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Designing the Decider

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Designing the Decider

EMILY S. BREMER*

ABSTRACT

The Administrative Procedure Act (APA) contains several provisions designed to ensure that presiding officials in so-called formal adjudications are able to make fair, well-informed, independent decisions. But these provisions do not apply to the vast majority of federal adjudicatory hearings. In this world of adjudication outside the APA, agencies enjoy broad procedural discretion, including substantial freedom to “design the decider.” This Article defines the scope of this discretion and explores how various agencies have exercised it. The discussion is enriched by examples drawn from an expansive new database of federal adjudicatory procedures. The Article argues that, although agency discretion to design the decider has benefits, it also imperils independent decision making, destroys government-wide uniformity, and undermines transparency.

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INTRODUCTION

Studying federal administrative adjudication on a system-wide basis is a daunting endeavor. Few agencies conduct proceedings according to the Administrative Procedure Act's (APA) adjudication provisions.¹ Most proceedings are not subject to this legal framework and are conducted according to procedures tailor-made to suit the specific needs of the adjudicating agency and the relevant program. Congress sometimes cultivates these tailored processes by enacting agency- or program-specific procedural requirements.² But even when Congress is involved, agencies bear much of the responsibility for crafting the details of their own, unique adjudicatory processes. This reality is facilitated by a fundamental administrative law principle that affords agencies broad discretion over their own procedures.³ The exercise of this procedural discretion has yielded breathtaking variety across the hundreds of adjudicatory programs that exist throughout the federal government. Perhaps as a consequence, most scholars who study administrative adjudication focus on a particular agency, program, or procedural device. Doing so is necessary to make the endeavor manageable.

This Article examines a narrow but important component of federal administrative adjudication: the rules that define the nature, position, and powers of the officials who preside over hearings.⁴ As with other aspects of administrative procedure, agencies have broad discretion to make these rules, i.e., to "design the decider." To help explore the scope and exercise of this discretion, this Article draws on a recent government-wide study of adjudication that was commissioned by the Administrative Conference of the United States (ACUS) and funded in part by Stanford Law School.⁵ In addition to a report authored by Professor Michael Asimow,⁶ the Conference's researcher, this study produced an ACUS recommendation⁷ and a publicly available online database of the procedures observed in hundreds of federal adjudicatory programs.⁸ Examples

1. See 5 U.S.C. § 554, 556, 557 (2012).

2. See Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1006 (2004).

3. See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).

4. See Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643 (2016).

5. ACUS is a free-standing federal agency that studies administrative procedure and makes recommendations for improvement to other agencies, the President, Congress, and the Judicial Conference. See 5 U.S.C. §§ 591–96 (2012). The agency is composed of 100 members drawn from government and the private sector, headed by a chairman who is appointed by the President with the advice and consent of the Senate. Recommendations are developed through a research-driven, consensus-based process and are adopted by the full Assembly (i.e., the whole membership) during semi-annual plenary sessions. See ADMIN. CONF. OF THE U.S., <https://www.acus.gov/about-administrative-conference-united-states-acus> [<https://perma.cc/2QRM-NUQM>].

6. See MICHAEL ASIMOW, EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (2016), https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-final-report_0.pdf [<https://perma.cc/DH76-J7NM>].

7. See Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,312, 94,314 (Dec. 23, 2016).

8. See ADJUDICATION RESEARCH: JOINT PROJECT OF ACUS AND STAN. L. SCH. [hereinafter ADJUDICATION RESEARCH], <https://acus.law.stanford.edu/> [<https://perma.cc/PS67-GPMF>].

drawn from this database illustrate the broad variation that results from the exercise of agency discretion to design the decider. This Article argues that, although this discretion has benefits, it also undermines decision-maker independence, government-wide uniformity, and transparency. These costs deserve greater attention.

I. THE LANDSCAPE OF ADMINISTRATIVE ADJUDICATION

Federal administrative adjudication is traditionally divided into only two types: “formal” adjudication, which is conducted in accord with the APA’s adjudication provisions⁹ and “informal” adjudication, for which the APA does not provide specific procedural requirements.¹⁰ Although widely used, these terms are problematic. One difficulty is 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.¹¹ Moreover, the vast majority of agency adjudication is “informal.” Even before the APA’s 1946 enactment, informal adjudication was referred to as “the life blood of the administrative process,” a description that remains accurate to this day.¹² Although ubiquitous, this “life blood” is profoundly non-uniform. In sum, the category of “informal” adjudication is so vast and various that treating it as a monolithic whole obscures more than it reveals.

For these reasons, this Article will eschew the traditional formal–informal dichotomy in favor of a classification scheme developed by Professor Michael Asimow and used in his recent study of administrative adjudication conducted for the ACUS.¹³

9. See 5 U.S.C. § 554, 556, 557 (2012).

10. *E.g.*, *Occidental Petroleum Corp. v. Sec. & Exch. Comm’n*, 873 F.2d 325, 337 (D.C. Cir. 1989) (explaining that “no provision of the APA contains specific procedures to govern an informal agency adjudication”); Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 744 (1976) (“[A]dministrative decision making labeled here as informal adjudication is largely unaddressed procedurally by the APA . . .”). 5 U.S.C. § 555 (2012), which addresses “ancillary matters,” such as the right to counsel for those compelled to appear before an agency, may be relevant in some informal adjudications. See OFFICE OF THE CHAIRMAN, ADMIN. CONFERENCE OF THE U.S., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EVALUATING THE STATUS AND PLACEMENT OF ADJUDICATORS IN THE FEDERAL SECTOR HEARING PROGRAM 35 (Mar. 31, 2014) [hereinafter EEOC REPORT], <https://www.acus.gov/sites/default/files/documents/FINAL%20EEOC%20Final%20Report%20%5B3-31-14%5D.pdf> [<https://perma.cc/CYN7-6TZH>]. Similarly, 5 U.S.C. § 558 (2012) may also “provide some meager protections in these cases.” Asimow, *supra* note 2, at 1006 n.16.

11. See ASIMOW, *supra* note 6, at 3.

12. Verkuil, *supra* note 10, at 744 (quoting ATTORNEY GENERAL’S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 35 (1941)).

13. See ASIMOW, *supra* note 6; see also Asimow, *supra* note 2, at 1005–06 (introducing the classification scheme).

Professor Asimow's scheme divides administrative adjudication into three categories:

- **Type A Adjudication** includes agency adjudications that are conducted in accordance with the APA's adjudication provisions.¹⁴
- **Type B Adjudication** includes proceedings that are conducted outside of the APA's adjudication provisions, but are subject to some legal requirement (imposed by statute, regulation, or executive order) that a decision be issued following an evidentiary hearing.¹⁵ An "evidentiary hearing" is "a proceeding [in] which the parties make evidentiary submissions, have an opportunity to rebut testimony and arguments made by the opposition, and to which the exclusive record principle applies."¹⁶ Under the "exclusive record principle," the decider "is confined to considering inputs from the parties (as well as matters officially noticed) when determining factual issues."¹⁷
- **Type C Adjudication** includes proceedings that are neither conducted in accord with the APA's adjudication provisions nor subject to any other legal requirement for an evidentiary hearing.¹⁸

Type A adjudication is the category traditionally referred to as "formal" adjudication.¹⁹ Together, Type B and Type C adjudication form the category traditionally referred to as "informal" adjudication. Avoiding that term, this Article will occasionally refer to Types B and C together as "non-APA" adjudication or "adjudication outside of the APA."²⁰

For several interrelated reasons, this Article will focus on the scope and exercise of agency discretion in Type B proceedings. First, the category of Type A adjudication is relatively small, procedurally uniform, and has been well studied.²¹ In contrast, and as previously noted, most administrative adjudication

14. See 5 U.S.C. § 554, 556, and 557 (2012). See generally ASIMOW, *supra* note 6, at 2 (explaining the three categories of agency adjudication).

15. See ASIMOW, *supra* note 6, at 2, 10.

16. *Id.* at 4, 10.

17. *Id.*

18. *Id.* at 2; see also *id.* at 4 ("In the case of Type C adjudication . . . no evidentiary hearing is legally required, and usually no such hearing occurs.").

19. See, e.g., Verkuil, *supra* note 10.

20. See ASIMOW, *supra* note 6. The notion of adjudication conducted "outside of the APA" might strike some as peculiar given that there are provisions of the APA that are frequently cited as governing informal adjudication. See 5 U.S.C. §§ 555, 558 (2012); see also Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 655 (1990) ("The determination in this case . . . was lawfully made by informal adjudication, the minimal requirements for which are set forth in § 555 of the APA."). Although these provisions may have some relevance in non-APA adjudication, they by no means provide an adjudicative analog to the APA's informal rulemaking provisions. See 5 U.S.C. § 553.

21. See ASIMOW, *supra* note 6, at 2.

is conducted outside of the APA.²² Second, the scope of agency discretion—and therefore the range of procedural variation—is greater in non-APA adjudication than it is in Type A adjudication.²³ This is because the APA establishes uniform procedural requirements for Type A proceedings, but does not do so for Type B and Type C proceedings. Although Type A adjudication offers a useful, fixed point of comparison, non-APA adjudication is in greater need of examination. Finally, there is significantly more information available about Type B adjudication than there is about Type C adjudication. ACUS’s recent study comprehensively catalogues Type A and Type B proceedings, offering a rich source of data.²⁴ Focusing on Type B proceedings takes advantage of this reality and confines the project to a manageable scope.

II. AGENCY DISCRETION TO DESIGN THE DECIDER

Agencies generally have broad discretion to design the procedures they observe, including in adjudicatory proceedings. The Constitution’s Due Process Clause, the APA, and other statutes establish minimum procedural requirements. Provided that agencies observe these minimum requirements, however, courts typically afford agencies substantial leeway to determine what procedures they will follow. In Type A proceedings, the APA requires that “the agency,” “one or more members of the body which comprises the agency,” or an Administrative Law Judge (ALJ) must preside over the taking of evidence.²⁵ This requirement does not apply, however, to adjudications conducted outside of the APA. Thus, in the Type B proceedings with which this Article is particularly concerned, a non-ALJ adjudicator may preside. The agency has substantial latitude to design the identity and powers of this “decider.”²⁶ This Part situates this procedural discretion within the more familiar aspects of administrative discretion before exploring the ways in which it is exercised.

22. See, e.g., ASIMOW, *supra* note 6, at 3 (explaining that Type C adjudications are “vastly more numerous than Type B”).

23. The variation among agencies is staggering. E.g., James E. Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1196 (2006) (“[T]he role of the administrative judge is not merely complex in its generic form, but also varies further from agency to agency, taking into account the unique mission, history, and political setting of each agency.”).

24. See ASIMOW, *supra* note 6, at 2 (“The database contains information about all of the schemes of Type A and Type B federal agency adjudication (with the exceptions of military and foreign affairs adjudication, which were omitted because of resource constraints).”).

25. 5 U.S.C. § 556(b) (2012).

26. This Article uses the terms “decider,” “presider,” and “adjudicator” interchangeably. As Section B.1. explains, however, this person’s title is one of the many elements over which agencies have discretion. And so, there is considerable variety in the terminology across agencies that conduct Type B proceedings.

A. Taking Account of Procedural Discretion

Discussions of administrative discretion often focus on agencies' substantive discretion in the realm of statutory interpretation and policy making.²⁷ The subject arises most often in the context of the doctrines that determine the scope of judicial deference to agency decision making. This is because administrative discretion resides in the space created by judicial deference.²⁸ Particularly relevant in this respect is the *Chevron* doctrine, according to which courts defer to an agency's reasonable interpretation of a statute the agency is responsible for administering.²⁹ *Chevron* is the undisputed star in the vast body of case law and scholarly literature addressing the two-sided coin of judicial deference and administrative discretion. A recent article reports that the case for which the doctrine is named "has been cited in more than 80,000 sources available on Westlaw, including in roughly 15,000 judicial decisions and nearly 18,000 law review articles and other secondary sources."³⁰ The sheer volume of these citations suggests the overwhelming attention given to substantive discretion in administration.

Often overlooked is that agencies also have substantial procedural discretion. In *Vermont Yankee*, the Supreme Court affirmed "that the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments."³¹ *Vermont Yankee* is best known for establishing the principle that courts should not impose upon agencies procedural requirements beyond those that Congress has created by statute. The Court also recognized, however, that agencies are not similarly constrained. Although the courts lack authority to impose different or additional procedures on agencies, agencies may choose to impose such procedures on themselves.³² This is one consequence of the "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure."³³ In short, agency procedural discretion resides in *Vermont Yankee's*

27. See Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in Vermont Yankee's White Space*, 32 J. LAND USE & ENV'T'L. L. 523 (2017). But see Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1919 (2016) (defending judicial deference to agency procedural decisions).

28. See Peter Strauss, *'Deference' Is Too Confusing: Let's Call Them 'Chevron Space' and 'Skidmore Weight'*, 112 COLUM. L. REV. 1143 (2012).

29. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

30. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 1 (2017).

31. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).

32. See, e.g., *New Life Evangelistic Ctr., Inc. v. Sebelius*, 753 F. Supp. 2d 103, 121 (D.D.C. 2010) ("Agencies are, of course, free to adopt additional procedures as they see fit").

33. *Vermont Yankee*, 435 U.S. at 543; see also 5 U.S.C. § 559 (2012) ("Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise."). Agencies often exercise this discretion to provide more procedure than is legally required. See Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009); Vermeule, *supra* note 27, at 1024–26.

“white space.”³⁴

Agency procedural discretion often extends to the full range of issues that arise in administering adjudicatory programs, from the decision of whether to adjudicate to the nature of the proceeding to the details of the procedures that will be observed. At the highest level, an agency may be able to choose whether to develop policy through rulemaking or adjudication.³⁵ Thus, the question of whether to adjudicate at all may be one the agency is authorized to answer. An agency that adjudicates will usually also have the authority to determine the nature or type of the proceeding.³⁶ The first question here is whether the agency’s governing statute requires a Type A proceeding.³⁷ This is a matter of statutory interpretation, and courts typically afford *Chevron* deference to an agency’s resolution of the issue. Indeed, courts have held that Type A adjudication is mandated only when the relevant statute requires the agency to conduct a “hearing on the record.”³⁸ In the absence of these magic words, the agency generally has discretion to adjudicate outside of the APA.³⁹ In these circumstances, however, the agency could still choose to afford more procedural protections than are required by statute by voluntarily conducting Type A adjudication.⁴⁰ In similar fashion, agencies sometimes conduct Type B proceedings even in the absence of any statutory provision requiring a non-APA evidentiary hearing.⁴¹

The law imposes few procedural requirements that apply uniformly across Type B adjudications, leaving agencies substantial procedural discretion over these proceedings. The Constitution’s Due Process Clause creates only modest

34. See Bremer & Jacobs, *supra* note 27, at 532–34.

35. See *SEC v. Chenery Corp.*, 332 U.S. 194, 1579–81 (1947) (*Chenery II*); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004).

36. Absent a clear and unambiguous statutory provision that makes the choice for the agency.

37. See 5 U.S.C. § 554(a) (2012).

38. See *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 16–17 (1st Cir. 2006); *Chemical Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1480–83 (D.C. Cir. 1989); see also *City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983) (assuming that Congress does not intend the APA to apply unless it uses the magic words). For example, a provision of the SEC’s statute requires APA adjudication by providing that “the Commission may impose a civil penalty on a person if the Commission finds, on the record, after notice and opportunity for hearing” that the person has committed certain violations. 15 U.S.C. § 77h-1(g)(1) (2012). With language such as this, a court would likely hold under *Chevron* step one that the statute clearly requires a Type A proceeding.

39. This approach has been criticized for a variety of reasons, including on the grounds that the phrase “hearing on the record” does not adequately distinguish between Type A and Type B adjudications. In both kinds of proceedings, the decision maker is expected to decide based on a record compiled through an evidentiary hearing. See ASIMOW, *supra* note 6, at 7.

40. See EEOC REPORT, *supra* note 10, at 23–24.

41. See, e.g., EEOC REPORT, *supra* note 10, at 13 (explaining that the EEOC operates its Federal Sector Hearing Program in the absence of any reference to hearings in the relevant civil rights statutes). This reality is at odds with the statement commonly made in administrative law textbooks that agencies must be specifically authorized to adjudicate. See, e.g., WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK & VICTORIA F. NOURSE, *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* 184 (2014) (“Congress must delegate the capacity to issue adjudicative orders having the force of law to the agency.”).

minimum requirements.⁴² These minimums are determined through the application of a flexible, context-specific analysis. The agency is always the first to conduct this analysis and, as a practical matter, often has the last word as to what procedure due process requires.⁴³ Similarly, and as noted above, the APA has almost nothing to say about the procedures that apply outside of Type A adjudications.⁴⁴ In Type B proceedings, there is often another statute outside of the APA that requires an evidentiary hearing. This statute may prescribe adjudicatory procedures, sometimes in great detail. Regardless of the procedural detail specified by statute, however, Congress ordinarily leaves ample room for the agency to design or embellish upon the procedures that will be followed. Proceedings before the Patent Trial and Appeal Board provide a good example. The America Invents Act (AIA) created several different proceedings for testing the validity of patents, specifying somewhat detailed procedures for each.⁴⁵ But the AIA also left room for the Patent and Trademark Office (PTO) to further flesh out those procedures by regulation.⁴⁶

The nature or category of the adjudicatory proceeding has important implications for the nature and powers of the presiding official or “decider.” As previously noted, the presiding official in a Type A proceeding generally must be an ALJ. This requirement significantly constrains the agency’s discretion to design the decider, because the APA⁴⁷ and the Office of Personnel Management’s (OPM) statutes⁴⁸ and regulations⁴⁹ provide the design. If a proceeding is not required to be a Type A proceeding, an agency nonetheless likely has the discretion to appoint ALJs to preside over the proceedings. As a practical matter, however, this discretion is constrained by the OPM’s role in the selection and appointment of ALJs.⁵⁰ More often, in the absence of a statutory

42. See, e.g., U.S. CONST. amend. V; *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970). *But see, e.g., Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

43. This phenomenon is frequently referred to as “administrative constitutionalism.” See *Bremer & Jacobs*, *supra* note 27, at 531.

44. See *supra* note 20; see also *Occidental Petroleum Corp. v. Sec. & Exch. Comm’n*, 873 F.2d 325, 337 (D.C. Cir. 1989) (“[N]o provision of the APA contains specific procedures to govern an informal agency adjudication . . .”).

45. See *Leahy-Smith America Invents Act*, Pub. L. No. 112-29, 125 Stat. 284 (2011).

46. E.g., 35 U.S.C. § 316(a) (2012) (providing that “[t]he Director shall prescribe regulations” addressing various procedural matters in *inter partes* review proceedings). See generally Rochelle Cooper Dreyfuss, *Giving the Federal Circuit a Run for its Money: Challenging Patents in the PTAB*, 91 NOTRE DAME L. REV. 236 (2015).

47. See, e.g., 5 U.S.C. § 556(c) (2012) (defining the presiding official’s powers).

48. See 5 U.S.C. §§ 1104(a), 1302(a), 1305, 3105, 3304, 3323(b), 3344, 4301(2)(D), 5372, and 7521 (2012).

49. See OPM Administrative Law Judge Program 5 C.F.R. pt. 930, subpt. B (2017).

50. The OPM, following its predecessor’s (the Civil Service Commission (CSC)) practice, takes the position that ALJs can only be appointed to preside over proceedings that are required by statute or regulation to be conducted in accord with the APA. See EEOC REPORT, *supra* note 10, at 27–32. In only two instances have agencies used their discretion to appoint ALJs in the absence of a statutory requirement to do so. In both instances, the CSC refused to permit the appointments, and congressional action ultimately was required to break the impasse. See *id.* at 11–12.

requirement to appoint ALJs, agencies elect to use non-ALJ adjudicators.⁵¹

B. Designing the Decider

The minimal legal constraints applicable in Type B adjudication leave agencies largely free to “design the decider,” i.e., to control the constellation of characteristics that define the presiding official. These characteristics can be divided into two general categories. The first category includes the various characteristics that determine the decider’s identity, including the official’s title, job description, rate of pay, qualifications, and position within the agency. These elements directly and indirectly affect the separation of functions within the agency, as well as the manner and extent of the decider’s accountability. Second, an agency has discretion to define the decider’s powers. Of particular interest here are the powers to collect information, to resolve the dispute, and to order remedies. These powers directly affect the nature, basis, and form of the adjudicator’s decision.

This Section explores the scope and exercise of these aspects of agency procedural discretion. To make the discussion more concrete and to demonstrate the variety that agency discretion has yielded, this Section offers examples drawn from the ACUS-Stanford database of Type B adjudication programs.⁵² The ACUS-Stanford database includes information about the representation of private parties, representation of agencies, availability and types of discovery, subpoena authority, ex parte contacts, types of hearings and appeals, cross-examination, information about adjudicators, information about alternative dispute resolution, caseload statistics, number of adjudicators, case types, and ability to appeal. Of the 133 agencies included in the database, 87 conduct administrative “adjudications” of some kind.⁵³ Most relevant for this Article’s purposes, the database provides information about presiding officials for 524 different adjudicatory programs, including 396 programs at the hearing level and 128 at the appellate level.⁵⁴ The ACUS-Stanford database offers a wealth of information about these officials, including their employing agency, the name of the office within which the adjudicatory program is housed, the adjudicatory scheme, the adjudicator’s title, and whether the adjudicator is subject to performance evaluations, is employed full-time as an adjudication officer, and is subject to quality control measures or production goals.⁵⁵ It is common for there to be more than one kind of decider within a single adjudicatory program. The

51. See EEOC REPORT, *supra* note 10, at 6.

52. See *supra* notes 6–8 and accompanying text.

53. See *Agencies*, ADJUDICATION RESEARCH, <https://acus.law.stanford.edu/agencies> [<https://perma.cc/PE8G-Q77Q>]; see also 5 U.S.C. § 551(6) (2012) (“[O]rder’ means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing”); 5 U.S.C. § 551(7) (“[A]djudication’ means agency process for the formulation of an order”).

54. See *Information About Adjudicators*, ADJUDICATION RESEARCH, <https://acus.law.stanford.edu/reports/adjudicators> [<https://perma.cc/2KWY-B46F>].

55. See *id.*

database consequently includes information about 784 kinds of adjudicators, including 577 at the hearing level and 207 at the appellate level.⁵⁶

1. The Decider's Identity

Agency discretion to design the decider in Type B adjudication first encompasses authority over the characteristics and rules that determine who within the agency will preside over hearings. There is great variety in how agencies exercise this discretion to define the decider's identity.

The characteristics that help define the decider's identity include that official's title, job description, and rate of pay. In Type B proceedings, the decider is often called an "administrative judge" (AJ), although agencies may use any other title.⁵⁷ There is no cross-cutting legal principal that restricts the range of possibilities here.⁵⁸ Moving beyond the decider's title, the agency also has discretion over this person's job description. The job description determines, among other things, whether the official is employed full-time as an adjudicator or has other, non-adjudicatory responsibilities. In addition, an agency can decide whether and how to subject its adjudicators to performance reviews, decision-making quotas, or other quality control measures. The agency also generally has some control over its adjudicators' rate of pay and eligibility for raises.⁵⁹

A handful of examples suffice to demonstrate the variation that occurs as a result of agency discretion over these three aspects of the decider's identity:

- A "Hearing Officer" is "a Coast Guard officer or employee who has been delegated the authority to assess civil penalties"⁶⁰ in the context of "all statutory penalty provisions that the Coast Guard is authorized to enforce."⁶¹ Hearing Officers are employed solely as adjudicators and are

56. See *id.* ACUS collected the information from publicly available sources such as the Code of Federal Regulations (CFR) and then asked individual agencies to verify the information and correct it as necessary. Of the 784 entries on adjudicators, only 260 are verified, including 181 at the hearing level and 79 at the appellate level.

57. See Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,312, 94,314 (Dec. 23, 2016).

58. It is possible, though rare, that the statute the agency is charged with administering may supply a term or title for Type B adjudicators. See, e.g., 35 U.S.C. § 6 (2012) (referring to "the administrative patent judges" who preside over PTAB proceedings); see also *Department of Commerce Hearing-Level Procedures*, ADJUDICATION RESEARCH, <https://acus.law.stanford.edu/hearing-level/usdcpcate0021-hearing-level-procedures> [<https://perma.cc/4PD7-RWGL>].

59. Government-wide personnel rules, regulations, and policies constrain agency discretion somewhat, although an agency is likely to consider the effect of those rules when it makes the initial decision about what kind of employee will adjudicate. OPM is responsible for these personnel rules, regulations, and policies. See 5 U.S.C. § 1104 (2012) (authorizing the President to delegate authority for personnel management to OPM).

60. 33 C.F.R. § 1.07-5(b) (2017); see *Department of Homeland Security Hearing-Level Procedures*, ADJUDICATION RESEARCH, <http://acus.law.stanford.edu/hearing-level/dhscgghp0004-hearing-level-procedures-0> [<https://perma.cc/5Y6E-WNNA>].

61. 33 C.F.R. § 1.07-1 (2017).

paid at the Senior Officer rank of Commander (CDR), at the paygrade of O-5, which is roughly equivalent to the civilian GS-13 or GS-14.⁶²

- Under the Department of Veterans Affairs' procurement suspension and debarment regulations, the Deputy Assistant Secretary of the Office of Acquisition and Logistics is authorized to adjudicate as the "Suspending and Debarring Official (SDO)."⁶³ This official has responsibilities in addition to serving as the SDO and is a member of the Senior Executive Service (SES). This official is accordingly compensated according to the SES pay scale.⁶⁴
- In the Equal Employment Opportunity Commission's (EEOC) Office of Field Programs, within the Federal Sector Hearings Program, an AJ who is also known as an "Attorney Examiner" reviews discrimination complaints by federal employees. These officials are employed full-time as adjudicators and are paid as GS-12, GS-13, or GS-14 employees.⁶⁵
- "Board Judges" preside over hearings held by the Civilian Board of Contract Appeals, a division of the General Services Administration (GSA) that adjudicates contract disputes between private contractors and civilian federal agencies. Board Judges enjoy many of the protections afforded to ALJs and are employed full-time as adjudicators.⁶⁶

62. See *O-5 Basic Pay Rate—Officer Military Payscale*, FEDERALPAY.ORG, <https://www.federalpay.org/military/grades/o-5> [<https://perma.cc/4SRA-3GTQ>]. The General Schedule (GS) establishes the base pay for civilian federal government employees, which is then adjusted based on locality. See *Pay & Leave*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2018/general-schedule/> [<https://perma.cc/UBT2-2GP8>]. The GS schedule has 15 "grades" or levels of pay, and within each grade, there are 10 "steps" that allow for pay to be refined according to the employee's years of service, etc.: For 2018, the base pay of a GS-13 employee is between \$75,628 (at Step 1) and \$98,317 (at Step 10), while the base pay of a GS-14 is between \$89,370 (at Step 1) and \$116,181 (at Step 10). See *Salary Table 2018-GS*, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2018/GS.pdf> [<https://perma.cc/2K6W-MKVN>].

63. See *Department of Veterans Affairs Hearing-Level Procedures*, ADJUDICATION RESEARCH, <https://acus.law.stanford.edu/hearing-level/dovaprocc0009-hearing-level-procedures> [<https://perma.cc/KJ6Z-3JU9>]; 48 C.F.R. § 9.403 (2017). These officials are vested with discretion to refer fact-finding to another presiding official, who conducts the evidentiary hearing and issues written findings of fact. See 48 CFR 9.406-3(d)(2), 9.407-3(d)(2) (2017). The regulations otherwise provide no guidance or requirements for the presiding official.

64. See *Senior Executive Compensation*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/senior-executive-service/compensation> [<https://perma.cc/T3VK-YFJC>]. For 2018, the SES pay scale is between \$126,148 and \$189,600. See *Executive Order 13819, Adjustments to Certain Rates of Pay* (Dec. 22, 2017), <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/pay-executive-order-2018-adjustments-of-certain-rates-of-pay.pdf> [<https://perma.cc/4YWF-J4KJ>].

65. *Equal Employment Opportunity Commission Hearing-Level Procedures*, ADJUDICATION RESEARCH, <https://acus.law.stanford.edu/hearing-level/eecofeds0002-hearing-level-procedures> [<https://perma.cc/45S2-TU9E>]; see also *supra* note 62 (discussing the GS pay scale and the rates of pay for GS-13 and GS-14 employees). The 2018 base pay for a GS-12 employee is between \$63,600 (at Step 1) and \$82,680 (at Step 10). See *Salary Table 2018-GS*, *supra* note 62.

66. See ASIMOW, *supra* note 6, at 40; *General Services Administration Hearing-Level Procedures*, ADJUDICATION RESEARCH, <https://acus.law.stanford.edu/hearing-level/gsaocbca0004-hearing-level-procedures-0> [<https://perma.cc/R4NB-Y755>]. The CA pay scale establishes a salary of \$164,200 for the

They are compensated on the Contract Appeals (CA) pay plan in the range of 1–3.⁶⁷

- The “Chief Financial Officer” and “Deputy Chief Financial Officer” preside over proceedings involving a debtor’s request for review of a Notice of Debt Collection regarding a delinquent debt owed to the United States Peace Corps. These officials are not employed full-time as adjudicators and therefore have other responsibilities.⁶⁸ They are paid according to the Department of State’s Foreign Service pay scale.⁶⁹

This short list merely hints at the diversity among deciders. Other titles for non-ALJ adjudicators include “Examiner,”⁷⁰ “Hearing Officer,”⁷¹ “Judgment Officer,”⁷² “Presiding Officer,”⁷³ and “Special Master.”⁷⁴ As the discussion above demonstrates, there is also seemingly limitless variety with respect the job responsibilities, oversight, and salary levels of Type B adjudicators.⁷⁵

Agencies may also establish employment qualifications, another important aspect of the decider’s identity. These include basic qualifications unrelated to the agency’s specific statutory mission, such as whether the decider is an

Chairman of the Board, \$159,274 for the Vice Chairman, and \$154,348 for other members of the Board. See Salary Table for Members of the Boards of Contract Appeals, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2018/BCA.pdf> [<https://perma.cc/N5FV-YHSB>].

67. See *General Services Administration Hearing-Level Procedures*, ADJUDICATION RESEARCH, *supra* note 66.

68. See *United States Peace Corps Hearing-Level Procedures*, ADJUDICATION RESEARCH, <https://acus.law.stanford.edu/hearing-level/pecodebt0002-hearing-level-procedures> [<https://perma.cc/6LUP-PEF5>].

69. See U.S. DEP’T OF STATE, 2018 FOREIGN SERVICE (FS) SALARY TABLE (2018), <https://www.state.gov/documents/organization/277016.pdf> [<https://perma.cc/S4BP-8REH>]. The Deputy Chief Financial Officer is paid at Class 1 of the FS pay scale, with base pay ranging from \$105,123 (at Step 1) to \$13,659 (at Step 14), while the Chief Financial Officer is a Senior Foreign Service official whose pay range is between \$126,148 and \$189,600. See *id.*

70. See *Overseas Private Investment Corporation Hearing-Level Procedures*, ADJUDICATION RESEARCH, <https://acus.law.stanford.edu/hearing-level/opicpemp0001-hearing-level-procedures> [<https://perma.cc/4WN6-P28C>].

71. See *Department of Agriculture Hearing-Level Procedures*, ADJUDICATION RESEARCH, <https://acus.law.stanford.edu/hearing-level/usdanado0002-hearing-level-procedures> [<https://perma.cc/5ZS2-G5A6>]. To comply with an 8th Circuit decision on the matter, *Lane v. USDA*, 120 F.3d 106 (8th Cir. 1997), USDA treats this as a Type A program, but by statute the presiding officials are not ALJs, see ASIMOW, *supra* note 6, at 36–37.

72. See *Commodity Futures Trading Commission Hearing-Level Procedures*, ADJUDICATION RESEARCH, <https://acus.law.stanford.edu/hearing-level/cftcrepa0005-hearing-level-procedures> [<https://perma.cc/LC72-J9M4>].

73. See *Department of Housing and Urban Development Hearing-Level Procedures*, ADJUDICATION RESEARCH, <https://acus.law.stanford.edu/hearing-level/hudomanu0004-hearing-level-procedures> [<https://perma.cc/SYN7-LHHQ>].

74. See *Department of Justice Hearing-Level Procedures*, ADJUDICATION RESEARCH, <https://acus.law.stanford.edu/hearing-level/dojxvcfx0009-hearing-level-procedures> [<https://perma.cc/APF2-VKGS>].

75. Just in the short list provided here, four separate pay scales are used, and the pay range is breathtakingly broad, ranging from a low of \$63,700 to a high of \$189,600.

attorney.⁷⁶ In addition, Type B agencies may require certain technical or subject matter expertise or experience as a precondition for employment.⁷⁷ For example, the EEOC requires the AJs in its Federal Sector Hearing Program to have specialized knowledge and experience with the civil rights laws.⁷⁸ Similarly, GSA requires its Board Judges to have a minimum of five years of experience with public contract law.⁷⁹ In some instances, Congress has directed an agency to employ adjudicators who have specialized qualifications. For example, the AIA directed the PTO to hire as administrative patent judges “persons of competent legal knowledge and scientific ability,” a statutory directive that the PTO has implemented by employing administrative patent judges with the expertise necessary to determine patent validity.⁸⁰

These matters are neither superficial nor insignificant: they determine the adjudicator’s role and position within the agency. Job descriptions and qualifications may affect whether an adjudicator has responsibilities in addition to presiding over hearings. This may have implications for the separation of functions within the agency. Salary decisions, performance reviews, quality control measures, and production goals may improve the decider’s accountability, undermine the decider’s independence, or both.⁸¹

Agencies also have discretion to address these higher-level considerations directly through rules designed to preserve the separation of functions and to promote decider accountability. Separation of functions rules may prohibit an adjudicator from having certain other responsibilities, such as a role in investigating, prosecuting, or advocating in the cases they will later decide. Many—but not all—agencies authorized to perform these various functions have regulations designed to separate them.⁸² Agencies also have discretion to design how an officer’s initial adjudicatory decision will be subject to reconsideration, review, or appeal.⁸³ The agency may reserve for itself the authority to make the final decision, regardless of the initial decision provided by the adjudicator.⁸⁴

76. In APA adjudication, by contrast, OPM is instead vested with the authority to determine the ALJ’s qualifications. *See* 5 U.S.C. § 5372(b)(2) (2012); *see also* 5 C.F.R. §§ 930.201–930.211 (2017) (OPM regulations implementing its statutory authority to regulate the selection, compensation, and tenure of ALJs employed by other agencies).

77. Barnett, *supra* note 4, at 1667.

78. *See* EEOC REPORT, *supra* note 10, at 31.

79. *See supra* note 65 and accompanying text.

80. 35 U.S.C. § 6(a) (2012).

81. *Cf.* Stephen B. Burbank, *What Do We Mean by “Judicial Independence”?*, 64 OHIO ST. L.J. 323, 331 (2003) (stating that “judicial independence and judicial accountability are different sides of the same coin”).

82. *See* ASIMOW, *supra* note 6, at 21–22.

83. The Administrative Conference has recommended that “[a]gencies that decide a significant number of cases should use adjudicators—rather than agency heads, boards, or panels—to conduct hearings and provide initial decisions, subject to higher-level review.” Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,312, 94,316 (Dec. 23, 2016).

84. Indeed, even in Type A adjudication, the APA expressly reserves to the agency the power to make the final decision. *See* 5 U.S.C. § 557(b) (2012) (“On appeal from or review of the initial

2. The Decider's Powers

In Type B adjudication, the agency's discretion to design the decider also includes the ability to define that official's powers.⁸⁵ First, agencies may adopt a variety of rules that determine what information is contained in the hearing record and is otherwise available to the decider. For example, some agencies empower adjudicators to order pre-hearing discovery, while other agencies do not.⁸⁶ In a similar fashion, some agencies empower adjudicators to keep information submitted by the parties confidential, while other agencies do not. Most, but not all, Type B agencies adopt regulations regarding the decider's ability to engage in *ex parte* communications.⁸⁷ These regulations address whether and in what circumstances the adjudicator may communicate with persons outside the hearing, including with other staff within the agency.⁸⁸ Although *ex parte* rules are best known for protecting the integrity of the process and promoting the separation of functions, these rules also affect what kind of information is available to the presiding official.

A second type of rules that define the decider's powers relate to the nature, basis, and format of the adjudicator's decision. Agency regulations may empower the presiding official to adjudicate for a class⁸⁹ or resolve disputes on summary judgment.⁹⁰ Other regulations may grant the decider remedial powers, address the finality of the decision, or require that the decision be in writing.⁹¹ As previously explained, a Type B adjudication is, by definition, one in which the exclusive record principle is observed. This is a matter of definition, however, and not of legal requirement. For this reason, the ACUS study was able to identify some Type B agencies that lack any publicly available, written

decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”).

85. There are certain powers, such as the authority to issue subpoenas that an agency can give to its adjudicators only if Congress has first given that power to the agency. For example, Title VII of the Civil Rights Act of 1964 empowered the EEOC to issue administrative subpoenas, and the EEOC has in turn granted that power to its federal sector adjudicators. *See* 42 U.S.C. § 2000e-9 (2012); 29 U.S.C. § 161(1) (2012); Alison B. Marshall & Jennifer C. Everett, *EEOC Subpoena Power*, 37 EMP. RELATIONS L.J. 3 (2011) (reviewing issues that arise in recent cases addressing the scope of the EEOC's subpoena power).

86. *See* ASIMOW, *supra* note 6, at 35.

87. *See id.* at 20–21.

88. For example, EEOC's federal sector hearing procedures do not prohibit *ex parte* communications, although such a prohibition is found in an EEOC order. *See* EEOC REPORT, *supra* note 10, at 9–10 & n.58; EQUAL EMP'T OPPORTUNITY COMM'N, ORDER NO. 690.001 (Jan. 30, 2002); *see also* EQUAL EMP'T OPPORTUNITY COMM'N, HANDBOOK FOR ADMINISTRATIVE JUDGES ch. 1 pt. E (2002), <http://www.eeoc.gov/federal/ajhandbook.cfm#initial> [<https://perma.cc/4RXM-YX7L>].

89. *See* Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634 (2017); Michael Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992 (2012).

90. *See* Admin. Conf. of the U.S., Recommendation 70-3, *Summary Decision in Administrative Adjudication*, 38 Fed. Reg. 19,785 (July 23, 1973).

91. *See* ASIMOW, *supra* note 6, at 32–33.

rule requiring observance of the exclusive record principle.⁹² As with agency discretion to define the decider's identity, agency discretion over the decider's power yields broad diversity across Type B programs.

III. REEVALUATING PROCEDURAL DISCRETION

Agency discretion to design the decider thus gives an agency control over the constellation of discrete elements that determine the nature, position, and powers of the officials who preside over adjudicatory hearings. This discretion offers benefits to agencies, regulated parties, and the public. But its exercise also imposes costs, both at the level of individual adjudicatory programs and from a broader, system-wide perspective.

A. *Benefits of Procedural Discretion*

The principal—and most frequently invoked—benefit of agency procedural discretion is that it enables an agency to design its processes in a manner best suited to meet the unique needs of that agency and the regulatory program at issue. This approach is grounded in the concept of comparative institutional advantage. It takes as its premise the notion that the agency is better positioned than Congress or the courts to select the optimal procedural design.⁹³ As Professor Asimow has explained: “[w]hether a particular procedural device should be employed (and the precise form in which it is provided) always requires a careful balance of the conflicting variables involved in choosing optimal procedures—accuracy, efficiency, and acceptability to the parties.”⁹⁴ Although it may seem strange to refer to the presiding official as a “procedural device,” the question of who within an agency will preside over a hearing and issue the agency's first (and perhaps final) decision is a central component of the overall procedural design. For this reason, it is properly subject to the flexible, context-specific analysis that governs other questions of procedural design in administrative adjudication.

This approach implicitly recognizes a link between administrative procedure and substantive regulatory policy.⁹⁵ To recognize such a link is consistent with the Supreme Court's decision in *Vermont Yankee*, which treated procedural discretion as derivative of an agency's substantive statutory authority.⁹⁶ Congress also seems to recognize a relationship between substance and procedure.

92. See ASIMOW, *supra* note 6, at 35. As Professor Asimow notes, it is possible that these agencies adhere to the principle without having codified it in a procedural regulation, manual, or other source of procedural law. *Id.*

93. See Bremer & Jacobs, *supra* note 27, at 541–42.

94. ASIMOW, *supra* note 6, at 19.

95. See, e.g., Bremer & Jacobs, *supra* note 27, at 526 (“Procedural choices are inextricably intertwined with substantive ends.”).

96. See *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (holding that the Commission acted within its statutory authority when it considered the environmental impact of spent fuel processes in licensing procedures).

When it has enacted agency-and program-specific procedural statutes that deviate from the APA's adjudication structure, it has often done so in the service of substantive ends. For example, the AIA created detailed, patent-specific adjudicatory processes for a variety of patent-related reasons, including to facilitate the invalidation and narrowing of certain patents thought to interfere with innovation and economic growth.⁹⁷ The appointment of expert "administrative patent judges" was one aspect of this substantively-focused procedural reform.⁹⁸ Finally, agencies also seem to view procedural discretion as a valuable and necessary component of their substantive statutory authority. Procedures (in adjudication and in connection with other kinds of agency action) are often carefully crafted with an eye toward improving an agency's ability to efficiently and effectively achieve its regulatory or other substantive mission. The EEOC's practice of hiring administrative judges with civil rights experience to preside over federal sector hearings is one example of how agency discretion to design the decider can be used to further an agency's substantive mission.⁹⁹

A secondary benefit of procedural discretion is that it enables agencies to offer greater procedural protections than would otherwise be required by law. As previously explained, adjudication outside of the APA offers few procedural protections to those whose interests are at stake in the proceedings. Even when there are powerful normative reasons to impose additional procedures on administrative agencies, Congress often lacks the political will to do it.¹⁰⁰ In the absence of congressional action, however, procedural discretion empowers agencies to independently and voluntarily take action to improve administrative procedure.¹⁰¹ Agencies will not always (and perhaps should not always) take the most procedurally protective path.¹⁰² For example, agencies have historically avoided appointing ALJs whenever possible.¹⁰³ Nonetheless, the agencies' ability to be procedurally innovative and progressive benefits regulated parties and the public.

97. See, e.g., Dreyfuss, *supra* note 46, at 242, 255 (explaining that one of the many goals of the AIA was to weed out invalid patents and narrow their claims).

98. See 35 U.S.C. § 6(a) (2012).

99. See EEOC REPORT, *supra* note 10, at 31.

100. See, e.g., Asimow, *supra* note 2, at 1008–09 (“The public would benefit if more cases were heard by ALJs because ALJs enjoy both de jure and de facto independence of the agencies for which they decide cases. It is unlikely, however, that Congress will be persuaded to do so in the foreseeable future.”).

101. This is the premise of many ACUS recommendations, including the recent recommendation on evidentiary hearings conducted outside of the APA. See Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,312, 94,314 (Dec. 23, 2016); see also, e.g., Admin. Conf. of the U.S., Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (Jan. 17, 2012) (urging agencies to voluntarily take action to improve the online availability of copyrighted materials incorporated by reference into federal regulations).

102. See Verkuil, *supra* note 10.

103. See Asimow, *supra* note 2, at 1009 & n.36.

B. Costs of Procedural Discretion

The first potential cost of agency discretion to design the decider is that it may imperil decider independence. An agency's ability to set the terms of its adjudicators' employment gives that agency some measure of influence over how those officials decide the matters that come before them. Agency authority to subject adjudicators to performance reviews, quality control measures, or decision-making quotas similarly gives the agency some control over the decision-making process. This control may offer improved accountability. But the flipside is that it erodes the decider's independence. This is precisely why the APA took these aspects of control over ALJs away from adjudicating agencies and vested them instead in the Civil Service Commission and its successor, OPM.¹⁰⁴ A Type B agency's ability to require its adjudicators to have certain subject matter expertise as a condition of employment presents a similar problem. Having a specialized decider may have benefits.¹⁰⁵ But it also increases the likelihood that adjudicators will come to their jobs with well-formed, preexisting commitments and beliefs about the optimal policy to be enforced through agency adjudication. This is why OPM does not permit agencies to require subject matter expertise as a condition of ALJ appointment.¹⁰⁶ Furthermore, the role of a Type B adjudicator is "to preside impartially over fair hearings *that implement and administer agency policy.*"¹⁰⁷ In other words, the adjudicator's "role demands adherence to agency policy and goals,"¹⁰⁸ and not independence in the judicial sense. This may hold true regardless of the precise details of how a particular agency has elected to exercise its discretion to design the decider. Finally, all of these issues may be further compounded if the hearing structure contemplates that the adjudicator's employer (i.e., the agency) will always and necessarily be one of the parties to the hearing.¹⁰⁹ For these reasons, reduced independence may be inherent in the administrative

104. See *Butz v. Economou*, 438 U.S. 478, 513 (1978) (holding that federal executive officials entitled to qualified immunity and persons performing adjudicatory functions are entitled to absolute immunity from damages); *Ramspeck v. Trial Exam'r Conference*, 345 U.S. 128, 132 (1953); *Nash v. Califano*, 613 F.2d 10, 14–16 (2d Cir. 1980) (holding that alleged invasion of ALJ's statutory right to decisional independence was justiciable controversy and there was standing); Asimow, *supra* note 2, at 1009. OPM also ensures that all ALJs are paid according to a special pay scale, according to which compensation is both higher than the GS scale and is not subject to the adjudicating agency's control. See 5 C.F.R. § 930.205 (2017); *Pay & Leave: Pay Administration*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/administrative-law-judge-pay-system/> [<https://perma.cc/HFS3-26Y7>].

105. Cf. J. Jonas Anderson, *Judicial Lobbying*, 91 WASH. L. REV. 401, 456–57 (2016) (noting benefits of specialized judges).

106. Agencies were once permitted to require ALJs to have specialized experience as a condition of appointment. The process was called "selective certification," and it was heavily criticized and ultimately abandoned. See John T. Miller, Jr., *The Vice of Selective Certification in the Appointment of Hearing Examiners*, 20 ADMIN. L. REV. 477 (1968).

107. Moliterno, *supra* note 23, at 1192.

108. *Id.*

109. *Id.* at 1195.

justice that can be offered through non-APA adjudication.¹¹⁰

From a system-wide perspective, the exercise of agency discretion to design the decider defeats the APA's purpose of promoting procedural uniformity across agencies.¹¹¹ In Type A adjudication, OPM's centralized authority over the certification, selection, appointment, and tenure of ALJs promotes substantial uniformity across agencies.¹¹² The APA's adjudication provisions also promote uniformity by (among other things) specifying the ALJ's core powers.¹¹³ In adjudication outside the APA, where agencies have discretion over these elements, uniformity is nowhere to be found. Indeed, Professor Asimow describes "the world of Type B adjudication" as being "wildly diverse"¹¹⁴ and "vast and formless,"¹¹⁵ while Type C adjudication is "even more wildly diverse."¹¹⁶ Indeed, the ACUS-Stanford database does not include information about Type C adjudication schemes because such information about them is so voluminous, varied, and difficult to find.¹¹⁷ This reality makes it very difficult to assess whether and to what extent agency adjudication is—in the aggregate—consistent with basic due process norms. In connection with this, and harkening back to the principal benefits of procedural discretion, it is not clear that agencies have special expertise in determining what due process requires. Agencies may have the advantage in tailoring adjudicatory processes to the needs of individual regulatory programs. But that is not the kind of expertise that is relevant in balancing due process values to ensure an adequate level of decider independence.

This hints at a third, derivative cost of agency discretion to design the decider: the diversity it facilitates makes non-APA adjudication significantly less transparent than Type A adjudication. In Type B adjudication, information must always be agency-specific, and the details of individual adjudicatory programs are often difficult to find, scattered across various sources, or simply not written down in any publicly available location.¹¹⁸ This is why studying federal administrative adjudication in the aggregate is such a daunting prospect for scholars and experts. Even agencies themselves may not have access to adequate information about adjudicatory procedures, a reality that would make

110. Cf. Barnett, *supra* note 4.

111. See Asimow, *supra* note 2; Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 AM. U. ADMIN. L.J. 65 (1996).

112. See, e.g., EEOC Report, *supra* note 10, at 27–32 (explaining OPM's role).

113. See 5 U.S.C. § 556 (2012).

114. ASIMOW, *supra* note 6, at 18.

115. *Id.* at 4.

116. *Id.* at 19.

117. See *id.* at 2.

118. See *supra* note 91 and accompanying text. For example, in a HUD adjudication program under the National Manufactured Housing Construction and Safety Standards Act of 1974 (NMHCSSA), "[n]o information on the presiding officer is set forth in the regulations except to note that he/she is appointed by the Secretary to hear any Informal Presentation of Views involving oral testimony." *Housing and Urban Development Hearing-Level Procedures*, ADJUDICATION RESEARCH, <https://acus.law.stanford.edu/hearing-level/hudomanu0004-hearing-level-procedures> [<https://perma.cc/H427-2V8J>].

it difficult for them to thoughtfully develop and maintain those procedures. This can be contrasted to the world of informal rulemaking, which is made uniform through APA-prescribed procedures that have been fleshed out by judicial case law. These sources of law create a clear conception of informal rulemaking. By contrast, there is no single, clear, uniform understanding of what constitutes adjudication outside of the APA. This makes it impossible for affected parties to have clear procedural expectations. It also prevents a system-wide evaluation of the integrity of administrative adjudication. These problems deserve greater attention.

CONCLUSION

Agency procedural discretion in Type B adjudication has contributed to the emergence of a vast and formless world of administrative adjudication outside of the APA. Agency discretion to design the decider is illustrative of this larger phenomenon. In this context, procedural discretion may simply be a natural consequence of the legal reality that Congress has vested the agency with the authority to adjudicate.¹¹⁹ And the resulting specialization conveys some benefits. But it also imposes costs—to decider independence, uniformity, and transparency. These costs have been acknowledged, but they deserve greater attention. Individual agencies can adhere to best practices that can help to mitigate these costs within individual adjudicatory programs.¹²⁰ Congressional action may be necessary, however, to address the issues on a system-wide basis.

119. See *supra* note 83 and accompanying text.

120. See Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,312, 94,314 (Dec. 23, 2016).

