 (2020) (discussing congressional development of rapid inquisitorial procedures to determine the admissibility of aliens at the border); *Monk*, 978 F.3d at 1275 (legislative reforms to VA appeals process).

[224] *See supra* note 92 (discussing ACUS publications that examine informal adjudication schemes).

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