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THE REDISCOVERED STAGES OF AGENCY ADJUDICATION

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ABSTRACT

Modern administrative law understands the Administrative Procedure Act (APA) to establish an informal and a formal procedural mode of two types of agency action: rulemaking and adjudication. This Article argues that this understanding, which is sound as applied to rulemaking, is wrong as applied to adjudication.

Revisiting the voluminous and long-neglected research that informed the APA, this Article argues the statute codified informal and formal stages—not modes—of adjudication. In this staged process, informal procedures such as investigations, examinations, inspections, and conferences are used in the initial stages of the process and are sufficient to finally dispose of the vast majority of cases. A statutory hearing requirement directs an agency to elevate the few remaining disputes to a subsequent hearing stage, which

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across agencies reflects a singular vision as to its purpose, timing, and procedural characteristics.

Understanding adjudication as a staged process makes the APA's regime coherent and offers new insights into the statute's conceptual foundation. It clarifies that an adjudicatory "hearing" under the APA is formal, while amplifying principles that appropriately can be used to cabin hearings and effectuate Congress's preference for agency over judicial resolution of administrative disputes. It provides a compelling explanation for the APA's failure to establish minimum procedural requirements for informal adjudication. And once hearings are removed from this category, it emerges that informal adjudication may be better characterized as executive than quasi-judicial. Modern administrative law admits of this possibility, but the APA is blind to it because the statute was founded upon a conception of administrative action as purely quasi-legislative and quasi-judicial and fundamentally not executive. This Article thus identifies a serious, unacknowledged problem: the APA's conceptual foundation has become antiquated.

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INTRODUCTION

It is axiomatic that the Administrative Procedure Act (APA) divides the universe of agency action into rulemaking and adjudication and provides for each of these an informal and a formal procedural mode.¹ With respect to rulemaking, this understanding is sound. Section 553 provides procedures for the informal mode of rulemaking, while Sections 553, 556, and 557 provide procedures for a trial-like, formal mode of rulemaking. These are modes in the sense that they are mutually exclusive alternatives for taking the same kind of action. An agency adopting a regulation to implement its organic statute will use either formal rulemaking or informal rulemaking—but not both—to develop the regulation. This choice of procedural mode may be dictated by statute, although the Supreme Court has interpreted the APA so as to nearly eliminate the possibility that formal rulemaking will be

1. See, e.g., GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 324 (8th ed. 2018) (“[T]he APA distinguishes between what have come to be called *formal* and *informal* procedural modes, though the APA itself does not use the words ‘formal’ or ‘informal.’”).

required.² Thus, informal rulemaking is usually available to agencies, and, as a purely descriptive matter, most agencies choose to use it instead of its formal counterpart.

This Article argues that, as applied to adjudication, this contemporary modes-based understanding of the APA's procedural structure is wrong. When the APA was adopted, informal and formal adjudication were not viewed as alternative modes, but rather as consecutive stages. Agencies used informal techniques during the initial stage of the adjudicative process. In the vast majority of cases, the agency determination generated through the initial, informal stage was sufficient to bring the matter to a close. In the rare instances in which a dispute persisted, and the agency's statute contained a hearing requirement, the matter would proceed to the formal stage of adjudication. This stage involved an evidentiary hearing, conducted before a hearing examiner using trial-like procedures designed to protect individual interests and ensure the fair and reliable resolution of the dispute.

This Article rediscovers adjudication's staged structure by examining the voluminous and long-neglected research that informed the APA.³ In 1939, as the political battle over the New Deal raged, it seemed increasingly likely that Congress would enact legislation to regulate administrative procedure. The principal proposal—embodied in the Walter-Logan bill—would have broadly judicialized the administrative process and was viewed by progressives as both ill-informed and potentially fatal to the New Deal administrative state. President Roosevelt responded by commissioning the Attorney General to conduct a “scientific” study of administrative procedure. The Attorney General convened a Committee on Administrative Procedure that, with the assistance of a team of attorney-investigators, prepared twenty-seven “monographs” examining the procedures and practices of existing federal agencies. These monographs informed a Final Report to Congress, which included proposals for legislative action. Altogether, this body of research provided the “intellectual foundation” for what became the APA.⁴ Adjudication's staged structure emerges clearly in the Committee's work, as does a singular vision of the purpose, timing, and essential procedural elements of an adjudicatory “hearing.”

The APA thus codified—but did not create—adjudication's staged structure. That structure emerged prior to the APA's enactment, in the many

2. See *United States v. Fla. E. Coast Ry.*, 410 U.S. 224 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972).

3. See FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) [hereinafter FINAL REPORT]; see *infra* notes 129–155 and accompanying text (identifying the twenty-seven monographs that informed the Final Report).

4. Kenneth Culp Davis, Walter Gellhorn & Paul Verkuil, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 513–14 (1986) [hereinafter *Present at the Creation*].

discrete administrative statutes enacted by Congress and implemented by federal executive agencies and independent establishments. Administrative statutes defined both the substantive scope of agency authority and the contours of the administrative process.⁵ Congress instructed agencies to accept applications or complaints; to conduct examinations or inspections; to pay benefits, issue licenses, or sanction parties for unlawful conduct; and to conduct hearings to resolve otherwise intractable disputes. Each agency fleshed out the process outlined in its organic statute by exercising its interstitial procedural discretion, often finding ways to use informal techniques to achieve agreement and prevent the need to hold a hearing (if the statute required one). Although there were contexts in which the applicable statute or the agency's practices produced some anomaly, a general pattern of consecutive adjudicatory stages emerged across government. The essential elements of a hearing also emerged, both through their observance and through their harmful neglect. Informed by these pre-APA practices, the APA's architects viewed adjudication as a staged process that often but not always culminated in a particular kind of hearing. The statute codified this vision.⁶

As may be evident, this Article's subject is not a legal doctrine per se, but a conceptual framing that has significant consequences for understanding administration and applying certain core administrative law doctrines. This Article aims to separate out that conceptual framing, which is implicit and typically not subject to intentional evaluation, from the doctrinal and theoretical questions that are administrative law's conscious concern.

Shifting from a modes-based to a stage-based understanding of adjudication has significant consequences for the doctrine governing when an agency must use the APA's formal adjudication procedures.⁷ From the modes-based perspective, it is sensible to ask whether an organic statute's requirement that an agency hold a "hearing" before making a decision requires a formal "on-the-record" hearing or permits an informal hearing not subject to the APA's procedures.⁸ The inquiry changes if the APA

5. The earliest administrative statutes were highly detailed, creating a "transmission belt[]" for bringing congressional policy to life in the real world, while later statutes granted agencies broader authority to develop federal policy according to articulated principles. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255 (2001).

6. See, e.g., 5 U.S.C. § 554(a) (leaving it to individual administrative statutes to determine when a hearing is required in adjudication); § 554(c) (requiring agencies to afford parties the opportunity to informally settle and submit a case to hearing only if it could not be resolved by consent); § 554(e) (allowing agencies to issue declaratory orders to terminate a controversy or resolve uncertainty); §§ 554(b), (d), 556, 557 (defining the essential elements of an adjudicatory hearing).

7. See 5 U.S.C. §§ 554, 556, 557.

8. See 5 U.S.C. § 554(a). In adjudication, informal hearings are sometimes referred to as hearings conducted "outside the APA," which means not in compliance with the minimum procedural

contemplates that informal techniques are used in the initial stages of adjudication, with remaining disputes subject to a hearing, which *by definition* is a proceeding conducted on the record. From the stage-based perspective, the possibility of an informal hearing evaporates. The research underlying the APA strongly supports this conclusion. It treats a wide variety of non-hearing procedures as “informal” adjudication and understands “formal” adjudication to mean a “hearing.” Constitutional due process may be so flexible as to allow for the possibility of many different kinds of hearings.⁹ But in APA adjudication, there is only one kind of hearing.¹⁰

Reviving the stage-based conception of adjudication would mean subjecting some existing informal hearing programs to the APA’s formal procedures, but it would also reinforce principles that appropriately can be used to cabin hearings. It offers a compelling explanation—and justification—for the APA’s failure to establish minimum procedural requirements for informal adjudication. If a dispute persists at the conclusion of the informal stage of the process, robust procedural protections are available in a formal hearing or on judicial review. This in turn illuminates an underappreciated function of statutory hearing requirements: to effectuate a congressional preference for administrative disputes to be adjudicated in the first instance by the agency instead of by a court. The stage-based conception also reinforces the principles that: (1) Congress should determine whether (and to what extent) an agency must use hearing procedures;¹¹ and (2) agencies should use informal techniques to resolve disputes by consent and thereby reduce the need for resource-intensive hearings.¹²

Finally, reviving the stage-based conception of adjudication reveals new concerns regarding the continued viability of the APA’s conceptual foundation. From the stage-based perspective, adjudicatory hearings are more obviously and intensely quasi-judicial. At the same time, once hearings are removed from the APA’s catch-all category of “informal

requirements codified in Sections 554, 556, and 557. See MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 3–4 (2019).

9. Wolf v. McDonnell, 418 U.S. 539, 557–58 (1974) (citing Grannis v. Ordean, 234 U.S. 385 (1914)). This point riffs on Judge Friendly’s well-known and “enigmatic[ly] title[d]” remarks on what he described as the Court’s “not altogether pellucid requirement” for satisfying constitutional due process. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1267 (1975).

10. Of course, the APA is a default regime of minimum procedural requirements. Congress can override it by statute, see 5 U.S.C. § 559, and agencies have discretion to exceed its minimums, such as by holding a hearing when the relevant statute requires none, see § 554(a). These possibilities may create confusion, but they do not alter the APA’s fundamental structure, which is this Article’s subject.

11. See 5 U.S.C. §§ 554(a), 556(b), 559.

12. See 5 U.S.C. § 554(c).

adjudication,” the remaining procedures—routine processing of applications and complaints, investigations, inspections, examinations, correspondence, conferences, negotiations, mediations, and settlements—appear to be executive actions with little meaningful quasi-judicial character.¹³ Agencies use these procedures because statutes require them. In this sense, most (if not all) informal adjudication is literally law execution. So why doesn’t the APA recognize three categories of agency action: rulemaking, adjudication, and executive administration? For one familiar with modern administrative doctrine, which acknowledges that much agency action is executive action, this seems a natural question.¹⁴ Investigating it reveals something surprising: the APA was based on a then-dominant conception of administrative action as being *exclusively* quasi-legislative and quasi-judicial and fundamentally *not* executive. Reviving adjudication’s stage-based structure thus reveals a serious and unacknowledged problem: the APA’s conceptual foundation has become antiquated.

This Article proceeds in four parts. Part I describes the contemporary understanding of the APA’s procedural structure for adjudication. It explains how viewing informal and formal adjudication through a modes-based lens shapes judicial doctrine and agency practice. Part II argues the APA was predicated on a very different, stage-based understanding of agency adjudication. This historical understanding entailed a singular vision as to the timing, purpose, and essential procedural elements of a hearing.¹⁵ Part II concludes by exploring how administrative law forgot adjudication’s staged structure. Part III argues that administrative law should revive the staged structure because it makes the APA’s regime more coherent and defensible. This would entail broader enforcement of the APA’s formal hearing provisions. But it would also better explain and justify the APA’s silence on informal adjudication procedures and reinforce principles that cabin formal proceedings. Finally, Part IV explores the deeper logic of

13. The activities listed here are agency action when they are part of the process used to produce a final disposition. See 5 U.S.C. § 551(6), (7), (13).

14. See, e.g., *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021) (“The activities of executive officers may ‘take “legislative” and “judicial” forms, but they are exercises of—indeed, under our constitutional structure they must be exercises of—the “executive Power,”’ for which the President is ultimately responsible.” (quoting *City of Arlington v. FCC*, 569 U.S. 290, 305, n.4 (2013))); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020) (describing the Consumer Financial Protection Bureau (CFPB) as “an independent agency that wields significant executive power”); *Morrison v. Olson*, 487 U.S. 654 (1988) (examining the executive character of the independent counsel’s investigative and prosecutorial functions).

15. Some may quite reasonably fit this Article within the emerging literature on “APA originalism.” See, e.g., Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807 (2018). This Article’s focus and concern, however, is the APA and the structure of administrative adjudication and not interpretive methodology as such.

adjudication's staged structure and what it reveals about the APA's conceptual foundation.

I. THE CONTEMPORARY UNDERSTANDING

It is blackletter law that the APA provides two procedural modes—formal and informal—of two types of agency action—adjudication and rulemaking. This structure is created by the APA's provisions and has been further constructed through three-quarters of a century of judicial precedent, agency practice, and scholarly exposition. This Part explores this contemporary understanding to lay the groundwork necessary to critically evaluate its broad acceptance.

A. *The Statutory Foundation*

The APA divides all agency action into two principal forms: rulemaking and adjudication.¹⁶ Each form of agency action is defined by reference to what it produces: adjudications produce orders;¹⁷ rulemakings produce rules.¹⁸ The statute separately defines these two products. An “[o]rder” is “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.”¹⁹ The inclusion of the phrase “other than rule making” makes adjudication a catch-all category for all agency actions that are *not* rulemaking.²⁰ This gives prime importance to the meaning of “rule,”²¹ which is defined as:

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or

16. *E.g.*, Jeffrey S. Lubbers, *Risk Regulation at the Federal Level: Administrative Procedure Constraints and Opportunities*, 1 RISK 43, 46 (1990); *see* 5 U.S.C. § 551(13).

17. “Adjudication” is defined as the “agency process for the formulation of an order.” 5 U.S.C. § 551(7).

18. “Rule making” is defined as the “agency process for formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5). In the APA, “rule making” appears as two words, but this Article will use the compound formulation, “rulemaking,” in keeping with the ubiquitous and longstanding practice in administrative law. *See* William H. Allen, *Administrative Actions*, 13A ROCKY MTN. MIN. L. SPECIAL INST. 2, 2 n.6 (1981).

19. 5 U.S.C. § 551(6) (emphasis added).

20. *E.g.*, Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749, 1753 (2020) [hereinafter Bremer, *Reckoning*]; Cooley R. Howarth, Jr., *Federal Licensing and the APA: When Must Formal Adjudicative Procedures Be Used?*, 37 ADMIN. L. REV. 317, 333–34 (1985); Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”: When Agencies Defer Decisions*, 103 GEO. L.J. 157, 170 (2014); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1111 (2009).

21. *See* LAWSON, *supra* note 1; Allen, *supra* note 18, at 2; Sean Croston, *It Means What it Says: Deciphering and Respecting the APA's Definition of “Rule”*, 53 WASHBURN L.J. 29 (2014); Ronald M.

prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.²²

Based on the core concepts that animate the statutory definitions,²³ two administrative actions could be classified as either rulemaking or adjudication: ratemaking and licensing. The APA neutralizes this potential uncertainty by expressly classifying ratemaking as rulemaking²⁴ and licensing as adjudication.²⁵

Having divided the universe of agency action into the defined category of rulemaking and the catch-all category of adjudication, the APA provides two procedural modes—formal and informal—that can be used to take either kind of action.²⁶ The APA prescribes minimum requirements for the formal procedural mode, the centerpiece of which is a trial-like hearing.²⁷ For the informal procedural mode, the statute prescribes minimum requirements for notice-and-comment rulemaking²⁸ but offers no specified procedure on the adjudication side.²⁹ Instead, informal adjudication is subject only to a handful of “[a]ncillary” matters requirements that are not

Levin, *The Case for (Finally) Fixing the APA’s Definition of ‘Rule’*, 56 ADMIN. L. REV. 1077 (2004) [hereinafter Levin, *Definition of “Rule”*].

22. 5 U.S.C. § 551(4). The four corners of rules and rulemaking are entirely (albeit perhaps imperfectly) defined. See Croston, *supra* note 21, at 28; Levin, *Definition of “Rule” supra* note 21; but see Allen, *supra* note 18, at 3 (arguing in 1981 that “there is no need to amend the definition because in the 35 years since the APA was enacted there is no evidence of anyone having been misled or of the definition causing any other problem”).

23. These core concepts are drawn from the Supreme Court’s pre-APA due process cases and include general versus specific application and retrospective versus prospective effect. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *Londoner v. City of Denver*, 210 U.S. 373 (1908).

24. See 5 U.S.C. § 551(4).

25. See 5 U.S.C. § 551(6). Employing the same product-based approach used for rulemaking and adjudication, the statute defines “[l]icensing” as an “agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license,” § 551(9), and further defines a “[l]icense” as “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.” § 551(8).

26. See Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159 (2000).

27. See 5 U.S.C. §§ 553(c), 554, 556, 557.

28. See 5 U.S.C. § 553.

29. Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351 [hereinafter Bremer, *Exceptionalism*]; Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 277–78 (1978) [hereinafter Verkuil, *Administrative Procedure*].

specific to adjudication and do not purport to establish a default informal adjudication procedure.³⁰

Altogether, the APA as traditionally interpreted (and taught in law schools) thus offers the following procedural menu:

FIGURE 1: CONTEMPORARY UNDERSTANDING OF APA PROCEDURAL MENU		
	Formal	Informal
Rulemaking	5 U.S.C. §§ 553, 556, 557	5 U.S.C. § 553
Adjudication	5 U.S.C. §§ 554, 556, 557	5 U.S.C. § 555

The centerpiece of the formal mode is a trial-like hearing that bears much resemblance to the judicial process, but with modifications to suit the unique needs of administration.³¹ The hearing is designed to be conducted in the ordinary course by an impartial presiding official called an administrative law judge (ALJ)³² and to include oral testimony and cross-examination, which are characterized as being among the rights of parties to the proceedings.³³ The ALJ is required to observe an exclusive record principle, meaning that her decision must be based only on the information compiled into the hearing record.³⁴ The APA identifies the presiding official's powers³⁵ and erects an employment regime designed to ensure her impartiality and offer some independence from her employing agency.³⁶ To accommodate the policymaking function of administrative agencies, the APA contemplates that an ALJ's decision is *initial*: it may become final but is subject to agency head control.³⁷ Reflecting principles familiar to courts,

30. See 5 U.S.C. § 555.

31. As Part II.A. will explain, this similarity is not coincidental.

32. The statute admits of two possibilities outside the ordinary course. First, "the agency," 5 U.S.C. § 556(b)(1), or "one or more members of the body which comprises the agency," § 556(b)(2), may preside over a formal hearing. Second, the hearing may be conducted "by or before boards or other employees specifically provided for by or designated under statute." § 556(b)(3).

33. See 5 U.S.C. § 556(d).

34. See 5 U.S.C. § 556(e).

35. See 5 U.S.C. § 556(c). The powers listed are "[s]ubject to published rules of the agency and within its powers." *Id.*; see also Allen, *supra* note 18, at 5.

36. See §§ 1104(a), 1302(a), 1305, 3105, 3304, 3323(b), 3344, 4301(2)(D), 5372, 7521; see Kent H. Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 803–08 (2013). Although the relevant statutes have not been amended, the regime for administering them is in flux due to an executive order issued in 2018. See Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018); Administrative Law Judges, 85 Fed. Reg. 59,207 (proposed Sept. 21, 2020).

37. See 5 U.S.C. § 557(b); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141 (2019). Agency head control of ALJ decisions may be

the APA prohibits *ex parte* communications between the presiding official and interested parties outside the agency.³⁸ But the APA's *ex parte* provisions are also tailored to the administrative context, which uniquely calls for regulation (but not outright prohibition) of *ex parte* communications between the presiding official and persons *inside* government who may be interested in the proceedings.³⁹ A key goal of these provisions is to effectuate an intra-agency separation of functions: to ensure the official responsible for prosecuting is not also responsible adjudicating, while also recognizing that policymaking and expertise are essential ingredients in administrative decisionmaking.⁴⁰

As the chart above indicates, the trial-like hearing procedures established by Sections 556 and 557 define the formal mode of both rulemaking and adjudication. The statute admits of only minor procedural differences based on the form of the agency's action. First, and important for the next section's discussion, each form has its own "triggering" provision to specify when formal procedures are mandated.⁴¹ Second, the formal procedures offer a limited exception—more broadly available in rulemaking than in adjudication—that may allow an agency to dispense with the oral components of the process.⁴²

The informal mode of rulemaking is conducted according to the notice-and-comment procedures established by Section 553. Compared to the formal mode, notice-and-comment rulemaking is simple and straightforward and need not include any oral hearing component.⁴³ First, the agency must publish a "[g]eneral notice of proposed rulemaking" in the *Federal Register*.⁴⁴ The notice must contain "a statement of the time, place,

necessary to prevent problems under the Constitution's appointments clause, by ensuring that ALJs are inferior officers whose decisions are subject to principal officer control. *See* Bremer, *Reckoning*, *supra* note 20; Richard J. Pierce, Jr., *Agency Adjudication: It Is Time to Hit the Reset Button*, 28 GEO. MASON L. REV. 643 (2021). The soundness of this structure may soon be tested in court. *See* Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320 (Fed. Cir. 2019), *cert. granted*, 2020 WL 6037208 (Oct. 13, 2020).

38. *See* 5 U.S.C. § 557(d)(1); Bremer, *Reckoning*, *supra* note 20, at 1778–80. An external party who makes a prohibited *ex parte* communication may be ordered "to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation." § 557(d)(1)(D).

39. Internal *ex parte* communications are not absolutely prohibited, but must be "place[d] on the public record of the proceeding." 5 U.S.C. § 557(d)(1)(C).

40. *Cf.* Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1249–53 (2014) (arguing that these provisions of the APA bring familiar separation of powers principles to bear on the administrative process).

41. *Compare* 5 U.S.C. § 553(c) (triggering formal procedures "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing"), *with* § 554(a) (triggering formal procedures "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing").

42. *See* 5 U.S.C. § 556(d).

43. *See* 5 U.S.C. § 553(c).

44. 5 U.S.C. § 553(b).

and nature” of the proceedings,⁴⁵ identify “the legal authority under which the rule is proposed,”⁴⁶ and include “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁴⁷ Second, the agency must accept public comment.⁴⁸ Finally, “[a]fter consideration of the relevant matter presented,” the agency must publish a final rule in the *Federal Register*, along with a “concise general statement of [its] basis and purpose.”⁴⁹ Although these procedural requirements are often described as “minimal” or “skeletal,”⁵⁰ they have offered sufficient substrate to support the development of a robust body of administrative common law.⁵¹

The APA contains no adjudicatory analogue to Section 553: there is no provision establishing minimum procedures for informal adjudication.⁵² Courts and scholars often say Section 555 is the only provision of the APA that applies in informal adjudication.⁵³ This is true but insubstantial because the provision does not establish minimum procedures for informal adjudication.⁵⁴ Instead, Section 555 addresses a handful of “ancillary matters” that may arise in a variety of proceedings, including informal adjudications.⁵⁵ It does not purport even to sketch the outlines of a process

45. 5 U.S.C. § 553(b)(1).

46. 5 U.S.C. § 553(b)(2).

47. 5 U.S.C. § 553(b)(3).

48. See 5 U.S.C. § 553(c).

49. 5 U.S.C. § 553(c). The statute also provides that the final rule must be published “not less than 30 days before its effective date.” § 553(d).

50. See Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in Vermont Yankee’s White Space*, 32 J. LAND USE & ENV’T L. 523, 533 (2017); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1439 (2004); Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241, 264; Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can’t Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 13 (2009); Peter L. Strauss, *Statutes That Are Not Static—The Case of the APA*, 14 J. CONTEMP. LEGAL ISSUES 767, 788 (2005).

51. See Shapiro & Murphy, *supra* note 50, at 13–14; cf. Adrian Vermeule, *Rules, Commands and Principles in the Administrative State*, 130 YALE L.J. F. 356 (2020). The dominant view is that this administrative common law conflicts with the text. See generally Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 69 GEO. MASON L. REV. 733 (2021). The resulting “ossification” of the rulemaking process is also a subject of controversy. See *infra* note 60.

52. See Bremer, *Exceptionalism*, *supra* note 29, at 1362 n.48; Bremer, *Reckoning*, *supra* note 20, at 1758; Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1216–17 (1992); Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 346 n.177 (2005) [hereinafter Levin, *Legacy*].

53. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990); Michael Asimow, *The Spreading Umbrella: Extending the APA’s Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1004 n.6 (2004); 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, 1058–59 (2004).

54. Section 558 may also have some application in informal adjudication, at least if the matter involves sanctions or licensing. See 5 U.S.C. § 558.

55. 5 U.S.C. § 555.

for informal adjudication. Nor has the provision been sufficient to facilitate judicial development of minimum procedures through administrative common law.⁵⁶

The traditional explanation for the APA's lack of informal adjudication procedures is two-fold. First, and perhaps carrying the greatest weight, is recognition that the catch-all category of informal adjudication is exceptionally vast and varied.⁵⁷ It includes *any* agency action that is neither rulemaking nor formal adjudication.⁵⁸ It is difficult if not impossible to imagine how one would come up with meaningful procedural minima to govern such a large and diverse range of agency actions. Second, even if the task was practicable, it has been widely viewed as undesirable and unnecessary. A principal reason for delegating authority to federal agencies is their ability to respond flexibly and nimbly to the oft-changing conditions present in a modern economy.⁵⁹ Procedural requirements inhibit this key comparative institutional advantage, making the administrative process slower and more rigid or "ossified."⁶⁰ There are instances in which this cost is worth it, to protect individual rights or promote political accountability. The dominant (albeit not unanimous) view has been that such considerations warrant imposing uniform procedural requirements in rulemaking and formal adjudication but weigh in favor of flexibility and speed in informal adjudication. The APA, it is thought, reflects this judgment that it is impracticable, unnecessary, and undesirable to require agencies to provide much procedural protection beyond that which due process requires in informal adjudication.⁶¹

This two-fold explanation for the APA's silence on informal adjudication crystallizes when the dominant view of the APA's structure is viewed through the lens of related legal doctrine and contemporary agency practice. These subjects are addressed, respectively, in the next two sections.

56. Bremer, *Exceptionalism*, *supra* note 29, at 1401.

57. See ASIMOW, *supra* note 8, at 6.

58. *E.g.*, Bettuci v. United States, 14 F. Supp. 2d 45, 51 (D.D.C. 1998) (explaining that informal adjudication is "a residual category including all agency actions that are not rulemaking and that need not be conducted through 'on the record' hearings" (quoting Izaak Walton League of Am. v. Marsh, 655 F.2d 346, 361 n.37 (D.C. Cir. 1981))).

59. See Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1583 (2011).

60. A large literature examines ossification in the rulemaking process. See, e.g., Aaron Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85 (2018); Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 144 (2012).

61. *But see* 5 U.S.C. § 555.

B. Agency Procedural Discretion

Understanding how the APA's statutory structure actually operates requires taking account of additional legal principles found outside of the statute's text.⁶² Crucially, the law has embraced extensive agency procedural discretion, along multiple dimensions. These include, with only modest limitations, agency discretion to: (1) choose whether to act via rulemaking or adjudication;⁶³ (2) opt to use the informal instead of the formal procedural mode; and (3) design procedures beyond the minimum (and often minimal) requirements imposed by statute and constitutional due process. The last two of these warrant discussion because they are important for this Article's analysis.

Absent a clear statutory command to use the formal procedural mode, courts have recognized broad agency discretion to use the informal procedural mode. Courts have held that an agency must use the APA's formal procedures *only* if its organic statute requires it to conduct a hearing "on the record."⁶⁴ In rulemaking, the Supreme Court has interpreted Section 553(c)'s "on the record" language strictly, such that agencies are rarely required to conduct formal hearings.⁶⁵ In adjudication, the Court has yet to interpret the same language as it appears in Section 554's triggering provision.⁶⁶ Lower courts have taken various positions over time, but the trend has been in favor of an approach that would similarly reduce the domain of formal hearings. Some courts have adopted a presumption in favor of formality when an agency's statute requires it to conduct an

62. This is sometimes referred to as "administrative common law." See generally Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1 (2011); Bremer, *Unwritten*, *supra* note 40; Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3 (1980); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012).

63. This is commonly referred to as the "*Chenery II* principle," so named for the case in which the Supreme Court established it. See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); see also M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004).

64. See 5 U.S.C. §§ 553(c), 554(a).

65. See *United States v. Fla. E. Coast Ry.*, 410 U.S. 224 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). It is often said that *Florida East Coast Railway* killed formal rulemaking. See Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1 (2017); Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237 (2014) [hereinafter Nielson, *Formal Rulemaking*]; see also *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 128 n.5 (2015) (Thomas, J., concurring) ("Today . . . formal rulemaking is the Yeti of administrative law. There are isolated sightings of it in the ratemaking context, but elsewhere it proves elusive.")

66. See Bremer, *Reckoning*, *supra* note 20; John F. Stanley, Note, *The "Magic Words" of § 554: A New Test for Formal Adjudication Under the Administrative Procedure Act*, 56 HASTINGS L.J. 1067 (2005).

adjudicatory hearing.⁶⁷ Other courts have adopted a contrary presumption in favor of informality.⁶⁸ In the most recent decisions, courts have held that an agency's determination of whether its organic statute requires formal adjudication is entitled to *Chevron* deference.⁶⁹ This last approach has been criticized.⁷⁰ Although it is arguably consistent with administrative law's broader preference for agencies—and not courts—to make core policy decisions,⁷¹ there are indications that the Court is tightening up its deference doctrines.⁷² The upshot is that while courts often disclaim a “magic words” approach to interpreting the APA's formal process requirements,⁷³ they are reluctant to require an agency to use the formal procedural mode if its organic statute does not call for a hearing “on the record.”⁷⁴

Finally, administrative law recognizes broad agency discretion to design procedures beyond applicable minimums established by law.⁷⁵ The Supreme Court has admonished that courts should not impose upon agencies procedural requirements that Congress has not seen fit to impose by statute, most especially the APA.⁷⁶ Agencies are not so restricted but must meet the cross-cutting requirements imposed by the APA⁷⁷ and constitutional due process,⁷⁸ as well as any additional, agency-specific requirements found in organic statutes.⁷⁹ As explained above, the APA's cross-cutting requirements for informal adjudication are extremely

67. See *Marathon Oil v. EPA*, 564 F.2d 1253, 1261–64 (9th Cir. 1977). The First Circuit initially took this approach, see *Seacoast Anti-Pollution League v. Costle* (Seacoast), 572 F.2d 872 (1st Cir. 1978), but later reversed itself, see *Dominion Energy Brayton Point, LLC v. Johnson* (Dominion Energy), 443 F.3d 12 (1st Cir. 2006).

68. See *City of W. Chi. v. NRC*, 701 F.2d 632, 644–45 (7th Cir. 1983).

69. See *Dominion Energy*, 443 F.3d at 12 (reversing *Seacoast*, 572 F.2d 872); *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989).

70. See William S. Jordan, III, *Chevron and Hearing Rights: An Unintended Combination*, 61 ADMIN. L. REV. 249 (2009).

71. See Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1895 (2016); but see Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931, 968–71 (2021) (arguing that agencies should not be permitted to opt in to *Chevron* deference on substantive decisions by choosing to use more formal adjudication procedures).

72. See *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (preserving deference to agency regulatory interpretations while emphasizing the many ways in which prior caselaw has cabined that deference).

73. But see *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748 (6th Cir. 2004) (embracing a “magic words” approach).

74. See, e.g., *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 234–38 (1973); *Arwady Hand Trucks Sales, Inc. v. Vander Werf*, 507 F. Supp. 2d 754, 759 (S.D. Tex. 2007).

75. See *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519, 524–25 (1978).

76. See *id.* at 547–49.

77. See *supra* at Part I.A. There are other statutes that impose cross-cutting requirements on agencies, but they are irrelevant to this Article's inquiry.

78. See generally Vermeule, *supra* note 71.

79. See Bremer & Jacobs, *supra* note 50, at 534–35.

limited.⁸⁰ So too are the cross-cutting requirements that flow from constitutional due process.⁸¹

In informal adjudication, because there are few cross-cutting procedural requirements, there is correspondingly wide latitude for the development of agency-specific procedures. In this space, Congress more often creates agency- or program-specific procedures, including for agency hearing programs outside the APA. Agencies can innovate beyond these tailor-made requirements.⁸² Deference doctrines also mean that courts afford agencies greater flexibility in interpreting, applying, and embellishing unique procedural requirements found in organic statutes.⁸³ The doctrinal consequence is that the law recognizes an exceptionally broad zone of agency discretion to design the procedures used in informal adjudication, including in informal hearings.

C. *The Landscape in Light of Precedent and Practice*

A complete view of the modern landscape of agency adjudication requires some consideration of how doctrine and discretion have influenced the lived reality of the APA's procedural structure. Although much could be said about this subject, a few central points are essential to illuminate the implicit conceptual frame that is the subject of this Article.

To begin, as a purely descriptive matter, administrative law has embraced a strong norm favoring informal over formal procedures. By interpreting the APA's triggering provisions strictly, courts have expanded agency discretion to use informal procedures. Agencies consistently have exercised this discretion to choose informal over formal procedures. Employing administrative law's characteristically deferential approach, courts have upheld agency decisions in favor of informality.⁸⁴ Congress has

80. See 5 U.S.C. § 555.

81. See generally Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984). The Supreme Court has adopted a highly flexible balancing test for determining what procedures are constitutionally required, and agencies are often responsible for applying the test. See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); Vermeule, *supra* note 71.

82. See generally Bremer, *Exceptionalism*, *supra* note 29 (examining how the *inter partes* review process for patents was developed through joint congressional-administrative design).

83. See *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984); cf. *Prof'l Reactor Operator Soc'y v. U.S. Nuclear Reg. Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) ("The Supreme Court has indicated, however, that reviewing courts do not owe the same deference to an agency's interpretation of statutes that, like the APA, are outside the agency's particular expertise and special charge to administer.").

84. See Jordan, *supra* note 70; see also, e.g., *Am. Trucking Ass'ns, Inc. v. ICC*, 770 F.2d 535, 544 (5th Cir. 1985) ("Judicial deference to an agency's interpretation of 'its' statute is surely the norm in contemporary administrative law." (quoting Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 598 (1985))); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1540 (2006) ("[T]he

not legislatively interfered with this phenomenon but rather seems to share its coordinate branches' preference for informal administrative procedures.⁸⁵ Decades of discrete decisions in accord with this preference have effectuated a widespread shift away from the APA's formal provisions and toward informal procedures.⁸⁶

Most agency action is adjudication, most adjudication is informal, and informal adjudication is extremely varied. Federal agencies make many minor, routine decisions through adjudication. But they also use adjudication—including informal adjudication—to make significant and highly contested decisions of federal policy. The following examples, although few, convey some sense of adjudication's vast and varied domain:

1. A Postal Service employee decides whether a letter has enough postage.⁸⁷
2. A Forest Service ranger approves (or denies) an application for a camping permit.⁸⁸
3. A Customs officer classifies a day planner not as a duty-free good, but rather as a bound diary subject to tariff.⁸⁹
4. The FCC grants a license to a wireless communications provider to use a specified portion of the electromagnetic spectrum.⁹⁰
5. A member of the Veterans' Administration (VA) Board of Veterans' Appeals affirms an initial decision denying retroactive payment of disability benefits.⁹¹
6. A Social Security employee working in a field office grants an initial claim for Social Security disability benefits.⁹²

deference model offered by [*Chevron* and *Mead*] represents the present administrative law norm.”).

85. See, e.g., *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 232–33 (1973) (describing Congress's impatience with the delay cause by the agency's adherence to formal procedures).

86. See *Sierra Club v. Peterson*, 185 F.3d 349, 367 n.26 (5th Cir. 1999) (Garza, J., dissenting); Bremer, *Exceptionalism*, *supra* note 29; William Funk, *Slip Slidin' Away: The Erosion of APA Adjudication*, 122 PA. ST. L. REV. 141 (2017).

87. See James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067, 1104–05 (2015).

88. See Allen, *supra* note 18, at 5.

89. See *United States v. Mead Corp.*, 533 U.S. 218, 225 (2001).

90. See 5 U.S.C. § 551(6) & (7).

91. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2409 (2019).

92. See Jon C. Dubin, *A Modest, Albeit Heavily Tested, Social Security Disability Reform Proposal: Streamlining the Adjudicative Process by Eliminating Reconsideration and Enhancing Initial Stage Development*, 23 GEO. J. ON POVERTY L. & POL'Y 203, 207–08 (2016). The vast majority of SSA disability claims are finally resolved initially or on reconsideration, without a hearing. *Id.*; see also, e.g.,

7. The Secretary of Transportation approves a state proposal to build an interstate highway through the middle of an important public park in Memphis, Tennessee.⁹³
8. A Customs and Border Patrol officer working at the border orders the expedited removal from the United States of an individual seeking to enter the country without a valid visa or entry document.⁹⁴
9. A Patent Trial and Appeal Board (PTAB) panel composed of three Administrative Patent Judges (APJs) determines that a patent is invalid.⁹⁵
10. An ALJ working in SSA's Office of Disability Adjudication and Review affirms an initial denial of a claim for Social Security disability benefits.⁹⁶

The first nine of these are informal adjudications, in the sense that the decision is issued at the end of a proceeding conducted outside of the APA's formal adjudication provisions. Numbers five, seven, nine, and ten entail the opportunity for a hearing before the decision is made. Only number ten is a formal adjudication, in the sense that the proceeding is conducted according to the APA's formal adjudication procedures.⁹⁷

SOC. SEC. ADMIN., OFFICE OF DISABILITY PROGRAM MGMT. INFO., JUSTIFICATION FOR ESTIMATES FOR APPROPRIATIONS COMMITTEES IN FISCAL YEAR 2020, 218 tbl. 3.21 (Mar. 2019), <https://www.ssa.gov/budget/FY20Files/FY20-JEAC.pdf> [<https://perma.cc/C8NT-SSA7>]. In FY 2018, only 562,452 (~25%) of the 2,231,974 claims that were initially filed progressed to a hearing before an ALJ. *Id.*

93. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 407 (1971). The decision was exceptionally important to the entire community of Memphis. See generally Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992).

94. "In fiscal year 2015, out of 235,413 total removals, over half—or 165,935—appear to have taken place at or near the border and ports of entry through the use of expedited removal," which does not entail any hearing. Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 194 (2017).

95. See *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021).

96. See Emily C. Russell & Glynn F. Voisin, *A Primer on Social Security Disability Law*, 62 LOY. L. REV. 829, 840 (2016).

97. There is a longstanding debate as to whether Social Security hearings must be conducted under the APA. See OFFICE OF THE CHAIRMAN OF THE ADMIN. CONF. OF THE U.S., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EVALUATING THE STATUS AND PLACEMENT OF ADJUDICATORS IN THE FEDERAL SECTOR HEARING PROGRAM 11–12 (2014). SSA has recently concluded that its hearings are not required to be conducted under the APA. See *Hearings Held by Administrative Judges of the Appeals Council*, 85 Fed. Reg. 73,138, 73,140 (Nov. 16, 2020). This

It is important to emphasize that administrative law embraces two kinds of hearings in adjudication: (1) formal “on-the-record” hearings conducted under the APA’s adjudication provisions; and (2) informal hearings, for which the APA establishes no minimum procedural requirements.⁹⁸ In keeping with administrative law’s broader preference for informality, most agency hearings today are informal, conducted outside of the APA, using procedures tailored to suit the needs of the particular agency or program.⁹⁹ Adding further to the confusion, these tailored hearing procedures are often trial-like and designed to facilitate the resolution of factual disputes.¹⁰⁰

This outcome is possible only because contemporary administrative law conceives of formal and informal procedures under the APA as a matter of alternative procedural *modes*. Applied to adjudication, however, the modes-based conceptual framing produces three possible processes: (1) formal adjudication using an “on-the-record” hearing conducted under the APA;¹⁰¹ (2) informal adjudication using a hearing conducted outside the APA;¹⁰² or (3) informal adjudication without a hearing, conducted according to any procedure that satisfies applicable minimums.¹⁰³ There is some tension between this outcome and the simpler menu of APA procedural options set forth above.¹⁰⁴ Further examination will reveal this tension is evidence of a deeper, unacknowledged problem: the contemporary modes-based understanding of adjudication conflicts with the understanding that animated the APA.

II. THE HISTORICAL UNDERSTANDING

This Part argues that the APA was founded upon a stage-based understanding of adjudication. This emerges clearly in the work of the Attorney General’s Committee on Administrative Procedure, which President Roosevelt commissioned to provide an impartial, scientific

Article strongly suggests the SSA is wrong.

98. See *supra* Part I.A.

99. See Bremer, *Exceptionalism*, *supra* note 29, at 1353; Bremer, *Reckoning*, *supra* note 20, at 1760–75.

100. See ASIMOW, *supra* note 8, at 60–61.

101. See *City of W. Chi. v. NRC*, 701 F.2d 632, 644 (7th Cir. 1983).

102. See *Duke Power Co. v. NRC*, 770 F.2d 386, 389 (4th Cir. 1985).

103. “Subject to constraints imposed by due process, or by particular statutes or procedural regulations, an agency is free to provide any procedure (or no procedure) in conducting informal adjudication.” AM. BAR ASS’N, A GUIDE TO FEDERAL AGENCY ADJUDICATION 178 (Jeffrey B. Litwak ed., 2d ed. 2012).

104. This three-option menu for adjudication has led Professor Michael Asimow to reject the formal-informal dichotomy as misleading and inaccurate in adjudication. He has proposed instead a system that classifies adjudications as Type A (APA formal hearings), Type B (non-APA evidentiary hearings), and Type C (non-hearing adjudications). See ASIMOW, *supra* note 8, at 3–4; Asimow, *supra* note 53, at 1005–06.

foundation for Congress's deliberations on administrative reform.¹⁰⁵ This part explains how the Attorney General's Committee contributed to the APA's development and then examines the Committee's voluminous work to reconstruct its stage-based conception of adjudication. It concludes by addressing the question of how administrative law forgot adjudication's staged structure.

A. *The APA's Historical Foundation*

The foundation of the administrative law structure described in Part I is the APA: a statute enacted in 1946 to resolve fundamental questions about the structure, operation, and legitimacy of the New Deal and its associated administrative apparatus.¹⁰⁶ The statute's enactment marked the culmination of a long, intense political struggle that was perhaps more about the New Deal's substance than it was about the comparatively dry mechanics of the administrative process.¹⁰⁷ In the late 1920s and throughout the 1930s, conservative opponents of the New Deal pursued procedural reform of administrative agencies. Indeed, Professor Paul Verkuil has explained that administrative procedure developed as a sub-specialty of administrative law during this seemingly late period "as much from deeply felt objections to government interference with the marketplace as from the necessity to make that interference coherent and credible."¹⁰⁸

The American Bar Association (ABA) led the charge and was substantially responsible for the first administrative reform bill to pass Congress: the Walter-Logan Bill.¹⁰⁹ The ABA's work towards this end began in 1933 when it created a Special Committee on Administrative Law for the professed purpose of assisting in the "study of the practical operation of the various types of administrative machinery (particularly on the quasi-judicial side)."¹¹⁰ The ABA committee, which was most notably chaired by

105. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1594–95 (1996).

106. See Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1224–27 (2015).

107. See generally Shepherd, *supra* note 105; see also Louis L. Jaffe, *The Report of the Attorney General's Committee on Administrative Procedure*, 8 U. CHI. L. REV. 401, 401 (1941) [hereinafter Jaffe, *Attorney General's Committee*] ("The social legislation of the Roosevelt administrations brought to the boiling-point the long-simmering agitation as to the appropriate form of administrative procedures.").

108. Verkuil, *Administrative Procedure*, *supra* note 29, at 261.

109. See S. 915, 76th Cong. (1939) and H.R. 6324, 76th Cong. (1940). For a detailed contemporary analysis of the Walter-Logan Bill, see generally James M. Landis, *Crucial Issues in Administrative Law—The Walter-Logan Bill*, 53 HARV. L. REV. 1077 (1940).

110. 56 ANNU. REP. A.B.A. 407, 411–12 (1933); see John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 434 (1947); Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN.

Roscoe Pound (Dean of Harvard Law School), issued an annual report almost every year from 1934 to 1939.¹¹¹ These reports identified a variety of possibilities for administrative reform, and the committee ultimately produced proposed legislation that would have broadly judicialized administrative procedure.¹¹² Although the committee's methodology, motives, and conclusions were severely criticized by some, its legislative proposal was ultimately introduced into Congress as the Walter-Logan Bill.¹¹³ It passed both houses in late 1940, only to be vetoed by President Roosevelt on December 18, 1940.¹¹⁴

One reason President Roosevelt offered for vetoing the Walter-Logan Bill was to allow the Attorney General to complete a study of administrative procedure that the President had commissioned more than a year earlier.¹¹⁵ On February 16, 1939, President Roosevelt had asked then-Attorney General Murphy to appoint a committee to conduct "[a] thorough and comprehensive study . . . of existing practices and procedures with a view to detecting any existing deficiencies and pointing the way to improvements."¹¹⁶ Dean Acheson, former Under Secretary of the Treasury, served as the Committee's Chairman. Other members of the Committee included Francis Biddle (Solicitor General of the United States), Ralph F. Fuchs (Professor at Washington University), Lloyd K. Garrison (Dean of the University of Wisconsin School of Law), Hon. D. Lawrence Groner (Chief Justice of the Court of Appeals for the District of Columbia), Harry Shulman (Sterling Professor of Law at Yale University), E. Blyth Stason

L. REV. 673, 682 (2010); Verkuil, *Administrative Procedure*, *supra* note 29, at 268; Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 J. POL'Y HIST. 379, 384–88 (2008).

111. Verkuil, *Administrative Procedure*, *supra* note 29, at 268 & n.43. The committee did not issue a report in 1935. See Louis L. Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1223 (1939) [hereinafter Jaffe, *Invective*].

112. Letter from President Franklin D. Roosevelt to the Attorney General (Feb. 16, 1939), reprinted in FINAL REPORT, *supra* note 3, at 252. Professor Louis Jaffe memorably remarked that this "entire statutory scheme might be entitled (with due allowance for a lawyer's hyperbole) 'A Bill to Remove the Seat of Government to the Court of Appeals for the District of Columbia.'" Jaffe, *Invective*, *supra* note 111, at 1232.

113. Professor Louis Jaffe's critique of the ABA committee's work was downright blistering. See Jaffe, *supra* note 111, at 1221–36. Some of the committee's proposals "met with forceful opposition within the Association," *id.* at 1225, and the House of Delegates approved the committee's legislative proposal in January 1939 over the objection of then-Solicitor General Robert Jackson, *id.* at 1232.

114. Franklin D. Roosevelt, *Logan-Walter Bill Fails*, 27 A.B.A. J. 52, 52–54 (Jan. 1941) (reprinting the President's veto message, in view of the ABA's support for the legislation); see generally Grisinger, *supra* note 110.

115. Roosevelt, *supra* note 114, at 53.

116. Letter from President Franklin D. Roosevelt to the Attorney General (Feb. 16, 1939), reprinted in FINAL REPORT, *supra* note 3, at 252. Attorney General Murphy's predecessor, Homer Cummings, had repeatedly urged President Roosevelt to commission a study of administrative procedure along the lines of a similar study of civil procedure in the U.S. District Courts that had recently been completed. See Letter from Attorney General Homer Cummings to President Franklin D. Roosevelt (Dec. 14, 1938), reprinted in FINAL REPORT, *supra* note 3, at 251.

(Dean of the University of Michigan School of Law), and Arthur T. Vanderbilt (former ABA President).¹¹⁷ The committee was supported by a professional staff (as further described below) and assisted by an Advisory Committee composed of agency representatives appointed by the heads of the executive departments and “independent establishments” included in the study.¹¹⁸

The Attorney General’s Committee made good use of the time afforded by President Roosevelt’s veto, ultimately producing a Final Report on Administrative Procedure that was based on twenty-seven monographs examining the practices and procedures of existing federal agencies.¹¹⁹ The monographs were prepared for the Committee by a staff of “lawyer-investigators”¹²⁰ working under Professor Walter Gellhorn’s direction.¹²¹ “The staff interviewed agency officials, attorneys who practice[d] before the[] [selected] agencies, and members of the public affected by” the agencies.¹²² In addition, the staff “attended proceedings, read the records of cases, and examined administrative files to see how the proceedings [we]re conducted.”¹²³ When a monograph was completed, it “was made available to the appropriate agency for its consideration, [and] the full Committee met for discussion of the study with agency officers.”¹²⁴ The feedback so received was incorporated into the final version of the relevant monograph. The monographs were contemporaneously viewed as thorough, impartial, reliable research into the actual practice of administrative procedure.¹²⁵

The study did not examine every agency in the federal government, but rather focused on agencies that “in a substantial way affect private interests by their power to make rules and regulations or by their power of adjudication in particular cases.”¹²⁶ Agencies that did not affect interests “outside the Government” or possess “significant . . . rule-making or

117. Office of the Att’y Gen., Order No. 3215 (Feb. 23, 1939), *reprinted in* FINAL REPORT, *supra* note 3, at 252–53; *see also* Jaffe, *Attorney General’s Committee*, *supra* note 107, at 402 n.4 (discussing the Committee’s membership).

118. Office of the Att’y Gen., Order No. 3215 (Feb. 23, 1939), *reprinted in* FINAL REPORT, *supra* note 3, at 252–53.

119. *See* Grisinger, *supra* note 110, at 390–91.

120. FINAL REPORT, *supra* note 3, at 4.

121. The members of the staff were Ralph S. Boyd, Kenneth C. Davis, Robert W. Ginnane, William W. Golub, Martin Norr, and Richard S. Salant. *See* FINAL REPORT, *supra* note 3, at III.

122. FINAL REPORT, *supra* note 3, at 4.

123. *Id.*

124. *Id.*

125. *See* Shepherd, *supra* note 105, at 1594–98, 1632–33; *see also* Walter F. Dodd, Book Review, *Attorney General’s Committee on Administrative Procedure Monographs Nos. 1–11*, 88 U. PA. L. REV. 764, 765 (1940); Edward G. Jennings, Book Review, *Monographs of the Attorney General’s Committee on Administrative Procedure*, 25 MINN. L. REV. 123, 124 (1940).

126. FINAL REPORT, *supra* note 3, at 2–3.

adjudicatory powers” were excluded.¹²⁷ The study’s defined scope also meant that, for some agencies, only certain divisions were examined, while other divisions were omitted.¹²⁸ In addition, a few of the monographs were organized by subject area, examining the activities of multiple agencies operating in shared regulatory space. The twenty-seven monographs examined the following agencies or regulatory fields:

1. Division of Public Contracts, Department of Labor, the Walsh-Healey Act.¹²⁹
2. Veterans’ Administration (VA).¹³⁰
3. Federal Communications Commission (FCC).¹³¹
4. United States Maritime Commission.¹³²
5. Federal Alcohol Administration.¹³³
6. Federal Trade Commission (FTC).¹³⁴
7. Administration of the Grain Standards Act, Department of Agriculture (USDA).¹³⁵
8. Railroad Retirement Board (RRB).¹³⁶
9. Federal Reserve System (The Fed).¹³⁷
10. Department of Commerce, Bureau of Marine Inspection and Navigation.¹³⁸
11. Administration of the Packers and Stockyards Act, USDA.¹³⁹
12. Post Office Department.¹⁴⁰
13. Federal Control of Banking, Comptroller of the Currency and Federal Deposit Insurance Corporation.¹⁴¹

127. *Id.* at 3. The Report identified the following agencies as having been excluded from the study: “the Foreign Service Building Commission, the American Battle Monuments Commission, the Arlington Memorial Amphitheatre Commission, the Government Printing Office, the Commission of Fine Arts, the Coast and Geodetic Survey, the International Fisheries Commission, the Civilian Conservation Corps, the Postal Savings System, the Bureau of Standards, the Civil Service Commission, the Bureau of the Budget, the General Accounting Office, the Reconstruction Finance Corporation, the Federal Works Agency, the Alaska Railroad, and the Tennessee Valley Authority.” *Id.*

128. *See id.* at 3–4.

129. S. DOC. NO. 76-186, pt. 1 (1940) [hereinafter MONOGRAPH 1 (PUBLIC CONTRACTS)]. The monographs were published in two sets numbered 1–13 (in 1940) and 1–14 (in 1941). For purposes of clarity, this Article will refer to the monographs by the numbers 1–27.

130. S. DOC. NO. 76-186, pt. 2 (1940) [hereinafter MONOGRAPH 2 (VA)].

131. S. DOC. NO. 76-186, pt. 3 (1940) [hereinafter MONOGRAPH 3 (FCC)].

132. S. DOC. NO. 76-186, pt. 4 (1940) [hereinafter MONOGRAPH 4 (MARITIME COMM’N)].

133. S. DOC. NO. 76-186, pt. 5 (1940) [hereinafter MONOGRAPH 5 (ALCOHOL)].

134. S. DOC. NO. 76-186, pt. 6 (1940) [hereinafter MONOGRAPH 6 (FTC)].

135. S. DOC. NO. 76-186, pt. 7 (1940) [hereinafter MONOGRAPH 7 (USDA GRAIN)].

136. S. DOC. NO. 76-186, pt. 8 (1940) [hereinafter MONOGRAPH 8 (RRB)].

137. S. DOC. NO. 76-186, pt. 9 (1940) [hereinafter MONOGRAPH 9 (THE FED)].

138. S. DOC. NO. 76-186, pt. 10 (1940) [hereinafter MONOGRAPH 10 (COMMERCE MARINE)].

139. S. DOC. NO. 76-186, pt. 11 (1940) [hereinafter MONOGRAPH 11 (USDA STOCKYARDS)].

140. S. DOC. NO. 76-186, pt. 12 (1940) [hereinafter MONOGRAPH 12 (POST OFFICE)].

141. S. DOC. NO. 76-186, pt. 13 (1940) [hereinafter MONOGRAPH 13 (BANKING)].

14. Administration of the Fair Labor Standards Act of 1938, Wage and Hour Division, Children's Bureau.¹⁴²
15. War Department.¹⁴³
16. Social Security Board (SSB).¹⁴⁴
17. Railway Labor, the National Railroad Adjustment Board, the National Mediation Board.¹⁴⁵
18. National Labor Relations Board (NLRB).¹⁴⁶
19. Civil Aeronautics Authority.¹⁴⁷
20. Department of the Interior.¹⁴⁸
21. United States Employees' Compensation Commission (ECC).¹⁴⁹
22. Administration of Internal Revenue Laws, Bureau of Internal Revenue, Board of Tax Appeals, Processing Tax Board of Review.¹⁵⁰
23. Bituminous Coal Division, Department of the Interior.¹⁵¹
24. Interstate Commerce Commission (ICC).¹⁵²
25. Federal Power Commission (FPC).¹⁵³
26. Securities and Exchange Commission (SEC).¹⁵⁴
27. Administration of the Customs Laws, United States Tariff Commission, Bureau of Customs.¹⁵⁵

As this list shows, both independent and executive agencies were included in the study. The methodology and structure of analysis in the monographs did not vary between these two kinds of agencies.

The work of the Attorney General's Committee is an essential component of the APA's legislative history.¹⁵⁶ The twenty-seven monographs were provided to Congress and published in two volumes as

142. S. DOC. NO. 77-10, pt. 1 (1941) [hereinafter MONOGRAPH 14 (FAIR LABOR)].

143. S. DOC. NO. 77-10, pt. 2 (1941) [hereinafter MONOGRAPH 15 (WAR)].

144. S. DOC. NO. 77-10, pt. 3 (1941) [hereinafter MONOGRAPH 16 (SSB)].

145. S. DOC. NO. 77-10, pt. 4 (1941) [hereinafter MONOGRAPH 17 (RAILWAY LABOR)].

146. S. DOC. NO. 77-10, pt. 5 (1941) [hereinafter MONOGRAPH 18 (NLRB)].

147. S. DOC. NO. 77-10, pt. 6 (1941) [hereinafter MONOGRAPH 19 (AERONAUTICS)].

148. S. DOC. NO. 77-10, pt. 7 (1941) [hereinafter MONOGRAPH 20 (INTERIOR)].

149. S. DOC. NO. 77-10, pt. 8 (1941) [hereinafter MONOGRAPH 21 (ECC)].

150. S. DOC. NO. 77-10, pt. 9 (1941) [hereinafter MONOGRAPH 22 (INTERNAL REVENUE)].

151. S. DOC. NO. 77-10, pt. 10 (1941) [hereinafter MONOGRAPH 23 (BITUMINOUS COAL)].

152. S. DOC. NO. 77-10, pt. 11 (1941) [hereinafter MONOGRAPH 24 (ICC)].

153. S. DOC. NO. 77-10, pt. 12 (1941) [hereinafter MONOGRAPH 25 (FPC)].

154. S. DOC. NO. 77-10, pt. 13 (1941) [hereinafter MONOGRAPH 26 (SEC)].

155. S. DOC. NO. 77-10, pt. 14 (1941) [hereinafter MONOGRAPH 27 (CUSTOMS)].

156. See *Present at the Creation*, *supra* note 4, at 513-14. As Professor Walter Gellhorn explained: "when the Act was finally put before the Congress, there was no debate about it in either House. It went through without a murmur, without any recorded vote, and with the assertion by Pat McCarran that there was unanimous agreement within the government, no opposition within the government." *Id.* at 514-15.

Senate documents in 1940 and 1941. The Committee's Final Report, which included proposed legislative text and separate statements of certain Committee members,¹⁵⁷ was submitted to then-Attorney General Robert H. Jackson (Mr. Murphy's successor) on January 22, 1941.¹⁵⁸ Two days later, Mr. Jackson transmitted the Final Report to Congress.¹⁵⁹ This too was published as a Senate document.¹⁶⁰

As Professor Kenneth Culp Davis put it, the "twenty-seven monographs . . . formed the *intellectual* foundation" for the Committee's Final Report and, ultimately, the APA.¹⁶¹ Although the Committee was split as to its value judgments and recommendations to Congress, the "minority" views were not in the nature of a dissent.¹⁶² To the contrary, the minority "agrees with almost all of what the committee says or recommends."¹⁶³ But the minority "adopt[ed] a more critical attitude toward administrative agencies" and, crucially, was more optimistic that generalizations could safely be made about the administrative process.¹⁶⁴ The minority accordingly urged Congress to go further in regulating administrative procedure government-wide, and "[t]he minority report was adopted by Congress."¹⁶⁵ The resulting statute codified many existing agency practices,¹⁶⁶ while reforming others.¹⁶⁷ In the immediate wake of the APA's enactment, the Committee's Final Report was widely viewed as an authoritative discussion of the new

157. These parts of the Final Report were entitled: (1) "Additional Views and Recommendations of Messrs. McFarland, Stason, and Vanderbilt," in which Justice Groner concurred and which was accompanied by an appendix offering "A Code of Standards of Fair Administrative Procedure," see FINAL REPORT, *supra* note 3, at 203, 217; and (2) "Additional Views and Recommendations of Mr. Chief Justice Groner," see *id.* at 248.

158. Letter of Submittal from the Att'y Gen.'s Comm. on Admin. Proc., Dep't of Just. to Robert H. Jackson, Att'y Gen. (Jan. 22, 1941), in FINAL REPORT, *supra* note 3, at IV. This is the same Robert Jackson who had objected to the ABA's proposed legislation in 1939, see *supra* note 113, and would later be appointed to the Supreme Court by President Roosevelt.

159. Letter of Transmittal from Robert H. Jackson, Att'y Gen. to the Vice President (Jan. 24, 1941), FINAL REPORT, *supra* note 3, at III.

160. S. DOC. NO. 77-8 (1941).

161. *Present at the Creation*, *supra* note 4, at 513-14. As noted above, Professor Davis was on the team of attorney-investigators that conducted the research for the Committee. See *supra* note 121. He later became one of the most influential thinkers in administrative law. See Levin, *Legacy*, *supra* note 52.

162. See generally Grisinger, *supra* note 110, at 398-404 (discussing the different views expressed by the various members of the committee).

163. See Jaffe, *Attorney General's Committee*, *supra* note 107, at 402 n.4.

164. *Id.* See also *Present at the Creation*, *supra* note 4, at 518, 522 (comments of K.C. Davis).

165. *Present at the Creation*, *supra* note 4, at 514 (comments of K.C. Davis); see Grisinger, *supra* note 110, at 404.

166. *E.g.*, Chem. Leaman Tank Lines, Inc. v. United States, 368 F. Supp. 925, 933 & n.2 (D. Del. 1973) ("The APA's distinction between rulemaking and adjudication was intended in large part as a codification of existing law and practice." (citing Robert W. Ginnane, "Rule Making," "Adjudication" and Exemptions Under the Administrative Procedure Act, 95 U. PA. L. REV. 621 (1947))).

167. See *Present at the Creation*, *supra* note 4, at 521.

statute's conception of administrative action.¹⁶⁸ And the monographs—the research foundation upon which the Committee unanimously relied—offered a detailed account of the administrative practices that informed this conception. These documents offer an unparalleled window into how the APA's founders defined, understood, and evaluated administration.¹⁶⁹

B. Formal and Informal Stages, Not Modes

The Committee's research provides strong evidence that the modern understanding of the relationship between informality and formality in adjudication is wrong: it was not a matter of *modes* but rather of *stages*.¹⁷⁰ The pattern that emerges clearly from the work of the Attorney General's Committee is one in which an agency would begin by using informal methods of adjudicating individual cases before moving, when necessary, to the formal *stage* of adjudication.¹⁷¹

The initial, informal stages of the process included a variety of activities: routine processing of requests for agency action,¹⁷² advice-giving,¹⁷³ inspections,¹⁷⁴ investigations,¹⁷⁵ examinations,¹⁷⁶ correspondence,¹⁷⁷

168. See, e.g., ADMINISTRATIVE PROCEDURE: A HANDBOOK OF LAW AND PROCEDURE BEFORE FEDERAL AGENCIES 58–59 (3d ed. 1948) (quoting extensively from the Final Report in explaining the relationship between informal and formal adjudication).

169. Upon their publication, a reviewer extolled the monographs as “all together . . . the greatest single contribution that has been made to the literature of administrative law in this country.” Jennings, *supra* note 125, at 124; see also Grisinger, *supra* note 110, at 380 (explaining that a purely political “narrative misses the significant contribution that the committee made to contemporary understandings of the administrative state and to its subsequent reform”).

170. Writing in 1960, Peter Woll observed that “[t]raditionally, the common belief has been that within each administrative agency there is a formal and informal adjudicative stage; therefore, if informal settlement fails, formal hearings follow.” Peter Woll, *Informal Administrative Adjudication: Summary of Findings*, 7 U.C.L.A. L. REV. 436, 437 (1960). This is the only conscious recognition of the stage-based concept of adjudication I have been able to identify in the secondary literature.

171. As Part IV explains, the administrative process described in the monographs (and here) was not created by the Attorney General's Committee or even the agencies it studied. It was created by Congress, in various administrative statutes that directed agencies to (among other things) conduct investigations, inspections, and hearings.

172. See, e.g., MONOGRAPH 13 (BANKING), *supra* note 141, at 21–22.

173. See, e.g., *id.* at 14 n.23, 15, 19, 23.

174. See, e.g., MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 3.

175. See, e.g., *id.* at 8; MONOGRAPH 11 (USDA STOCKYARDS), *supra* note 139, at 19; MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 8; MONOGRAPH 13 (BANKING), *supra* note 141, at 7–8.

176. “Examination” can refer to agency administration of exams to ascertain whether an individual has certain skills or knowledge. See MONOGRAPH 3 (FCC), *supra* note 131, at 49–50; MONOGRAPH 19 (AERONAUTICS), *supra* note 147, at 40 & n.87. It can also refer to activities more akin to investigation or supervision to ensure compliance with regulatory requirements. See MONOGRAPH 13 (BANKING), *supra* note 141, at 13–18.

177. See, e.g., MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 26.

conferences,¹⁷⁸ mediation,¹⁷⁹ negotiation,¹⁸⁰ and settlements.¹⁸¹ Most cases before an agency could be resolved informally using these techniques, with the private party's acquiescence if not agreement. This was possible because in the vast majority of cases, there was no basis for dispute as to the appropriate outcome. Under these conditions, the informal stage of the process was sufficient to collect undisputed facts with indisputable legal significance.¹⁸² The agency therefore could make a final decision without further proceedings. Only in rare instances of uncertainty about the underlying facts or how the law should apply to known facts would any disagreement about the outcome persist past the initial, informal stages of the process.¹⁸³

In the relatively rare instances in which informal methods failed to resolve doubts about the appropriate outcome, the case would move forward to the formal stage of the adjudicative process. This stage entailed a trial-like, adversarial hearing, the purpose of which was to take evidence and produce a binding determination of the matter that had proved incapable of resolution through the initial, informal stages of the process.¹⁸⁴ If dispute persisted after the formal hearing, the law further provided for intra-agency appeal, typically culminating with agency head review and followed by judicial review of the agency's final decision.

The underlying monographs and the Final Report make explicit the staged (or "phased") structure of agency adjudication, which was understood to be the "orthodox" administrative approach to individualized decisionmaking. Most strikingly, the introduction to the Final Report explains that:

Administrative adjudication has two more or less distinct phases. The first . . . is the phase which we have called "informal adjudication," where, in place of formal hearings, decisions are made after inspections, conferences, and negotiations. In most agencies, there is opportunity for these informal methods of considering issues which

178. See, e.g., MONOGRAPH 9 (THE FED), *supra* note 137, at 33; MONOGRAPH 11 (USDA STOCKYARDS), *supra* note 139, at 21; MONOGRAPH 13 (BANKING), *supra* note 141, at 23.

179. See, e.g., MONOGRAPH 4 (MARITIME COMM'N), *supra* note 132, at 16.

180. See, e.g., MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 26.

181. See, e.g., *id.* at 23.

182. See, e.g., MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 12.

183. See, e.g., FINAL REPORT, *supra* note 3, at 35; MONOGRAPH 3 (FCC), *supra* note 131, at 55; *cf.* Grisinger, *supra* note 110, at 394 ("The report also emphasized that the formal adjudicatory hearing, the subject of much lawyerly critique, was a comparatively small part of the administrative process.").

184. There are ubiquitous references throughout the monographs to "formal hearings," conveying a strong sense that the researchers viewed procedural formality and hearings as synonymous. See, e.g., MONOGRAPH 3 (FCC), *supra* note 131, at 55; MONOGRAPH 4 (MARITIME COMM'N), *supra* note 132, at 26-27; MONOGRAPH 6 (FTC), *supra* note 134, at 16; MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 2; MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 14.

arise, and in all but a surprisingly small percentage of cases, these methods finally dispose of the matters at hand. . . . If informal methods do not succeed in ending a matter, or if they have not been utilized at all, the second phase, which we have called “formal adjudication” is reached. This phase is marked by hearings in which testimony is taken, subject to cross-examination, and embodied into a record.¹⁸⁵

The monographs contain similarly explicit references to adjudication’s staged structure. For example, the Post Office’s procedures for enforcing statutory prohibitions against mail fraud “in their general outlines follow the orthodox administrative course, beginning with the investigation of complaints preliminary to the issuance of a citation which is followed by a hearing leading to the issuance of decision and order.”¹⁸⁶ Using strikingly similar language, the monograph on the SEC explains that:

In their broad outlines, the Commission’s procedures follow the orthodox patterns: (1) In the case of licensing and the bulk of the exemptions and declarations, initiation of action by application; (2) investigation; (3) complaint or other notice of hearing; (4) hearing; (5) trial examiners’ report; (6) exceptions thereto, with briefs and oral argument; and (7) decision and order.¹⁸⁷

The Final Report’s discussion of informal adjudication is explicitly organized around the principle that an “[i]nitial informal decision is an essential device in disposing of large numbers of claims and license applications” without the necessity of a trial-like hearing.¹⁸⁸ References to the “initial” or “preliminary” and “informal” components of the process,¹⁸⁹ as well as to the “hearing stage,” are ubiquitous throughout the Committee’s work.¹⁹⁰

185. FINAL REPORT, *supra* note 3, at 5.

186. MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 18.

187. MONOGRAPH 26 (SEC), *supra* note 154, at 15.

188. FINAL REPORT, *supra* note 3, at 38. The quoted language appears in a heading—the concept of initial disposition through informal means is literally an organizing principle.

189. *E.g.*, MONOGRAPH 8 (RRB), *supra* note 136, at 10–16 (examining the procedure used to make the “initial determination” under the Retirement Act); MONOGRAPH 9 (THE FED), *supra* note 137, at 31; *cf.* TOM C. CLARK, DEP’T OF JUST., ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 48 (1947) [hereinafter ATTORNEY GENERAL’S MANUAL] (“[T]he agency should advise the party at some preliminary stage (investigatory or otherwise) that it is contemplating the initiation of a formal proceeding and that it is giving him an opportunity to settle or adjust the matter.”).

190. *See* FINAL REPORT, *supra* note 3, at 5, 35, 43, 50; MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 129, at 9; MONOGRAPH 7 (USDA GRAIN), *supra* note 135, at 6; *see also* MONOGRAPH 9 (THE FED), *supra* note 137, at 28 n.105 (referring to the “stage of hearing”). The monographs also frequently refer to the “pre-hearing stage” and the “post-hearing stage.” *See* MONOGRAPH 3 (FCC), *supra* note 131, at 23; MONOGRAPH 7 (USDA GRAIN), *supra* note 135, at 13; *see also* MONOGRAPH 9 (THE FED), *supra*

More profound than these express references is how the staged structure of adjudication emerges throughout the Committee's work as a deeply ingrained, cross-cutting characteristic of the adjudicative process. Although the monographs examine a wide diversity of agencies, statutory regimes, and regulated industries, the initial use of informal methods followed by the submission of remaining disputes to a formal, trial-like hearing is consistent throughout. The most efficient way to illustrate this deep and abiding structure is to examine how it manifests in several broad categories of agency action taken through adjudication. These categories include grants of benefits, licensing, and the enforcement of regulatory requirements.

The first category of cases in which the staged pattern emerges involves benefits programs such as those administered by the Railroad Retirement Board,¹⁹¹ Social Security Board,¹⁹² and the Veterans' Administration.¹⁹³ These programs entailed the payment of funds to individuals under criteria established by Congress. An agency administering such a program would typically develop rules or forms for qualifying individuals to use to apply for these benefits.¹⁹⁴ The agency would accept, process, and evaluate submitted applications. There were three broad possibilities for agency action on an application. First, the application might be complete and demonstrate without doubt that the applicant was entitled to payment, in which case payment would be approved and made with minimal additional process.¹⁹⁵ In many of these cases, the way was smoothed by pre-application "informal" consultation between the applicant and the agency. That is, the applicant would request and receive advice from an agency employee about how to prepare a successful application, thus ensuring near-immediate approval upon submission.¹⁹⁶ Second, it might be obvious that information

note 137, at 29, 30, 31.

191. This included the payment and "adjustment" (in cases of under- or over-payment) of annuities, death benefits, and pensions under the Railroad Retirement Act of 1937, *see* MONOGRAPH 8 (RRB), *supra* note 136, at 2, and the payment of unemployment compensation (and collection of employer contributions) under the Railroad Unemployment Insurance Act of 1938, *see id.* at 3.

192. The statutory hearing requirement in Social Security cases was added in 1935, and the agency was still in the process of designing its hearing program at the time of the Committee's study. MONOGRAPH 16 (SSB), *supra* note 144, at 2–3, 14–23. Nonetheless, the Social Security Board already used a process that fits the staged pattern, in which more careful attention and involved process was reserved for disputes that percolated up through the initial stages. *See id.* at 6–14. It is easy to see how the hearing requirement would simply add on to the later stage of this established process. *See id.* at 14.

193. *See* MONOGRAPH 2 (VA), *supra* note 130. A subsidy program administered by the Maritime Commission might also be included in this category. *See* MONOGRAPH 4 (MARITIME COMM'N), *supra* note 132, at 26–27.

194. *See* MONOGRAPH 2 (VA), *supra* note 130, at 6; MONOGRAPH 8 (RRB), *supra* note 136, at 10; MONOGRAPH 16 (SSB), *supra* note 144, at 4.

195. Some verification of information contained in the application might first be required. *See* MONOGRAPH 8 (RRB), *supra* note 136, at 11. Initial adjudicator decisions were also typically subject to internal review. *Id.*

196. *See, e.g.,* MONOGRAPH 2 (VA), *supra* note 130, at 7–8.

or supporting documentation necessary to determine whether payment was due was missing from the application. In these cases, an employee of the administering agency would inform the applicant, orally or by letter, of the deficiency and advise them how the issue could be resolved. In response, many applicants would remedy the deficiency and payment would be approved and made. If remedying the deficiency was not possible, the applicant might withdraw the application. In these ways, many or most applications of initially uncertain outcome would be resolved through what were described as “informal” means of “correspondence” or “conference.”¹⁹⁷ If these efforts did not result in an application’s being completed or withdrawn, the case would fall into a third category, consisting of applications that should be denied. Only when there was factual uncertainty or a claim for benefits was going to be denied would a case move forward to the hearing stage.¹⁹⁸

The same pattern is evident in licensing, which includes all cases in which an individual seeks to secure from an agency any “form of permission.”¹⁹⁹ These cases arise under statutes that, broadly speaking, require private parties to obtain government approval to engage in specified activities: to be a radio operator,²⁰⁰ grain inspector,²⁰¹ live-poultry trader,²⁰² airplane pilot,²⁰³ or water power project developer;²⁰⁴ to participate in the liquor industry;²⁰⁵ or to establish a Federal Reserve branch bank.²⁰⁶ An agency authorized to grant licenses typically would adopt rules or forms governing applications for licenses.²⁰⁷ The agency would accept applications and process them. As in benefits programs, applications for licenses generally would be: (1) complete, meritorious, and thus immediately granted (often as a result of pre-submission “informal” process

197. See, e.g., MONOGRAPH 16 (SSB), *supra* note 144, at 5.

198. See, e.g., MONOGRAPH 8 (RRB), *supra* note 136, at 4.

199. 5 U.S.C. § 551(8).

200. See MONOGRAPH 3 (FCC), *supra* note 131, at 49–50.

201. See MONOGRAPH 7 (USDA GRAIN), *supra* note 135, at 8–10.

202. See MONOGRAPH 11 (USDA STOCKYARDS), *supra* note 139, at 10.

203. See MONOGRAPH 19 (AERONAUTICS), *supra* note 147, at 40.

204. See MONOGRAPH 25 (FPC), *supra* note 153, at 6.

205. See MONOGRAPH 5 (ALCOHOL), *supra* note 133, at 1–3.

206. See MONOGRAPH 9 (THE FED), *supra* note 136, at 24. This is a non-exhaustive list of the licensing activities examined in the monographs.

207. These activities were sometimes undertaken in the absence of express statutory direction. For example, under the National Banking Act, “[w]hile the statute is silent as to the use of forms, the Comptroller [of the Currency] has in practice required that the articles of association and organization certificate be filed on prepared forms which are furnished without charge.” MONOGRAPH 13 (BANKING), *supra* note 141, at 6. Indeed, “[t]he Comptroller has prepared forms for practically every important act of a national bank.” *Id.* at 6 n.17. Similarly, faced with statutory silence on the matter, the FDIC “necessarily formulated its own procedure” for deciding “upon applications for admission to insurance.” *Id.* at 13–14.

and advice-giving);²⁰⁸ (2) incomplete or problematic, and thus subject to “informal” process leading to withdrawal by the applicant or perfection and grant by the agency;²⁰⁹ or (3) unmeritorious and necessitating denial, often after failed attempts at perfection via the informal process.²¹⁰ Typically, only applications that garnered third-party objections²¹¹ or were going to be denied would move on to the hearing stage of the process.²¹²

A third kind of case in which the staged structure of adjudication is evident involves the administrative enforcement of regulatory requirements or prohibitions. This would include direct enforcement of statutory mandates, such as the Department of Labor’s enforcement of statutory requirements that certain employers pay overtime,²¹³ the FTC’s enforcement of statutory prohibitions on unfair competition and unfair or deceptive commercial acts,²¹⁴ the Fed’s enforcement of banking regulations,²¹⁵ or the Post Office’s enforcement of statutory prohibitions on mail fraud.²¹⁶ The staged structure of adjudication is strongly evident in these cases. The enforcing agency would typically: (1) accept complaints of violation;²¹⁷ (2) investigate the complaint through correspondence or field investigation; (3) informally negotiate voluntary cessation of the violative conduct, with or without a payment of reparations or penalty;²¹⁸ and (4) if informal methods failed to resolve the matter, proceed to the hearing stage.²¹⁹

208. See, e.g., MONOGRAPH 3 (FCC), *supra* note 131, at 45; MONOGRAPH 9 (THE FED), *supra* note 137, at 33.

209. See, e.g., MONOGRAPH 3 (FCC), *supra* note 131, at 45; MONOGRAPH 5 (ALCOHOL), *supra* note 133, at 3 n.17; MONOGRAPH 9 (THE FED), *supra* note 137, at 33.

210. At the Federal Reserve Board, “[i]n some cases, particularly those involving applications for membership, conferences prior to submission of the application to the Board may result in disclosing the difficulties to the applicant and presenting him with an opportunity to correct them or to negate the charges.” MONOGRAPH 9 (THE FED), *supra* note 137, at 35 n.127. In one such case, “the applicant did in fact shift its personnel to some extent [in response to the Board’s feedback] and filed a new application,” but “[t]he second application was also rejected.” *Id.* at 35 n.128.

211. Cf. MONOGRAPH 3 (FCC), *supra* note 131, at 44.

212. See, e.g., *id.* at 13; MONOGRAPH 5 (ALCOHOL), *supra* note 133, at 5. Where no hearing is provided, a remaining dispute may go to court, as in the licensing procedures used “in the case of the establishment of branches of Federal Reserve banks.” See MONOGRAPH 9 (THE FED), *supra* note 137, at 32. In this example, only two applications were denied, with one applicant acquiescing in the result, see *id.* at 33–34, and the other unsuccessfully seeking “to compel the approval of their application by mandamus proceedings,” *id.* at 35.

213. See MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 129, at 4.

214. See MONOGRAPH 6 (FTC), *supra* note 134, at 3.

215. See MONOGRAPH 9 (THE FED), *supra* note 137, at 6.

216. See MONOGRAPH 12 (POST OFFICE), *supra* note 140, 15–16.

217. See *id.* at 18.

218. See, e.g., *id.* at 20.

219. See, e.g., MONOGRAPH 6 (FTC), *supra* note 134, at 12; MONOGRAPH 7 (USDA GRAIN), *supra* note 135, at 17; MONOGRAPH 9 (THE FED), *supra* note 137, at 26. A matter advanced to the hearing stage via the issuance of a complaint or some other method of instituting formal proceedings. See, e.g., MONOGRAPH 7 (USDA GRAIN), *supra* note 135, at 18; MONOGRAPH 9 (THE FED), *supra* note 137, at

Even these kinds of cases—which seem most likely to involve adversity between the enforcing agency and the private party accused of wrongful conduct²²⁰—could usually be completed through informal means, without progressing to the hearing stage.²²¹ This was possible because there was rarely any genuine dispute as to the operative facts or the applicable law. For example, consider the Department of Labor's enforcement of minimum wage and overtime requirements and child labor prohibitions.²²² These proceedings were typically initiated by an informal complaint that an employer had violated the law.²²³ Field investigation was often sufficient to resolve the complaint:

In only about 50 percent of the cases in which charges of violation have been filed by private individuals have the accusations been supported by facts discoverable upon official investigation; in the remaining cases, upon the completion of the field inspection, the charges have been dismissed as unsupported by evidence.²²⁴

Ordinarily, the investigation included inspection of the employer's own records, which were sufficient to either reveal or rule out any violation. The agency's field inspectors were authorized to settle, through informal means, any case involving \$50 or less:

In these cases the inspector holds no hearing, nor does he in any sense act as an arbitrator between disputants. He merely presents to the employer the evidence of underpayment and, if the employer acknowledges his liability, arranges that payment shall be made in his presence to the appropriate employees, from whom [the inspector] takes signed receipts.²²⁵

If the amounts involved were greater than \$50 or involved child labor:

The employer is told that if he immediately remits the asserted deficiency to the Department for distribution by it to the named employees, the matter will be closed; otherwise, a formal complaint will issue and the employer may present his defense at a subsequent

25.

220. See, e.g., MONOGRAPH 10 (COMMERCE MARINE), *supra* note 137, at 9.

221. See, e.g., MONOGRAPH 6 (FTC), *supra* note 134, at 8.

222. See MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 129.

223. See *id.* at 4. "The extreme informality by which complaints may be lodged with the Division of Public Contracts becomes understandable when it is known that in no instance is a formal complaint issued against an alleged offender prior to a thorough investigation by the field inspection staff of the Division of Public Contracts." *Id.*

224. *Id.*

225. *Id.* at 6.

hearing. It is at this point that in approximately 90 percent of the cases the matter terminates, for the employer chooses to settle rather than enter a contest which might possibly subject him to unfavorable publicity, expense, or even loss of opportunity to bid for future Government work. It is to be emphasized, too, that the collection letter is sent only in those instances in which the precise facts can be stated without equivocation, usually because knowledge of them is derived from the employer's own records; in these cases, therefore, the likelihood of a successful defense is a slim one.²²⁶

The vast majority of informal complaints were thus resolved through informal, non-hearing means: informal complaint, field investigation, negotiation, and settlement.²²⁷

If a matter could not be resolved through informal means, the agency would proceed to the hearing stage of the process. This was necessary when there was a dispute regarding the underlying facts or the legal consequences of known facts. Thus, “[a] formal complaint issues from the Division [of Public Contracts] if the employer fails to respond to a collection letter or expresses doubts concerning the accuracy of the statements contained in it.”²²⁸ A hearing was similarly needed when the collection letter was not based on concrete evidence, perhaps because the employer's records were insufficient or appeared to have been falsified.²²⁹ In addition, when the case involved more complicated issues, such as evidence of kickbacks or falsity in the employees' accusations, elevation to the hearing stage might be required.²³⁰

License revocation proceedings followed a similar pattern and might also be included in the category of cases involving the enforcement of regulatory requirements.²³¹ The principal distinction is that the obligations in revocation proceedings are grounded in the previously issued license. A party granted a license or permit²³² is typically subject to various ongoing rules or obligations, the violation of which subjects the license to

226. *Id.* at 6–7.

227. In another regime involving agency investigations into wrongful conduct, some cases (as permitted by the governing statute) were sometimes resolved by informal means when “the officers who ma[d]e the preliminary inquiry . . . determine[d] . . . to take no further action. In such cases, reports [we]re not always even made to the Bureau; the matter [was] simply dropped.” MONOGRAPH 10 (COMMERCE), *supra* note 138, at 8.

228. MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 129, at 7.

229. *See id.* at 6.

230. *See id.* at 7.

231. *See* MONOGRAPH 7 (USDA GRAIN), *supra* note 135, at 10–15.

232. “License” and “permit” may be used interchangeably. *See* MONOGRAPH 20 (INTERIOR), *supra* note 148, at 3. Indeed, under the APA, “licensing” includes any form of agency permission. *See* 5 U.S.C. § 551(8)–(9).

revocation.²³³ Revocation proceedings, which necessarily involve adverse action by the agency against the licensee, would typically be processed through informal investigation and negotiation, followed when necessary by a trial-like hearing prior to revocation.²³⁴ Indeed, in proceedings such as these, the hearing often appears as the final stage in a lengthy, ongoing regulatory relationship.²³⁵

C. Apparent Deviations from the Staged Structure

Before examining the characteristics of a “hearing,” there are three deviations from the staged structure of adjudication so far described that emerge in the monographs and merit discussion.

First, agencies sometimes omitted some or all of the informal techniques of the initial stage of adjudication.²³⁶ Ordinarily, this would occur when it was apparent that informal techniques could not prevent a hearing from being necessary. For example, if an application for a license or for a payment of benefits contained information that appeared to compel denial, the agency might promptly initiate a hearing before first undertaking any informal investigation or conferencing.²³⁷ If the necessity for denial was not immediately apparent on the face of the application but became apparent upon some modest degree of inquiry, additional informal process might similarly be dispensed in favor of prompt advancement to the hearing stage.²³⁸

233. See, e.g., MONOGRAPH 5 (ALCOHOL), *supra* note 133, at 8–12; MONOGRAPH 7 (USDA GRAIN), *supra* note 135, at 10–15; MONOGRAPH 9 (THE FED), *supra* note 137, at 24 n.94.

234. See MONOGRAPH 7 (USDA GRAIN), *supra* note 135, at 10.

235. For example, the FDIC’s Board of Directors was authorized to terminate a bank’s insurance through a proceeding that entailed a statutorily mandated hearing. See MONOGRAPH 13 (BANKING), *supra* note 141, at 25–26, 26 n.54. The Committee explained that termination proceedings were the “climax of a long effort to secure the correction of practices considered by the Corporation to be unsound or illegal.” *Id.* at 26. This effort entailed years of “informal efforts to secure correction,” through examination, advice, and warnings, which took an increasingly official form so as to pressure the bank into compliance without resort to formal proceedings. See *id.* at 27–28. This approach, which entailed substantial coordination among the several agencies involved in banking regulation, was remarkably successful, such that “of the several proceedings which have involved national banks, none has resulted in the issuance of a termination order, since the Comptroller has either secured correction or brought about the closing of the bank.” *Id.* at 28. Indeed, in the three years from 1937 to 1939, only “22 cases reached the hearing stage.” *Id.* at 34.

236. See, e.g., MONOGRAPH 5 (ALCOHOL), *supra* note 133, at 3; MONOGRAPH 26 (SEC), *supra* note 154, at 15.

237. See MONOGRAPH 11 (USDA STOCKYARDS), *supra* note 139, at 11–12.

238. For example, the FPC rules of practice permitted informal complaints, which could be resolved by mediation and did not necessarily result in a hearing, and formal complaints, the filing of which set in motion the formal process leading to hearing. See MONOGRAPH 24 (FPC), *supra* note 152 at 24–25.

Second, agencies commonly returned to informal techniques during the hearing stage in an effort to resolve the dispute and thus obviate the need to complete the hearing. Recognizing this reality, the Committee's study of the SEC notes that "in almost all proceedings, there is extensive utilization of informal steps preceding *and interspersed with* the formal ones."²³⁹ As the hearing stage of the proceedings progressed, additional information might emerge that would narrow the possibilities for genuine dispute. Agencies would therefore use informal techniques—of correspondence, conference, negotiation, and settlement—to reach a resolution of the issues before the conclusion of the hearing stage.²⁴⁰ As in private litigation, if the agency and the party subject to the proceeding came to an agreement, the matter might be settled after the notice of hearing was issued but before the oral component of the proceeding was scheduled to take place or the decision was issued.²⁴¹ Another variant of this is found at the ICC, which would hold a hearing to determine whether a carrier had charged an unlawful rate but would then use a post-hearing informal process to calculate the reparations due to remedy the violation.²⁴²

Third, some agencies conducted hearings even in the absence of any dispute. The most striking variant of this emerges in the practice of "default hearings." Some agencies, eager to ensure that statutory hearing rights were unquestionably respected, would schedule and then hold a hearing even if the party subject to the proceeding did not request the hearing, respond to a notice of hearing, or appear for the hearing.²⁴³ In these cases, the hearing examiner and any trial attorney(s) for the agency would appear at the time and place scheduled for the hearing and would conduct the proceeding in the absence of the private party. The Committee urged agencies to abandon the practice of holding default hearings, which was viewed as both a waste of agency resources and unnecessary to satisfy statutes requiring an "opportunity for hearing" prior to adverse action.²⁴⁴ In the Committee's

239. MONOGRAPH 26 (SEC), *supra* note 154, at 15 (emphasis added). The SEC also made extensive use of pre-hearing "informal conferences and negotiations," such that "[n]ormally, . . . no substantial factual issues remain for the hearing, and, indeed, not seldom the only remaining purpose of the hearing is to make a record which will embody and support the fruits of the conferences." *Id.* at 41. The Committee concluded that "the Commission has been highly successful in simplifying and diminishing the usual formal litigious process through its conference technique." *Id.*

240. *See, e.g.*, MONOGRAPH 2 (VA), *supra* note 130, at 13; MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 21 & n.77.

241. *See, e.g.*, MONOGRAPH 6 (FTC), *supra* note 134, at 15–16; MONOGRAPH 13 (BANKING), *supra* note 141, at 36.

242. *See* MONOGRAPH 24 (ICC), *supra* note 152, at 16.

243. *See* FINAL REPORT, *supra* note 3, at 41 n.2, 307–13; *see, e.g.*, MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 25; MONOGRAPH 13 (BANKING), *supra* note 141, at 32–33; MONOGRAPH 23 (BITUMINOUS COAL), *supra* note 151, at 43–44; MONOGRAPH 24 (ICC), *supra* note 152, at 16; MONOGRAPH 26 (SEC), *supra* note 154, at 58.

244. *See, e.g.*, MONOGRAPH 26 (SEC), *supra* note 154, at 58–59.

view, in the absence of an objection to the agency's action from the party subject to it, there was no need to actually hold a hearing.²⁴⁵ Offering the opportunity for a hearing was sufficient.²⁴⁶ In such cases, although the agency's action was adverse to the party, the agency could properly proceed based on the evidence compiled through the initial, informal stage of the process.²⁴⁷

These apparent deviations from the staged structure of adjudication do not undermine—and perhaps even further cement—the staged structure. This is because identifying and discussing these apparent deviations would not be possible without a clear understanding of what constitutes both an “informal” process and a formal “hearing.” Thus, for example, negotiation and settlement occurring after the commencement of the hearing stage is readily identifiable as an informal technique within the formal stage of adjudication. What may appear at first to be deviations from the staged structure of adjudication are better understood as nuances that prove the overarching concept. They contribute to the sense that the Committee had a clear idea of the purpose, timing, and characteristics of an adjudicatory hearing.

D. A Singular Vision of the Hearing Stage

The monographs indeed also convey a singular vision of the adjudicatory “hearing.” Today, courts, agencies, and scholars struggle to identify when a statutory hearing requirement calls for an “on-the-record” hearing under the APA. The Attorney General's Committee on Administrative Procedure seems to have experienced no such difficulty.

The Purpose and Place of Hearings. Hearings had a clear purpose: to provide a fair and reliable method for an agency to unilaterally resolve disputes that persisted through the initial, informal stage of the process. In the vast majority of cases, matters could be resolved informally because the facts were known and the legal consequences of those facts were obvious.²⁴⁸

245. The FDIC's statute provided that “[u]nless the bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured bank.” MONOGRAPH 13 (BANKING), *supra* note 141, at 31. Despite this clear language, “in the one case in which a bank . . . failed to appear at the hearing, the Corporation's case was presented before the trial examiner . . . as though the bank had appeared.” *Id.* at 32. The agency reasoned that since its case “could be presented in a few hours, . . . little was lost by going through with the formal procedure.” *Id.* The Committee judged the hearing “a wholly useless and unnecessary step.” *Id.*

246. See FINAL REPORT, *supra* note 3, at 307.

247. See MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 25.

248. A hearing was thus not viewed as necessary or appropriate when the agency's decision depended on judgment and policy and not on factual findings. See, e.g., MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 14–15; MONOGRAPH 13 (BANKING), *supra* note 141, at 12.

Usually, a party appearing before an agency received the action desired (benefits, a license, a determination of no wrongdoing, etc.) or acquiesced in the agency's informal advice or determination to the contrary. If the initial, informal process could not produce one of these outcomes, the agency and the private party would find themselves at odds, unable to agree on the facts or the appropriate outcome. At this stage, a hearing was needed to find facts, air disputes, and provide a legitimate basis for the agency to decide the case even if the private party continued to disagree.²⁴⁹

Implicit in the purpose of hearings is also an established place within the sequence of the administrative process. An agency typically initiated a hearing *after* the initial, informal stages of the process.²⁵⁰ A revealing passage is found in the Committee's discussion of the USDA's poultry-licensing activities, which the Committee held up as demonstrating "very sharply the inutility of resorting too readily to the hearing room."²⁵¹ In the Committee's (now cringe-worthy) description:

[T]he Department is here dealing not only with men of substance, but also with many individuals who are petty merchants, equally unused to government regulation and to legal processes. Many of them have linguistic handicaps which make it difficult to grasp the meaning of even relatively simple documents and official communications. Few of them can afford to retain competent counsel to advise [them] In these cases, when some reason (other than failure to furnish a complete financial statement) appears for withholding instant granting of an application for a license, the Department turns at once to formal proceedings, instead of first utilizing the simpler methods of conversation. It is likely that a single competent investigator equipped with an alert sense of fairness and ability to speak Yiddish could accomplish more in the New York market than can an examiner and an attorney in a hearing. In many cases the investigator could no doubt demonstrate to the applicant that a license could not be granted under the act; in others, information might be acquired which would

249. See, e.g., MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 129, at 9. Even where the Committee thought no formal hearing was appropriate, it urged that the final stage of the process should entail procedures designed to protect against factual error and offer a disappointed party "the opportunity to rebut or otherwise counterbalance the evidence upon which unfavorable action has been taken," MONOGRAPH 13 (BANKING), *supra* note 141, at 12, and "be notified of the nature of the reasoning by which the adverse decision was reached," *id.* at 13.

250. Both sides of this divide—the initial, informal process and the subsequent hearing—were considered important for their distinct purpose. Thus, for example, the Committee criticized the USDA's Stockyards Division for abandoning a staged "conference method" in favor of a "hearing method" in which a hearing was heard on every petition for modification of an established rate, even when the matter was susceptible to resolution via a "consent order" issued based on pre-hearing, informal conferences. MONOGRAPH 11 (USDA STOCKYARDS), *supra* note 139, at 24.

251. *Id.* at 11.

resolve the existing doubts, so that a license could issue forthwith; in some, the investigatory process might fail to satisfy both the applicant and the Department, and in these cases a hearing might finally be necessary.²⁵²

Just as a hearing was properly preceded by informal (often determinative) process, so too was it followed by post-hearing procedures, including internal review for quality control and appeal to the agency head for error correction, policy control, and final decision.²⁵³ Judicial review was typically available from this final agency action.²⁵⁴

The Procedural Elements of a Hearing. Crucially, hearings had a clear internal structure and set of attendant procedural characteristics. One discrete indication of this appears in the monograph evaluating the Post Office, in which the Committee distinguishes between “formal hearings,” which are also described as “hearings in the usual sense,” and “hearings” that are “nothing more than a conference about matters in issue” because “[t]here is no presiding officer, no established order for presentation of evidence, and no stenographic record of the proceedings made.”²⁵⁵ More broadly, the monographs consistently evaluate the same basic collection of procedures, principles, and concerns, in the same basic order, regardless of the agency under examination. Reading the monographs as a researcher, one gets the strong impression that the Committee must have given its attorney-investigators a clear set of instructions as to the hearing elements that should be examined. This impression is corroborated by remarks made by the director of the Committee’s study, Professor Walter Gellhorn, during a panel discussion marking the APA’s 40th anniversary: “We had a focus. We knew what it was we were looking for. It wasn’t left to each person to go into an agency and say, ‘What are the questions here?’ We had a checklist so to speak.”²⁵⁶ The “checklist” served its purpose, for the monographs share a consistent format that conveys a clear sense of what a hearing entails.

252. *Id.* at 11–12. The Committee criticized other agencies (and their statutes) for resorting to hearings too quickly to undertake activities more suited to initial, non-hearing procedures followed later by a hearing at the proper time and for an appropriate purpose. See MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 9–10.

253. See MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 129, at 15–21; MONOGRAPH 2 (VA), *supra* note 130, at 24–37; MONOGRAPH 3 (FCC), *supra* note 131, at 26–37; MONOGRAPH 11 (USDA STOCKYARDS), *supra* note 139, at 25.

254. The typical means of securing judicial review were by appeal of the agency’s action or via a petition for injunction or mandamus. See FINAL REPORT, *supra* note 3, at 79–83. A detailed examination of the monographs’ discussion of judicial review is beyond the scope of this Article.

255. See, e.g., MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 9.

256. *Present at the Creation*, *supra* note 4, at 524.

First, the “initiation of formal proceedings”²⁵⁷ typically occurred through “a complaint or other notice of hearing.”²⁵⁸ Frequently compared to a “bill of particulars,” the form and content of this notice was important. It ensured the party subject to the hearing had sufficient notice as to what the hearing would be about and could prepare for it properly.²⁵⁹ Another point of interest was the methods used to make the complaint or notice of hearing known to the interested parties (such as through service or publication). The party subject to hearing might file an answer to the complaint or notice, and the monographs considered both the agency’s expectations and the industry’s common practices as to the form and content of these responses. A common theme is whether the agency’s procedures upon initiation of the formal stage of the proceeding were designed to, and actually did, promote efficient and fair conduct of the hearing.

Third, “[t]he trial examiner and his powers”²⁶⁰ was a subject of careful study throughout the monographs. The monographs often describe the number of examiners employed by the agency, their demographics and training, and details about their employment (salary, supervision, any non-hearing duties).²⁶¹ Other important considerations related to the scope of the examiner’s authority to issue subpoenas, rule on motions, and otherwise control the conduct of the hearing. Some agencies delegated meaningful authority to the examiner, while others took a centralized approach that left the examiner with little independent authority. The Committee appears to have been clearly of the view that a more decentralized approach involving greater delegated authority and decisional independence was preferable.²⁶² Another common point of inquiry was whether the examiner acted more passively, relying on the parties to develop the evidence and issues, or took a more active and inquisitorial role in shaping the hearing’s trajectory, such as by participating in the questioning of witnesses.²⁶³ Finally, a prominent subject of concern involved the relationship between the examiner and other employees within the agency, particularly those with prosecutorial or investigatory roles.²⁶⁴ These other employees included those who conducted the initial informal stages of the process and decided whether to initiate

257. MONOGRAPH 6 (FTC), *supra* note 134, at 12.

258. MONOGRAPH 26 (SEC), *supra* note 154, at 15; *see* MONOGRAPH 20 (INTERIOR), *supra* note 148, at 12.

259. *See, e.g.*, MONOGRAPH 5 (ALCOHOL), *supra* note 133, at 7.

260. *E.g.*, MONOGRAPH 6 (FTC), *supra* note 134, at 16.

261. Some agencies held too few hearings to maintain a dedicated staff of hearing examiners. *See* MONOGRAPH 13 (BANKING), *supra* note 141, at 34.

262. *See* FINAL REPORT, *supra* note 3, at 44–53.

263. *See, e.g.*, MONOGRAPH 5 (ALCOHOL), *supra* note 133, at 21; MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 19, 21–23.

264. *See, e.g.*, MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 11–12; MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 34.

formal proceedings, those who acted as trial attorneys during the hearings, and those who supervised the examiner or reviewed his work.²⁶⁵ Finally, the monographs routinely considered the form and nature of the examiner's report.²⁶⁶

Third, the centerpiece of the hearing stage was the hearing itself: a readily identifiable event held in person to take and test evidence and testimony from witnesses. Each hearing had a time and a place. The discussion of the latter is particularly interesting, as hearings were conducted in a wide variety of locations, including federal courtrooms, dedicated hearing rooms, agency employees' individual offices, hotel rooms, agency field offices, and even outdoors (one particularly vivid example involved hearings held by the side of the road next to the examiner's car).²⁶⁷ The atmosphere of the hearing varied across agencies. Sometimes, it is described as "formal," in the sense of replicating the dignity and decorum of a courtroom.²⁶⁸ In other instances, the atmosphere is described as "informal," which seems to mean the participants were more relaxed, chatty, and perhaps even allowed to smoke.²⁶⁹

Regardless of location or atmosphere, these events retained a clear identity as "hearings." Evidence was taken, witnesses testified, parties were permitted to engage in cross-examination—all with a view toward establishing the determinative facts.²⁷⁰ A core concern was the rules that were used to determine the admissibility of evidence, as well as the hearing examiners' practices with respect to enforcing those rules.²⁷¹ In most agencies, the rules of evidence were enforced in a more relaxed manner than they would be in a courtroom, and examiners tended to err on the side of liberality in admitting evidence. The Committee seems to have generally approved of examiners taking a more liberal approach, since it viewed such flexibility as a major advantage of administration over judicial enforcement. But the Committee was also critical of examiners who took too liberal an

265. In many cases, the same employees served in these different capacities. For example, it was common for an attorney who conducted the initial investigation and negotiations to decide to initiate proceedings and then also to appear as the trial attorney in the hearing. This was done to take advantage of the employee's expertise and experience with the matter, but of course it also could raise concerns about the proper separation of functions.

266. See MONOGRAPH 13 (BANKING), *supra* note 141, at 35.

267. See MONOGRAPH 20 (INTERIOR), *supra* note 148; Grisinger, *supra* note 110, at 395.

268. See, e.g., MONOGRAPH 25 (FPC), *supra* note 153, at 35.

269. See, e.g., MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 26–27.

270. See, e.g., MONOGRAPH 2 (VA), *supra* note 130, at 15.

271. See, e.g., MONOGRAPH 2 (VA), *supra* note 130, at 19; MONOGRAPH 18 (NLRB), *supra* note 146, at 19.

approach, which usually resulted in excessively lengthy hearing records riddled with irrelevant information.²⁷²

Fourth, a hearing was conducted on the record.²⁷³ A stenographer was hired to record the proceedings, although agency practices varied as to who could receive a copy of the transcript and at what cost.²⁷⁴ The essentiality of record-keeping to a “hearing” is emphasized by contrast to the common practice of not keeping a record of informal, oral components of the pre-hearing stage of the process, such as conferences and negotiations.²⁷⁵ And it was not just a matter of keeping the record: in an adjudicatory hearing, it was also expected that the decision would be based exclusively on the record and not on information outside of the record.²⁷⁶ That a formal hearing would necessarily be conducted on the record is consistent with then-prevailing conceptions of due process. At the time the APA was enacted, it was unthinkable that a hearing could be conducted appropriately *not* on the record.²⁷⁷

Fifth, after the hearing, the examiner would prepare a report. The report was to be based on the record of the hearing, including the transcript and any information that had been submitted in writing during the hearing.²⁷⁸ In some agencies, the report simply described the evidence and issues in the case. In other agencies, the report had a more analytical character and contained proposed findings of fact and perhaps also recommendations as to the appropriate outcome.²⁷⁹ The monographs frequently discuss *ex parte*

272. See FINAL REPORT, *supra* note 3, at 70–71.

273. Discussion of the record in adjudicatory hearings is ubiquitous throughout the monographs. See, e.g., MONOGRAPH 4 (MARITIME COMM’N), *supra* note 132, at 7; MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 27; MONOGRAPH 13 (BANKING), *supra* note 141, at 34; MONOGRAPH 27 (CUSTOMS), *supra* note 155, at 16. The monographs do not discuss any agency that held an adjudicatory hearing *not* on the record.

274. See, e.g., MONOGRAPH 24 (ICC), *supra* note 152, at 17.

275. See, e.g., MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 9.

276. This “exclusive record principle” likely explains the monographs’ consistent concern with judicial notice and other practices whereby the presiding official might base her decision on information outside the hearing record. See, e.g., MONOGRAPH 3 (FCC), *supra* note 131, at 30; MONOGRAPH 13 (BANKING), *supra* note 141, at 34.

277. The critical difference between a hearing and a conference seems to have been that a record was always kept of the former but not necessarily of the latter. See, e.g., MONOGRAPH 24 (ICC), *supra* note 152, at 48 (explaining that a “formal hearing” is preferred over an “informal conference” where the “oral method” is needed to facilitate follow-up questions “but it is thought that a transcript for later careful scrutiny and for permanent record is important”); *id.* at 52 (describing the use of “formal conferences” held pre-hearing and on-the-record, in which “the Commission prohibited all lawyers from attending” because engineers, accountants, and land appraisers “could come to an agreement with much greater facility without the assistance of legal talent”).

278. The importance of the decision being based on the record is evident in concern over whether and in what circumstances it was appropriate for an examiner or agency head to take “judicial notice” of facts outside the record. See, e.g., MONOGRAPH 24 (ICC), *supra* note 152, at 37–40.

279. See, e.g., MONOGRAPH 13 (BANKING), *supra* note 141, at 34 (trial examiner makes factual findings and explains the basis in the record therefor but does not make a recommendation as to the proper disposition of the case); MONOGRAPH 17 (NLRB), *supra* note 145, at 22 (“After the hearing is

communications, particularly those that would occur if the examiner sought assistance or information from other government personnel in the course of preparing the report.²⁸⁰ Other practices at this point in the process varied across agencies but could include: submission of proposed findings by the parties, post-hearing briefing or oral argument before the examiner or agency head, or the opportunity for parties to review and file exceptions to the examiner's proposed findings.²⁸¹ In most agencies, the examiner's report was reviewed by a supervisor to ensure proper form, good quality, and consistency with the agency's policy and precedent.²⁸²

Sixth, the case was decided. Agency practices varied somewhat as to issuance of the final decision and the opportunities afforded for appeal or rehearing. It was very common for the examiner's report to be transmitted to the agency head, which could mean a department head or a full commission or board, depending on the agency's structure. An opportunity for oral argument or an informal conference with the agency head might be available before the final decision was made. Sometimes, the examiner would issue a tentative decision that could become final, but often the final decision was actually made by the agency head. Internal appeals or rehearing would be provided, typically with the goal of correcting any errors before the decision became the agency's final decision.²⁸³

E. Legislative-Type Hearings

The monographs also contain scattered mentions of legislative-type hearings, which are readily distinguishable from adjudicatory hearings. Often referred to as "informal hearings,"²⁸⁴ legislative-type hearings were used in rulemaking to serve the legislative purposes unique to that

closed, the trial examiner is required to prepare an intermediate report containing findings of facts and recommendations as to the manner in which the case should be decided.".)

280. Most often, this would include employees within the same agency, although there are examples of hearing examiners seeking information or guidance from employees of other agencies that operated in shared or adjacent regulatory space.

281. See, e.g., MONOGRAPH 3 (FCC), *supra* note 131, at 26; MONOGRAPH 6 (FTC), *supra* note 134, at 23-25; MONOGRAPH 18 (NLRB), *supra* note 146, at 23; MONOGRAPH 23 (BITUMINOUS COAL), *supra* note 151; MONOGRAPH 24 (ICC), *supra* note 152, at 26-34.

282. See, e.g., MONOGRAPH 16 (SSB), *supra* note 144, at 7, 16-18; MONOGRAPH 19 (AERONAUTICS), *supra* note 147, at 20.

283. See FINAL REPORT, *supra* note 3, at 44-53.

284. MONOGRAPH 5 (ALCOHOL), *supra* note 133, at 30-31; MONOGRAPH 7 (USDA GRAIN STANDARDS), *supra* note 135, at 4. The terminology is neither defined nor perfectly consistent. There are instances in which the monographs refer to legislative-type hearings as "formal hearings." See MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 34; cf. MONOGRAPH 9 (THE FED), *supra* note 137, at 16. They are also frequently referred to as "public hearings," *see id.* at 33, but that term is also used to refer to adjudicatory hearings.

context.²⁸⁵ Agencies conducted these hearings “not for the purpose of proving facts, but rather for the purpose of investigating them.”²⁸⁶ Indeed, such hearings were “devoted less to an exploration of issues of fact than to a consideration of the wisdom or unwisdom” of a proposed regulation.²⁸⁷ As explained in connection with the FCC’s informal rulemaking hearings, these proceedings allowed an agency:

to obtain, in an efficacious manner, the expressions of opinion and advice of persons who do not have regularly established contacts with the agency, and might otherwise be unavailable for consultative purposes. They provide a means for obtaining not only the judgment of interested parties on the announced issues but also suggestions relating to other matters of collateral import.²⁸⁸

These wide-ranging inputs helped to inform the agency’s ultimate *legislative* judgment and to secure the cooperation of regulated parties in the agency’s subsequent efforts to enforce the regulations.²⁸⁹

Reflecting their legislative context and purpose, this type of hearing was typically “conducted in the same manner as hearings before congressional committees.”²⁹⁰ The ordinary procedural trappings of the court room—the touchstone for defining adjudicatory hearings—were largely absent.²⁹¹ For example, in rulemaking hearings before the Federal Alcohol Administration:

285. See MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 129, at 26–29; MONOGRAPH 3 (FCC), *supra* note 131, at 73–79; MONOGRAPH 5 (ALCOHOL), *supra* note 133, at 30–31; MONOGRAPH 7 (USDA GRAIN), *supra* note 135, at 4; MONOGRAPH 9 (THE FED), *supra* note 137, at 16; MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 34; MONOGRAPH 14 (FAIR LABOR), *supra* note 142, at 16; MONOGRAPH 15 (WAR), *supra* note 143, at 18; MONOGRAPH 20 (INTERIOR), *supra* note 148, at 67; MONOGRAPH 27 (CUSTOMS), *supra* note 155, at 16, 21.

286. MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 129, at 28; see also MONOGRAPH 14 (FAIR LABOR), *supra* note 142, at 76. It is easy to imagine how these aspects of the Committee’s analysis may have contributed to Professor Davis’s development of the “distinction between ‘adjudicative facts’ and ‘legislative facts.’” Levin, *Legacy*, *supra* note 52, at 320; see generally Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942).

287. MONOGRAPH 15 (WAR), *supra* note 143, at 18.

288. MONOGRAPH 3 (FCC), *supra* note 131, at 75–76. Contributing to their efficiency, these proceedings often involved large numbers of participants. See, e.g., MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 129, at 28; MONOGRAPH 3 (FCC), *supra* note 131, at 73; cf. MONOGRAPH 15 (WAR), *supra* note 143, at 18.

289. See MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 129, at 24; MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 33–34; MONOGRAPH 20 (INTERIOR), *supra* note 148, at 67.

290. MONOGRAPH 5 (ALCOHOL), *supra* note 133, at 30; see also MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 129, at 26; MONOGRAPH 14 (FAIR LABOR), *supra* note 142, at 16; MONOGRAPH 27 (CUSTOMS), *supra* note 155, at 21.

291. E.g., MONOGRAPH 7 (USDA GRAIN), *supra* note 135, at 4. Certain FCC rulemaking hearings are referred to as “formal hearings” because, although initially intended to be conducted as legislative-type hearings, the intense controversy they engendered caused them to evolve to “more closely resemble[] an adversary proceeding.” MONOGRAPH 3 (FCC), *supra* note 131, at 74.

The parties are entitled to be heard, but they have no right to cross-examine witnesses. The witnesses are interrogated only by the representatives of the Administration; if one of the parties desires to ask a question, the query may be submitted in writing to the presiding officers and, if thought to be of any value, is then submitted to the witness.²⁹²

The procedures used by the Department of Commerce's Bureau of Marine Inspection and Navigation in its rulemaking hearings are described similarly:

The hearings themselves, as would be expected, resemble a conventional legislative committee hearing on a bill. Arguments instead of evidence are the order of the day. No oaths are required, and cross-examination is absent. Such questioning as occurs comes from the members of the Board who preside at the hearing.²⁹³

Likewise, in its legislative-type hearings, the United States Tariff Commission followed a "policy of allowing considerable leeway in the introduction of evidence" and adopted a flexible "attitude with respect to the technical rules of evidence."²⁹⁴ The Committee judged this appropriate given the context:

Ordinarily, *ex parte* statements and other forms of hearsay evidence are freely admitted, and the best evidence rule is not rigidly enforced. The Commission properly regards the hearing as merely a part of the legislative process in which is engaged, and any evidence which is submitted at the hearing is subject to verification from the books and records of the parties involved and from any other sources.²⁹⁵

In making its determination following a legislative-type hearing, an agency typically did not confine itself to material contained in the hearing record.²⁹⁶ This deviation from the exclusive record principle deemed so essential in adjudicatory hearings was appropriate in the rulemaking context because "the most important raw material which goes into the manufacture of

292. MONOGRAPH 5 (ALCOHOL), *supra* note 133, at 30. Rulemaking hearings in the Department of the Interior's Bureau of Fisheries also "were conducted as legislative hearings," in which "[c]ross-examination was not permitted and but few questions were asked by the representatives of the Bureau." MONOGRAPH 20 (INTERIOR), *supra* note 148, at 67.

293. MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 34. *See also* MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 129, at 28.

294. MONOGRAPH 27 (CUSTOMS), *supra* note 155, at 17.

295. *Id.* at 17.

296. *See, e.g.*, MONOGRAPH 3 (FCC), *supra* note 131, at 78; MONOGRAPH 5 (ALCOHOL), *supra* note 133, at 31.

regulations, the value judgments of the rule makers, cannot possibly be reduced to fact terms.”²⁹⁷

In sum, legislative-type hearings were conducted: (1) in rulemaking rather than adjudication; (2) for the purpose of assisting the agency in making legislative determinations and not to resolve fact-bound disputes; and (3) using procedures designed to resemble those of legislative committees instead of courts. These three interrelated characteristics distinguish legislative-type hearings from the adjudicatory hearings that were the Committee’s primary focus. They throw into sharp relief the Committee’s singular vision as to the placement, purpose, and structure of adjudication’s hearing stage.

F. *The Staged Structure’s Collapse*

Although the terms “pre-hearing stage” and “hearing stage” have remained ubiquitous in administrative case law and scholarship,²⁹⁸ the stage-based conception of adjudication’s structure apparently started to fall apart—or simply fade from conscious view—shortly after the APA’s adoption.²⁹⁹ It is worth considering how and why the significant shift from the stage-based to the modes-based conceptual lens occurred.

The story of how the stage-based concept was lost perhaps begins in 1950 with *Wong Yang Sung v. McGrath*.³⁰⁰ In this case, the Supreme Court held that deportation proceedings were subject to the APA’s formal adjudication requirements.³⁰¹ The decision was a rousing defense of the APA and the uniform application of its procedures to all agency hearings. But Congress overrode the decision in short order, transforming a prominent hearing program into an *informal* hearing program.³⁰² Two modes of adjudicatory hearings were born. By 1960, a study of informal adjudication suggested that the stages had collapsed, in the sense that informal and formal techniques of adjudication were frequently intermingled in agencies’ actual practice.³⁰³ In its 1973 decision in *Florida East Coast Railway*, the Supreme Court embraced a modes-based conception of rulemaking

297. MONOGRAPH 5 (ALCOHOL), *supra* note 133, at 31.

298. In some instances, the stage-based conception manifests beyond mere word choice, in fuller discussion but without recognition of its import, as if hiding in plain sight. See Rakoff, *supra* note 26, at 162.

299. See Woll, *supra* note 170, at 437.

300. 339 U.S. 33 (1950).

301. *Id.*

302. See *Marcello v. Bonds*, 349 U.S. 302, 306 (1955); Bremer, *Reckoning*, *supra* note 20, at 1752; William Funk, *The Rise and Purported Demise of Wong Yang Sung*, 58 ADMIN. L. REV. 881, 885–86 (2006).

303. Woll, *supra* note 170, at 437.

procedures.³⁰⁴ The modes-based conception seems to have infiltrated thinking about adjudication procedures shortly thereafter, although its path from rulemaking to adjudication is difficult to trace.³⁰⁵

These developments suggest that objections to formal procedures were not quelled by the APA's adoption. The question of whether and when judicialized procedures should be imposed upon administrative agencies was a central point in the debate that led to the APA's adoption.³⁰⁶ Although Congress enacted the more robust set of minimum hearing procedures recommended by the Attorney General Committee's minority report, it did not impose any procedural requirements on informal adjudication. Skepticism regarding the prudence of generalizing about informal adjudication persisted, as did the preference for informal procedures.³⁰⁷ When presented with opportunities to cabin the reach of the APA's formal hearing procedures, courts, agencies, Congress, and scholars have consistently taken them.³⁰⁸

Several interrelated practical realities may have also helped to obscure adjudication's staged structure. First, the number of informal adjudications has always dwarfed the number of formal hearings.³⁰⁹ This imbalance has proven to be more salient than the temporal relationship between informal and formal adjudication. Second, and related, informal techniques have always been used both before and after the initiation of the hearing stage to improve efficiency by limiting hearings. This intermixing has obscured adjudication's stage-based structure, as has the persistent desire to reduce the domain of formal hearings.³¹⁰ Third, the vast and varied character of informal adjudication has shielded it from regular, systemic scrutiny.³¹¹

304. See *United States v. Fla. E. Coast Ry.*, 410 U.S. 224 (1973).

305. But see *U.S. Lines, Inc. v. Fed. Maritime Comm'n*, 584 F.2d 519, 536 (D.C. Cir. 1978) (citing *Fla. E. Coast Ry.*, 410 U.S. at 324–38; *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756–58 (1972)) (treating a “hearing on the record” as presenting the same interpretive question in adjudication as in rulemaking); *City of W. Chi. v. NRC*, 701 F.2d 632, 641 (7th Cir. 1983); see also Puckett, *supra* note 87, at 1105 & n.224 (citing *Fla. E. Coast Ry.*, 410 U.S. at 237–38) (distinguishing “a hearing on the record”).

306. See *supra* Part II.A.

307. See, e.g., Warner W. Gardner, *The Procedures by Which Informal Action Is Taken*, 24 ADMIN. L. REV. 155, 157–58 (1972).

308. See Bremer, *Exceptionalism*, *supra* note 29. Some might say this is as it should be. See, e.g., Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

309. This was true when the Attorney General's Committee conducted its study, see, e.g., FINAL REPORT, *supra* note 3, at 35–36, and it has remained true to the present day, see ASIMOW, *supra* note 8; Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 741 (1976) [hereinafter Verkuil, *Informal Adjudication*].

310. See, e.g., Woll, *supra* note 170, at 437 (“Throughout the administrative process, pre-hearing conferences, conferences during the course of hearings, and other informal devices are utilized extensively to reduce substantially the quantitative and qualitative significance of the adversary hearing process.”).

311. See, e.g., ASIMOW, *supra* note 8, at 6; Bremer, *Reckoning*, *supra* note 20, at 1782. Only in

Fourth, the shift from adjudication to rulemaking as the default mechanism of administrative policymaking may have strengthened informal adjudication's scrutiny shield, while acculturating lawyers, scholars, and judges to the modes-based conception of administrative procedure. Finally, administrative law and scholarship is dominated by the courts' top-down judicial perspective, which is more accessible and salient than the lived reality of administrative procedure as it is experienced within the federal government's various agencies.³¹² Over time, the two perspectives diverged, with courts and scholars adopting a modes-based understanding insensitive to the staged structure of on-the-ground adjudication.³¹³

The systemic consequence of these forces has been the proliferation, with little notice or objection, of informal adjudicatory hearings conducted outside of the APA's hearing provisions.³¹⁴ This result, which would likely surprise administrative experts from earlier eras,³¹⁵ was possible only because administrative law forgot adjudication's staged structure and filled the gap by importing rulemaking's modes-based structure.

III. REVIVING ADJUDICATION'S STAGED STRUCTURE

Understanding adjudication as a staged process rather than as a matter of alternative informal or formal procedural modes has several significant and beneficial consequences. First, it offers a compelling explanation for the APA's failure to establish minimum procedural requirements for informal adjudication. Second, it clarifies that there is only one kind of adjudicatory "hearing" under the APA: a formal, on-the-record hearing. This suggests that many of the informal adjudicatory hearings that agencies use today should be conducted under the APA's formal hearing provisions. Third, while reviving adjudication's staged structure reinvigorates the APA's formal hearing requirements *when they apply*, it also reveals several

the mid- to late-1960s did informal agency action begin to garner attention as a field of cross-cutting procedural study. *See* Gardner, *supra* note 307, at 157. The most notable works in this vein were undertaken by two prominent scholars who had been intimately involved in the Attorney General's Committee on Administrative Procedure: Walter Gellhorn and Kenneth Culp Davis. *See generally* KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); WALTER GELLHORN, *OMBUDSMAN AND OTHERS* (1966); WALTER GELLHORN, *WHEN AMERICANS COMPLAIN* (1966).

312. Recognizing this, administrative law scholars have recently begun to refocus attention from courts to agencies. *See, e.g.*, Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017); Christopher J. Walker, *Administrative Law Without Courts*, 65 U.C.L.A. L. REV. 1620 (2018).

313. *See infra* notes 373–374 and accompanying text (explaining that adjudication as actually conducted by agencies has retained its staged structure).

314. *See* ASIMOW, *supra* note 8, at 6.

315. For example, Mr. Gardner's 1972 article on informal action contains not one single mention of informal adjudicatory hearings. *See* Gardner, *supra* note 307.

powerful principles that agencies and Congress can employ to limit those circumstances.

A. *The APA's No Longer Vexing Silence*

For those who study the APA, the statute's failure to prescribe minimum procedural requirements for informal adjudication is vexing. The silence makes the statute asymmetrical. For rulemaking, the APA establishes minimum procedural requirements for both the informal and formal modes.³¹⁶ But for adjudication, the APA establishes minimum procedural requirements only for the formal mode.³¹⁷ The traditional explanations for this asymmetry are unsatisfying. It is surely true that the catch-all category of "informal adjudication" is so vast and varied that to prescribe minimum procedures would be both impossible and undesirable.³¹⁸ But the APA was motivated principally by objections to the procedures used in agency adjudication, and the statute's silence on informal adjudication leaves *nearly all* agency adjudication free from cross-cutting procedural regulation. As the Attorney General Committee's Final Report explained, "even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process."³¹⁹ This dominance of informality in adjudication, mentioned previously,³²⁰ has persisted through to the present day. Writing in 1976, Professor Paul Verkuil explained that "the phrase 'informal adjudication' describes about 90 percent of what the government does with respect to the individual."³²¹ A 2019 study commissioned by the Administrative Conference of the United States (ACUS) and conducted by Professor Michael Asimow found the landscape much the same.³²²

That the APA would leave untouched the vast majority of the problem it was intended to address—and would do so *implicitly* rather than through any express exemption—seems strange and implausible. For teachers and

316. See 5 U.S.C. §§ 553, 556, 557.

317. See 5 U.S.C. §§ 554, 556, 557. The statute thus leaves informal adjudication procedures largely free from uniform procedural regulation, subject only to the scattershot provisions found in 5 U.S.C. §§ 555 and 558.

318. Even within a single agency, informal techniques may appropriately vary across divisions and activities. See, e.g., MONOGRAPH 6 (FTC), *supra* note 134, at 6.

319. FINAL REPORT, *supra* note 3, at 35.

320. See *supra* note 309 and accompanying text.

321. Verkuil, *Informal Adjudication*, *supra* note 309, at 741 (citing Gardner, *The Procedures by Which Informal Action Is Taken*, 24 ADMIN. L. REV. 155, 156 (1972)).

322. ASIMOW, *supra* note 8.

students of administrative procedure, it is a deeply unsatisfying state of affairs.

Adjudication's staged structure resolves this conundrum, offering a more compelling reason for the APA's silence. Near-complete procedural flexibility in informal adjudication is appropriate because matters that warrant the time and expense of a hearing will be afforded one at the end of the administrative process and before the agency issues its final decision.³²³ The structure of this reasoning—that informality in the initial stages of the process is warranted by thoroughness or formality later in the process—appears throughout the monographs. For example, in the FTC's adjudication under Section 5(b) of the FTC Act,³²⁴ “[t]he informality of applications for complaints involves no danger of injury or hardship to those against whom the charges are directed; for each application passes through a searching process of official investigation before it eventuates in the issuance of a complaint or in possibly damaging publicity.”³²⁵ Crucially, the Committee's research suggested that informal action was often sufficient to resolve all doubt as to the proper administrative outcome. Take, for example, the Federal Reserve Board's forfeiture and removal proceedings, which culminated in a hearing that lacked “some of the more formalized administrative procedures.”³²⁶ The Committee's faith in the outcome produced through the informal stages of the process, combined with its conviction regarding the purpose of a hearing, leads it to a forgiving conclusion:

The marked informality of the Board's procedure is readily explicable. So complete have been the pre-hearing conferences and examinations, and so reluctant has the Board been to proceed, that the hearing and the ultimate decision is and can be little more than a formal gesture superimposed upon what everyone, including the respondents, concede is a *fait accompli*. After the elaborate preliminaries, the hearings are nothing but the statutory addition of an otherwise unnecessary nail in the coffin. There have been no real

323. This leaves open the question of how to determine which matters warrant a hearing. That significant question is addressed below in Part IV.C.

324. Section 5(b) authorizes the FTC to enforce the Act's prohibition on unfair methods of competition and unfair or deceptive commercial acts. This provision, which has been codified in the U.S. Code, has not been amended since 1941. Compare MONOGRAPH 6 (FTC), *supra* note 134, at 3 (quoting from Section 5(b)), with 15 U.S.C. § 45(b) (codifying Section 5(b)).

325. MONOGRAPH 6 (FTC), *supra* note 134, at 4.

326. In particular, the trial examiner often “knew of or actually participated in the preliminary stages of the case,” scant attention was paid to the rules ensuring adequate evidence would be adduced at the hearing, and “[n]o intermediate report or proposed findings have been submitted to the respondent[] prior to decision.” MONOGRAPH 9 (THE FED), *supra* note 137, at 31.

issues of fact, since the facts of violation have been readily admitted by the respondents.³²⁷

In the absence of any remaining, genuine dispute between the agency and the private party, a hearing was unnecessary and so its procedural integrity was irrelevant.³²⁸

Indeed, the Final Report appeals to the ultimate availability of formal process at the hearing stage to support its recommendation that Congress leave informal adjudication unregulated.³²⁹ For example, with respect to programs involving “large numbers of applications for licenses or permits where the decision does not depend on tests of skill,” the Final Report explains that “[o]nly after these applications have passed through the sieve of initial decision—which in most cases satisfactorily ends the matter—is it necessary or possible to have formal proceedings.”³³⁰

B. One Kind of Hearing

Understanding adjudication as a matter of stages also has significant consequences for the common legal question of whether an agency subject to a statutory “hearing” requirement must conduct the hearing under the APA’s formal adjudication provisions or may instead conduct an informal hearing “outside the APA.”³³¹ This question is comprehensible *only* through a modes-based lens. Viewed through the stage-based lens upon which the APA was based, the question evaporates. Informal adjudication is synonymous with non-hearing adjudication. And a statutory “hearing” requirement means that the agency’s adjudication procedures must include a hearing stage that complies with Sections 554, 556, and 557. In adjudication under the APA, there is only one kind of hearing.

One challenge to reviving the stage-based approach is that it would seem to require interpreting the same language differently in two different

327. *Id.*

328. *Id.*

329. *See* FINAL REPORT, *supra* note 3.

330. *Id.* at 39.

331. *See* ASIMOW, *supra* note 8.

provisions of the APA.³³² The provisions at issue identify the circumstances in which an agency must observe the APA’s formal hearing requirements:

Section 553(c) (rulemaking): “When rules are *required by statute to be made on the record after opportunity for an agency hearing*, sections 556 and 557 of this title apply instead of this subsection.”³³³

Section 554(a) (adjudication): “This section applies, according to the provisions thereof, in every case of adjudication *required by statute to be determined on the record after opportunity for an agency hearing*.”³³⁴

The stage-based approach requires one to read these provisions using diametrically opposed background presumptions. In rulemaking, the presumption is in favor of informal, legislative-type hearings. Thus, a statute would have to require more than just a “hearing” in order to trigger a trial-like evidentiary hearing under the APA’s formal procedures. In adjudication, however, the background presumption is that a “hearing” is a trial-like proceeding conducted under the APA’s formal provisions. A statute would have to clearly defeat that presumption to authorize the use of an informal adjudicatory hearing.

Strange as it may seem, the statute’s call for these contrasting background presumptions was understood and accepted at the time the APA was adopted. Most notably, the Attorney General’s Manual on the APA confirms this approach.³³⁵ The *Manual* explains that in “adjudication the specific statutory requirement of a hearing, without anything more” means

332. This may be in tension with the presumption of consistent usage, although that presumption “readily yields to context, and a statutory term—even one defined in the statute—may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.” *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 320 (2014) (internal quotation marks and citations omitted).

333. 5 U.S.C. § 553(c) (emphasis added).

334. 5 U.S.C. § 554(a) (emphasis added).

335. See ATTORNEY GENERAL’S MANUAL, *supra* note 189, at 41–43. The Supreme Court has treated the *Manual* as an authoritative guide to interpreting the APA. *E.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2419 (2019); *Vt. Yankee Nuclear Power Corp. v. Nat’l Res. Def. Council*, 435 U.S. 519, 546 & n.19 (1978). Some aspects of the *Manual*’s analysis should be viewed with suspicion as a political attempt to rewrite the APA to serve the Executive Branch’s interests. See, e.g., Duffy, *supra* note 62, at 119; Shepherd, *supra* note 105, at 1682–83. But the document is reliable where, as here, its “interpretation is contrary to the Executive Branch’s interest.” Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 790 (2010).

the agency is required to conduct a hearing “on the record.”³³⁶ But in rulemaking:

it was concluded that a statutory provision that rules be issued after a hearing, without more, should not be construed as requiring agency action “on the record”, but rather as merely requiring an opportunity for the expression of views. That conclusion was based on the legislative nature of rule making, from which it was inferred, unless a statute requires otherwise, that an agency hearing on proposed rules would be similar to a hearing before a legislative committee, with neither the legislature nor the agency being limited to the material adduced at the hearing. No such rationale applies to administrative adjudication.³³⁷

The same explanation was offered in a 1947 law review article by Robert Ginnane,³³⁸ who was at the time working as an attorney in the Solicitor General’s Office³³⁹ but had previously served as one of the attorney-investigators who supported the Attorney General’s Committee.³⁴⁰ Having participated in the research and writing of the monographs, Mr. Ginnane’s views are particularly probative.

This evidence supports the conclusion that “on the record” has the same meaning in Sections 553 and 554: it refers to an evidentiary hearing conducted under the APA’s formal hearing provisions. But Congress expected that a statutory “hearing” requirement would be interpreted according to different background presumptions in rulemaking versus adjudication. A “hearing” was presumptively informal (quasi-legislative) in rulemaking and presumptively formal (quasi-judicial) in adjudication.

To the modern reader, this seems like an obviously unstable regime, and over time it has proven to be so. Nonetheless, this unstable regime codified the agency practices that informed the statute and is in fact the policy choice Congress made in the APA. Perhaps the simplest explanation for the APA’s inadvisable drafting is that while “we’re all textualists now,”³⁴¹ we were not textualists in 1946.³⁴²

336. See ATTORNEY GENERAL’S MANUAL, *supra* note 189, at 42.

337. *Id.* at 42–43 (citing H.R. REP. NO. 98-1980, at 51 n.9 (1946)).

338. See Ginnane, *supra* note 166, at 635–36.

339. *Id.* at 621 n.†. Mr. Ginnane’s discussion of the issue is remarkably similar to the *Manual*’s discussion. It is possible he wrote both.

340. See *supra* note 121.

341. Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFTOTg> [<https://perma.cc/GK9F-9U82>].

342. See Diarmuid F. O’Scaillain, “*We Are All Textualists Now*”: *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN’S L. REV. 303, 304 (2017).

For today's textualist, however, there are other provisions of the APA that both support and are illuminated by the stage-based conception of adjudication. A key such provision is Section 554(c), which directs agencies subject to a statutory hearing requirement to offer interested parties the opportunity to resolve a case informally before submitting remaining disputes to a formal hearing:

The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.³⁴³

This provision not only embraces adjudication's staged structure, but its importance becomes more apparent when it is read with that structure in mind.³⁴⁴ The APA's exemption of certain matters from formal hearing requirements lend further textual support to the stage-based understanding.³⁴⁵ The exemption for "proceedings in which decisions rest solely on inspections, tests, or elections"³⁴⁶ appears to recognize that some matters can be definitely resolved through informal "methods of determination do not lend themselves to the hearing process."³⁴⁷ Meanwhile, the exemption for "matter[s] subject to a subsequent trial of the law and the facts de novo in a court" recognizes that there is no need for a formal hearing at the administrative level when one will later be available in court.³⁴⁸ Finally, the stage-based conception of adjudication dispels ambiguity regarding the circumstances in which agencies may issue declaratory orders under the APA.³⁴⁹ For decades, the dominant view was

343. 5 U.S.C. § 554(c).

344. See *infra* note 367 and accompanying text.

345. See Ginnane, *supra* note 166, at 637–38.

346. 5 U.S.C. § 554(a)(3); see Ginnane, *supra* note 166, at 638.

347. S. REP. NO. 79-752, at 16 (1945); H.R. REP. NO. 79-1980, at 27 (1946); S. DOC. NO. 79-248, at 202, 261 (1946); *Administrative Procedure: Hearing on S. 674 Before the Senate Subcommittee on the Judiciary*, 77th Cong., 1394, 1457 (1941); see also FINAL REPORT, *supra* note 3, at 37 (discussing the rationale for the exemption). The Final Report gives three examples of such proceedings: grain grading under the Grain Standards Act, airmen's certificates under the Civil Aeronautics Act, and locomotive inspections under the Interstate Commerce Act. *Id.*

348. 5 U.S.C. § 554(a)(1).

349. Section 554(e) provides that in adjudication, "[t]he agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e); see generally Emily S. Bremer, *The Agency Declaratory Judgment*, 78 OHIO ST. L.J. 1169 (2017) (examining agency use of the APA's declaratory order device

that the placement of the provision in Section 554 indicated that declaratory orders could be issued only in formal adjudication.³⁵⁰ Read with the stage-based structure in mind, and consistent with the monographs' discussion of pre-APA declaratory practice, it emerges clearly that declaratory orders are perhaps most appropriately used to improve the informal, pre-hearing stage.³⁵¹ Indeed, used effectively, declaratory orders can reduce the need for formal hearings.³⁵²

C. *Cabining Hearings*

A significant implication of adjudication's staged structure is that many and perhaps most of the hundreds of adjudicatory hearing programs presently conducted outside the APA should be conducted under the APA.³⁵³ Although the circuit courts have taken various approaches to defining the appropriate background presumption for interpreting Section 554(a), the trend has been towards a more deferential approach that facilitates agency evasion of the APA's hearing provisions. But the Supreme Court has not yet addressed the matter. This leaves open the possibility of reviving adjudication's stage-based structure to reinvigorate the APA's hearing regime. From the judicial perspective, this would clean up an area of the law that has become messy as the stage-based understanding of adjudication has been lost to the mists of time and rulemaking's modes-based approach has crept in to fill the resulting theory gap. But even if the development would simplify judicial precedent, there remains a serious question of how it would affect administrative practice.

There are several reasons to believe that reviving adjudication's staged structure would not overburden—and ultimately would improve—administrative adjudication. These reasons all tie back to a core point: while the staged structure makes the APA's formal procedures more powerful

and urging its expansion); Admin. Conf. of the United States, Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

350. See Bremer, *The Agency Declaratory Judgment*, *supra* note 349, at 1173, 1185–89.

351. For example, the Committee explained how the Federal Alcohol Administration's pre-hearing process could be more effective if pre-approvals of liquor advertisements were provided via declaratory ruling. See MONOGRAPH 5 (ALCOHOL), *supra* note 133, at 11.

352. The Post Office was able to use a device described variously as an “advance ruling” or “declaratory judgment” to streamline its process. MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 39–40. Thus, for example, the Post Office rarely instituted lottery-order proceedings against domestic mailers because “most publishers and companies now follow the practice of submitting the details of their scheme and their advertising to the Department for a rul[e],” and “[i]n almost all cases where the Department's ruling is adverse, the matter will not be deposited for mailing.” *Id.* at 16 n.59.

353. The exception would be programs under an organic statute that expressly exempts hearings from the APA's procedures. See 5 U.S.C. § 559; *Marcello v. Bonds*, 349 U.S. 302, 306 (1955). 5 U.S.C.

when they apply, it also reinforces several principles that empower Congress and agencies to cabin those circumstances.³⁵⁴

First, an adjudicating agency need only conduct a hearing under the APA when Congress has by statute required it to do so.³⁵⁵ This fundamental principle is express in the APA's text.³⁵⁶ Reviving the stage-based understanding of adjudication would not affect this principle but would clarify the default rule that statutorily mandated hearings in adjudication must comply with the APA's minimum procedural requirements.³⁵⁷ It would also illuminate for Congress the core purpose of an administrative hearing: to resolve disputes resistant to resolution through informal methods. If disputes are likely to remain (even if infrequently) after informal methods are exhausted, and Congress prefers those disputes be adjudicated by the agency in the first instance, then the statute should require a hearing prior to final administrative resolution.³⁵⁸ From this perspective, formal agency hearings are not a threat to administrative action. To the contrary, agency hearings emerge as a central tool for effectuating Congress's preference for certain matters to be decided by an agency instead of by a court.³⁵⁹

A corollary principle is that Congress can statutorily exempt an agency from the APA's hearing requirements. It can do so altogether by simply not requiring a hearing.³⁶⁰ A second alternative that involves a complete displacement of the APA's formal procedures is for Congress to require an agency to conduct a legislative-type hearing as part of a larger adjudicatory scheme. As Mr. Ginnane explained in 1948, in such circumstances, the "legislative draftsmen must use the word 'hearing' with full appreciation of the procedural consequences which may follow."³⁶¹ Thus, if "it is desired to provide for informal hearings as an opportunity merely for the expression of views, . . . the phrase 'informal hearing' [should] be employed together

354. Cf. ADMINISTRATIVE PROCEDURE: A HANDBOOK OF LAW AND PROCEDURE BEFORE FEDERAL AGENCIES 58 (3d ed. 1948) ("Procedure may be informal where the statutes provide or require no hearing, where cases may be determined by consent, or where the agency desires facts for the preliminary determination of whether to initiate and undertake a hearing."). Courts may prefer for hearings to be cabined, but the power to achieve that goal belongs to the political branches.

355. See, e.g., MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 9.

356. See 5 U.S.C. § 554(a).

357. See 5 U.S.C. §§ 554, 556, 557.

358. Congress might also make a contrary choice—preferring an agency to engage in informal adjudication (or, as this Article characterizes it, first-line execution of an administrative statute), but allocating primary responsibility for resolving certain or all disputes to the courts. See, e.g., MONOGRAPH 3 (FCC), *supra* note 131, at 50–51, 53 n.38.

359. Cf. *Cravatt v. Thomas*, 399 F. Supp. 956, 969 (W.D. Wis. 1975) (understanding the APA's adjudication provisions as part of "Congress' major effort to regulate judicial review of administrative action" by ensuring courts "will be facilitated by the spadework done administratively").

360. Although, as suggested in the preceding paragraph, the consequence of such silence may be to leave such disputes to be resolved by the courts.

361. Ginnane, *supra* note 166, at 637.

with” an express exemption from Sections 554, 556, and 557 of the APA.³⁶² Modern procedural innovations offer terms less confusing than “informal hearing” that could be used to refer to an oral opportunity for a public airing of views in the context of an adjudication, such as “workshop” or “listening session.”³⁶³ A third alternative is that Congress might tailor a required evidentiary hearing by providing targeted exemptions from the APA’s formal procedures. The statute expressly contemplates that some such tailoring of the APA’s hearing provisions may be desirable. For example, the APA’s ALJ regime “does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute.”³⁶⁴ Two prominent examples of this kind of tailoring are Immigration Judges and the Patent Trial and Appeal Board with its Administrative Patent Judges.

Second, the stage-based understanding of adjudication emphasizes that agencies should use informal methods first, in part to limit formal hearings. The APA was grounded on the expectation that most matters subject to adjudication can and should be resolved informally.³⁶⁵ Hearings are appropriately reserved for the relatively small number of cases that require unilateral resolution of otherwise intractable disputes.³⁶⁶ This approach is codified in Section 554(c), which expressly empowers agencies to use informal methods to reach consent, thereby limiting hearings to circumstances in which consent cannot be obtained.³⁶⁷ Congress can support this structure by carefully designing administrative statutes to contemplate informal techniques such as inspections, tests, negotiations, and other alternative methods of dispute resolution.³⁶⁸ Agencies can use the

362. *Id.* at 637. Instead of suggesting an express exemption in the statutory text, Mr. Ginnane advised that “an explanation in the Committee reports that [‘informal hearing’] is intended to preclude application of Sections [554, 556, and 557] of the Administrative Procedure Act.” Today’s savvy legislative draftsman, however, should anticipate textualist courts. In addition, express exemption from the APA’s requirements is consistent with Section 559’s oft-overlooked admonishment that a “[s]ubsequent statute may not be held to supersede or modify [the APA] . . . except to the extent that it does so expressly.”

363. This alternative would have the advantage of preserving the singular meaning of an adjudicatory “hearing” and might obviate the need for an express exemption from the APA’s formal hearing requirements.

364. 5 U.S.C. § 556(b).

365. See FINAL REPORT, *supra* note 3, at 36–39.

366. See MONOGRAPH 9 (THE FED), *supra* note 137, at 25–26.

367. See 5 U.S.C. § 554(c); *supra* note 343 and accompanying text. See also *Diehl v. Franklin*, 826 F. Supp. 874, 881 (D.N.J. 1993) (citing § 554(c)(2)) (“Where the parties are unable to settle a controversy by consent, all interested parties are entitled to a hearing and decision in accordance with APA sections 556 and 557.”).

368. The Railroad Unemployment Insurance Act established a multi-layer administrative appeals process, with judicial review standards tailored to encourage the exhaustion of administrative appeals. See MONOGRAPH 8 (RRB), *supra* note 136, at 4.

procedural flexibility afforded by the APA to use advice-giving, conferences, collaboration, and like techniques to encourage private parties to consent to agency decisions, rendering hearings unnecessary in the vast majority of cases. The staged approach explains and emphasizes the important role of agency procedural discretion during the informal stage of adjudication. It also legitimates that discretion by taking it out of direct conflict with individual hearing rights. The opportunity for a hearing is provided at the end of process and is not simply eliminated by the agency in its sole discretion.

A corollary principle found here recognizes agency procedural discretion to tailor hearing requirements beyond the APA's minimums. As Professor Michael Asimow has recently and exhaustively catalogued, the many hundreds of hearing programs that are conducted outside the APA are nonetheless conducted using substantially trial-like procedures.³⁶⁹ They often use sophisticated techniques—such as pre-hearing conferences, class actions, motions practice, and summary judgment—that are informed by modern judicial practices and go well beyond the APA's basic procedures.³⁷⁰ (Sometimes this tailoring comes from Congress, such as in the highly detailed adjudication procedures of used in administrative patent hearings under the America Invents Act.³⁷¹) Reviving adjudication's staged structure would entail enforcing the APA's minimum procedures, but it would leave intact all the procedural tailoring that Congress and the agencies have added beyond the APA's minimums.³⁷²

There is a final reality that limits the practical burdens of reviving the stage-based conception: descriptively, the adjudicatory process remains staged. Cases before agencies begin with the filing of applications or complaints. The vast majority of these cases are resolved informally and with the consent or acquiescence of the interested party.³⁷³ Only when a dispute persists—ordinarily because the agency has concluded that it cannot grant a party's request or must find that party in violation of the law—is a hearing conducted.³⁷⁴

369. See generally ASIMOW, *supra* note 8.

370. See generally *id.*; Ernest Gellhorn & William F. Robinson, Jr., *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1971); Alexander I. Platt, *Is Administrative Summary Judgment Unlawful?*, 44 HARV. J.L. & PUB. POL'Y 239 (2021); 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).

371. See Bremer, *Exceptionalism*, *supra* note 29.

372. See Bremer, *Reckoning*, *supra* note 20; cf. Ginnane, *supra* note 166, at 642 ("Far more than is generally realized, the procedures of many federal agencies were already in substantial conformity with the principles of the [APA].").

373. For example, as previously noted, approximately 75% of initial claims for Social Security disability benefits are resolved without resort to the hearing stage. See *supra* note 92.

374. See, e.g., *Benoit v. U.S. Dept. of Agric.*, 577 F. Supp. 2d, 12, 18 & n.14 (D.D.C. 2008) (describing the staged process used to resolve a Section 741 Complaint Request and explaining how that

In sum, the practical consequences of reviving adjudication's staged structure would be powerful but concentrated. It would leave untouched the vast world of non-hearing informal adjudications, while requiring most existing hearing programs to comply with the APA's hearing provisions. Returning to the nine examples of adjudication offered in Part I.C. concretizes this assessment:

1. A Postal Service employee decides whether a letter has enough postage. *No change because there is no statutory hearing requirement.*
2. A Forest Service ranger approves (or denies) an application for a camping permit. *No change because there is no statutory hearing requirement.*
3. A Custom's officer classifies a day planner not as a duty-free good, but rather as a bound diary subject to tariff. *No change because there is no statutory hearing requirement.*
4. The FCC grants a license to a wireless communications provider to use a specified portion of the electromagnetic spectrum. *No change because Congress has authorized the Commission to use auctions instead of hearings for issuing spectrum licenses.*³⁷⁵
5. A member of the VA Board of Veterans' Appeals affirms an initial decision denying retroactive payment of disability benefits. *This hearing, which is today conducted outside the APA, would likely be subject to the APA's hearing provisions.*³⁷⁶ *Most significantly, this would mean the presiding official would need to be an ALJ.*³⁷⁷
6. A Social Security employee working in a field office grants an initial claim for Social Security disability benefits. *No change because there is no statutory hearing requirement at this stage of the process and no reason for the applicant to dispute the positive outcome.*

staged process is consistent with the APA's adjudication provisions).

375. See 47 U.S.C. § 309(j); see generally Jonathan Blake, *FCC Licensing: From Comparative Hearings to Auctions*, 47 FED. COMM'NS L.J. 179 (1994).

376. See 38 U.S.C. §§ 7105, 7107, 7113.

377. See 5 U.S.C. § 556(b).

7. The Secretary of Transportation approves a state proposal to build an interstate highway through the middle of an important public park in Memphis, Tennessee. *No change because the hearing required by statute is a legislative-type hearing and not an adjudicatory hearing.*³⁷⁸
8. A Customs and Border Patrol officer working at the border orders the expedited removal from the United States of an individual seeking to enter the country without a valid visa or entry document. *No change because there is no statutory hearing requirement.*
9. A PTAB panel composed of three APJs determines that a patent is invalid. *Modest changes to ensure this highly trial-like procedure complies fully with the APA's hearing requirements. The most significant such change—recognition of agency head control—has already been secured by the Supreme Court's decision in Arthrex.*³⁷⁹
10. An ALJ working in SSA's Office of Disability Adjudication and Review affirms an initial denial of a claim for Social Security disability benefits. *No change because these hearings are already conducted under the APA. The stage-based structure reinforces the APA's application.*

Reviving adjudication's staged structure would not affect eight of these ten examples, but would likely require PTAB proceedings and VA hearings (examples five and nine) to comply with the APA's formal procedures. The most significant consequence of reinvigorating the APA is that it would require many agencies to hire ALJs to replace current non-ALJ adjudicators. This would be expensive because ALJs are typically paid more than non-ALJ adjudicators.³⁸⁰ Congress should provide the necessary funding and should also reform the ALJ hiring and tenure structure to address longstanding problems that have contributed to agencies' avoidance of the

378. See *Overton Park*, 401 U.S. at 414–415.

379. See *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986–87 (2021).

380. Instructive on this point is an analysis conducted by ACUS in 2015 of the budgetary consequences of converting AJs to ALJs in the EEOC's Federal Sector Hearing Program. ADMIN. CONFERENCE OF THE U.S., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EVALUATING THE STATUS AND PLACEMENT OF ADJUDICATORS IN THE FEDERAL SECTOR HEARING PROGRAM 42–49 (2014). It bears noting, however, that: (1) the relevant statutes do not require EEOC to conduct these hearings; and (2) the APA's formal hearing provisions do not apply where, as here, a trial de novo subsequently is available in federal court. *Id.* at 3; see 5 U.S.C. § 554(a)(1). Reviving the APA's staged structure would therefore *not* require the Federal Sector Program to comply with the APA's formal hearing provisions.

APA's regime.³⁸¹ The end result of these efforts, however, would be to fulfill one of the APA's most important promises: the government-wide provision of independent, impartial, and highly competent adjudicators.

In sum, what administrative law has lost over the decades is not the operational reality of adjudicatory stages but rather the conscious recognition of those stages as an important element of the APA's statutory design. This Article seeks to revive that recognition because it makes the APA more coherent, with minimal disruption to agency operations and much benefit to the administrative state as a whole.³⁸²

IV. CLARIFYING THE APA'S CONCEPTUAL FOUNDATION

This Part delves deeper into the logic of adjudication's staged structure and argues that it reveals new concerns about the continued vitality of the APA's conception of administrative action. Recall that the APA divides all agency action into two categories: quasi-legislative (rulemaking) and quasi-judicial (adjudication). Putting rulemaking to one side, what do the rediscovered stages of agency adjudication reveal about what it means to say that adjudication is "quasi-judicial"?³⁸³

A. A Narrowed View of Quasi-Judicial Action

Understood from the stage-based perspective, hearings emerge as a relatively narrow and well-defined category of quasi-judicial agency action. As explained above, the adjudicatory hearing was a well-defined proceeding generally reserved for circumstances in which the agency could bring a matter to conclusion only through unilateral resolution of a dispute that had percolated up through the initial, informal stages of the adjudicatory process.³⁸⁴ As the Committee's Final Report explained:

Upon the basis of the information gathered by their staffs and submitted informally by the claimants, the agencies—often through field officers—make their initial decisions. In the vast majority of cases these decisions are accepted by the claimants. Only where they

381. See Bremer, *Reckoning*, *supra* note 20, at 1796.

382. In prior work, I have analyzed in greater detail the costs and benefits of reinvigorating the APA's adjudication provisions. See Bremer, *Exceptionalism*, *supra* note 29; Bremer, *Reckoning*, *supra* note 20.

383. This Part's near-exclusive focus on adjudication is in keeping with this Article's overall focus on adjudication. The rulemaking side of the story will be the subject of future work.

384. Cf. FINAL REPORT, *supra* note 3, at 39 ("Only after these applications have passed through the sieve of initial decision—which in most cases satisfactorily ends the matter—is it necessary or possible to have formal proceedings.").

are not, are formal proceedings with witnesses and arguments and appeals to reviewing bodies invoked.³⁸⁵

The APA was established upon the recognition that administrative statutes had replicated this pattern across the wide expanse of the administrative state. Whether the underlying statute requires the payment of benefits, the issuance of licenses or permits, or the enforcement of legal obligations imposed on regulated parties, most of the government's work can be done with the cooperation of affected private parties.³⁸⁶ A hearing is held only when there is a dispute.³⁸⁷

Adjudication's staged structure thus reserves resource-intensive, trial-like proceedings for agency action that most resembles judicial action: deciding cases and controversies.³⁸⁸ This proposition is implicitly supported by the monographs' routine usage of "cases"³⁸⁹ and "controversies"³⁹⁰ to refer to the matters that survived through to the hearing stage. More fundamentally, the core function of an administrative hearing was to provide a fair and reliable method for bringing a matter to a close in the face of disagreement between the agency and the affected private individual.³⁹¹ In the U.S., however, "judges have traditionally had the power to bind those who disagree with them."³⁹² With this in mind, it becomes clearer that the hearing stage of adjudication was designed for the most quintessentially

385. *Id.*

386. *Cf.* Rakoff, *supra* note 26, at 162 ("[T]he practical impact of [informal agency] activities could be ignored since the issues resolved informally were generally not contested or were fairly unimportant.").

387. The monograph discussing the work of the National Mediation Board provides a succinct passage in which this structure is so strongly evident that no familiarity with the Board's statutory mandate is required to see it:

After he has completed his informal investigation, the mediator reports its results to the Mediation Board. If the Board finds that a legitimate dispute about representation exists, the mediator attempts to induce the parties to the dispute to agree upon the employees who shall be permitted to participate in the election. In at least 80 percent of the cases the mediator is successful in getting such an agreement. In another 15 percent of the cases there is no contesting organization. Only in the remaining 5 percent is it necessary to conduct a hearing to determine who shall participate.

MONOGRAPH 17 (RAILWAY LABOR), *supra* note 145, at 23.

388. *See* U.S. CONST. art. III, § 2, cl. 1; *see, e.g.*, John Harrison, *Addition by Subtraction*, 92 VA. L. REV. 1853, 1855 (2006) (describing "the heart of the judicial power" as "the adjudication of cases and controversies"); Louis J. Virelli III, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1212 (2011) (describing "the heart of judicial power" as "the ability to hear and decide specific cases").

389. *See, e.g.*, MONOGRAPH 1 (PUBLIC CONTRACTS), *supra* note 129, at 9 ("[I]n the bulk of cases which reach the hearing stage, the Division, while having reason to suspect violations, is unable to ascertain precisely the extent of such violations."); MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, 2-36 (using "cases" ubiquitously to refer to individual matters subject to administrative investigation, hearing, and decision).

390. *See, e.g.*, MONOGRAPH 3 (FCC), *supra* note 131, at 20.

391. *See* FINAL REPORT, *supra* note 3, at 35, 43.

392. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1814 (2008).

quasi-judicial variant of agency action.³⁹³

Even so, a final agency decision issued after a hearing attains real-world effect only with the cooperation of the affected private party or a court.³⁹⁴ If an agency issues the decision the private party requested—a grant of benefits, an issued permit, a favorable finding of no wrongdoing—there is presumably no further dispute. If the agency’s decision is less favorable to the private party, the private party may acquiesce in the decision, and the dispute may end.³⁹⁵ Or the private party might not acquiesce, in which case the dispute persists and is likely to end up in court, albeit via a different route depending on the nature of the underlying statutory regime.³⁹⁶ If the agency has ordered the private party to do something (e.g., pay a fine) or not do something (e.g., cease conducting a now-unlicensed business), and the private party does not comply, the agency must go to court to enforce its order.³⁹⁷ Another possibility is that the private party may seek judicial review of the agency’s action, directly or indirectly, in an effort to secure a judicial decision that will invalidate or set aside the agency’s decision.³⁹⁸ In this way, even the hearing stage is not the end of the road for the most persistent administrative disputes. When the tools of administration run out, administrative law reserves the remaining cases and controversies for judicial resolution.

Administrative law’s commitment to preserving certain matters for resolution via judicial process is evident in other aspects of administration adjacent to the core activities of adjudication and rulemaking. First, agencies also used a staged structure of adjudication to regulate the practice of attorneys and other representatives appearing before the agency. Thus, an attorney admitted to practice before an agency was afforded a hearing

393. Cf. MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 1–2 (explaining the omission of the Bureau of Standards from the study by noting that it “does frequently serve as arbitrator of controversies concerning technical questions, *but only by consent of the parties*, and ordinarily without anything resembling formal hearing”) (emphasis added).

394. Real-world effect should be distinguished from legal effect. An agency decision may be legally binding and yet it only acquires real-world effect when the party subject to it *complies*.

395. There are many examples of regimes in which the private party facing adverse agency action has a statutory right to a hearing, but the agency reports that requests for hearing are rare. *See, e.g.*, MONOGRAPH 3 (FCC), *supra* note 131, at 50–51; MONOGRAPH 9 (THE FED), *supra* note 136, at 23–24.

396. Cf. *Sackett v. EPA*, 566 U.S. 120, 129 (2012) (noting “the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction” and explaining that “the next step [after the EPA issued a compliance order] will either be taken by the Sacketts (if they comply with the order) or will involve judicial . . . deliberation (if the EPA brings an enforcement action)”).

397. *See, e.g.*, *Humphrey’s Executor v. United States*, 295 U.S. 602, 620–21 (1935) (“If the [FTC’s cease and desist] order is disobeyed, the commission may apply to the appropriate circuit court of appeals for its enforcement.”). Sometimes the judicial action might be handled by the DOJ, even when the agency is an independent agency. *See* MONOGRAPH 3 (FCC), *supra* note 131, at 48.

398. *See, e.g.*, MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 17.

before being disbarred.³⁹⁹ Second, some agencies were authorized by law to issue subpoenas to compel the submission of documents or the testimony of witnesses.⁴⁰⁰ Most of the time, agencies did not have to issue subpoenas because requested documents and testimony were provided voluntarily.⁴⁰¹ When a subpoena did issue, the target typically complied.⁴⁰² But if they did not comply, the agency could enforce the order in court.⁴⁰³ Finally, some statutory regimes included in the Committee's study provided the possibility of criminal penalties. When an agency in the course of administering the statute thought criminal penalties might be warranted, the case was referred to the Department of Justice (DOJ).⁴⁰⁴ The DOJ would investigate and, if appropriate, prosecute the case in federal court.⁴⁰⁵

B. The Missing Category of Agency Action

A picture begins to emerge of an elegant, temporally grounded regime that matches required procedures to the character of the governmental action that is needed at each stage of the process. Figure 2 (which appears on the next page) illustrates the regime as it was originally designed using the stage-based conceptual lens. Given the APA's principal concern for ensuring proper institutional and procedural treatment of quasi-judicial tasks, it may be most illuminating to consider this regime by moving backward through the stages of the administrative process. In the final stage, the most important and difficult cases and controversies—those matters closest to the heart of the judicial power—are adjudicated by federal courts. At the hearing stage before the agency, the quasi-judicial nature of the task—deciding a matter in the face of private disagreement—is matched by judicialized hearing procedures.⁴⁰⁶

399. See MONOGRAPH 22 (INTERNAL REVENUE), *supra* note 150, at 72; MONOGRAPH 23 (BITUMINOUS COAL), *supra* note 151, at 14–15; MONOGRAPH 24 (ICC), *supra* note 152, at 104; MONOGRAPH 26 (SEC), *supra* note 154 at 63 n.131.

400. See 5 U.S.C. § 555(d).

401. See, e.g., MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 15.

402. See, e.g., *id.*

403. See, e.g., *id.*

404. See MONOGRAPH 22 (INTERNAL REVENUE), *supra* note 150, at 17, 43–44; MONOGRAPH 26 (SEC), *supra* note 154, at 6.

405. In a similar vein, the Committee excluded the Bureau of the Census from its study because it “adjudicates no cases and issues no regulations” and “[s]tatutory penalties for failure to furnish information and for unlawful activities affecting enumerations are imposed only by courts.” MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 2; see also *supra* note 393 (discussing the Committee's scoping decisions with respect to the divisions within the Department of Commerce).

406. As noted before, a formal hearing has an adversarial quality. Even if a statutory regime is one in which the agency is not necessarily in an adversarial position vis-à-vis the individuals who appear before it, by the time a case reaches the hearing stage, an intractable dispute has emerged, putting the agency and the individual into an adversarial posture. This logic is evident in the Equal Access to Justice Act (EAJA), a fee-shifting statute that applies in “adversary adjudications,” which are defined as those conducted under the APA's hearing provisions. 5 U.S.C. § 504(b)(1)(C); see generally Bremer,

FIGURE 2: EXECUTIVE AND JUDICIAL STAGES OF STATUTORY IMPLEMENTATION			
Time:	1	→ 2	→ 3
Stage:	Informal	Formal	Judicial
Actions:	Process Inquire Investigate Inspect Supervise Examine Publicize Correspond Conference Negotiate Mediate Settle	Take Evidence Decide	Enforce Set Aside Compel Judge Sentence
Process:	Execution Discretion	Quasi-Judicial Hearing	Judicial Trial
Forum:	Agency	Agency	Court

From this perspective, the diverse range of actions taken during the initial, informal stage of “adjudication,” before any dispute has crystallized, do not appear to have any meaningful quasi-judicial character.⁴⁰⁷ They frequently involve fact-bound determinations about how the law should apply in individual cases. But the similarity to judicial action ends there. To approach the point somewhat differently, it is easy to see how the matters subject to agency hearing could be sent instead to a federal court for adjudication.⁴⁰⁸ But to task federal courts with the many actions that are

Exceptionalism, *supra* note 29 at 1385–87 (explaining how courts have adopted a strict interpretation of Section 554(a)’s triggering language in the EAJA context). Even if a formal hearing under the APA is conducted inquisitorially, as in the case of Social Security hearings, the relationship between the agency and the applicant unavoidably will be adversarial at this stage. *But see* Pierce, *supra* note 37, at 648 (“Hearings at agencies that administer benefit programs are not adversarial proceedings, as the only party that participates in the hearing is the applicant for benefits.”).

407. *Cf.* MONOGRAPH 13 (BANKING), *supra* note 141, at 43–44 (describing the informal procedures used to regulate banks, which the APA classifies as “informal adjudication,” as “wholly different from those which resemble the conventional judicial process”).

408. Over the years there have been proposals to do just that. *See, e.g.*, Michael S. Greve, *Why We*

swept into the APA’s catch-all category of informal adjudication may be—in various ways and combinations—inappropriate, undesirable, or unconstitutional. Federal judges may not give advisory opinions.⁴⁰⁹ They do not administer examinations to people⁴¹⁰ or institutions.⁴¹¹ Nor do they investigate, inspect, negotiate, or settle. These tasks, when they must be undertaken in connection with civil or criminal litigation before federal courts, are left to police and prosecutors, other executive officers and employees, and private litigants.⁴¹² Finally, the role of a judge (at least in the American system) is primarily retrospective, deciding the legal consequences of action that has already been taken. Judges cast in this mold are ill-suited to the prospective commands—inspecting, licensing, permitting, ratemaking—that are a hallmark of modern statutes.⁴¹³

The many non-hearing actions the APA classifies as “informal adjudication” are also executive in a more literal sense: the agencies undertake them at Congress’s express statutory instruction.⁴¹⁴ Indeed, the stage-based structure that emerges so clearly in the monographs was not devised by the Attorney General’s Committee or by the agencies it studied. That structure was created by Congress and fleshed out (interstitially) through agency regulations, policies, and practices. Congress decided to adopt statutes requiring more active, prospective regulation of the private markets and conduct. Congress chose to vest federal agencies with primary responsibility for implementing those statutes.⁴¹⁵ The statutes defined the contours of the administrative process, directing agencies to (in various combinations according to the overarching congressional purpose) accept applications or complaints, conduct examinations or inspections, pay benefits, issue licenses, enact regulations, and hold hearings. Most informal

Need Federal Administrative Courts, 28 GEO. MASON L. REV. 765, 771 (2021).

409. See generally Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621, 625 (2021).

410. See MONOGRAPH 3 (FCC), *supra* note 131, at 49–50. State supreme courts often have a significant role in regulating legal practice but are assisted by an administrative agency responsible for much of the front-line work, including administering bar examinations. See, e.g., VA. CODE ANN. § 54.1-3919 (West 2021).

411. See MONOGRAPH 13 (BANKING), *supra* note 141, at 16–18.

412. Meanwhile, both policing and prosecutorial discretion are components of administration. See, e.g., Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91 (2016); Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036 (1972); DAVIS, *supra* note 311.

413. See FINAL REPORT, *supra* note 3, at 12–17. Similarly, administrative law’s preference for informal action—which typically is completed with the party’s consent or acquiescence—serves administration’s primary goal: to ensure law becomes reality. Administration values this forward-looking goal over the retrospective goal of punishment. See MONOGRAPH 9 (THE FED), *supra* note 137, at 26.

414. In the rare instances in which the action was not expressly mandated by the statute, the Committee explains how the action is nonetheless within the discretion granted to the agency by its statute. See, e.g., MONOGRAPH 6 (FTC), *supra* note 134, at 10–11.

415. Congress also created and structured the agencies, either in the same or earlier statutes.

adjudication was thus simple executive administration of clear statutory commands. So why doesn't the APA have a third category for agency action that is predominately if not exclusively executive?⁴¹⁶

C. *An Antiquated Conception of Administrative Action*

A principal reason the APA treats administrative action as exclusively quasi-legislative and quasi-judicial is that the Committee's underlying research did likewise. But this too-simple explanation hints at something deeper. The Committee's work reflects a conception of administrative action that was dominant at the time but seems antiquated today.

To begin, the Committee's Final Report embraced the proposition that administration is fundamentally *not* executive. This position is reflected in the Final Report's lengthy analysis of the reasons why Congress had "resorted, continuously and with increasing frequency, to the administrative process as an instrument for the execution of the policies which it has enacted into law."⁴¹⁷ Crucially, the Committee treated administration and executive action as two separate and mutually exclusive options available to Congress.⁴¹⁸ It described executive action as "a distinctive field of governmental action, comprising those numerous functions which commonly are regarded, for historical or other reasons, as belonging peculiarly to the executive department."⁴¹⁹ These functions include things that government must do but which cannot be done by either the courts or Congress. Examples offered include the granting of passports or the expenditure (as opposed to the appropriation) of public funds.⁴²⁰ For these

416. The statute hints at the possibility of third kind of agency action by recognizing licensing as distinct. See 5 U.S.C. § 551(8)–(9). But then it extinguishes the possibility by decreeing licensing to be adjudication. See § 551. It is a puzzle why the three-branch structure of the U.S. Constitution loses a branch in its translation to the unwritten administrative constitution's principal statutory component. See Rakoff, *supra* note 26, at 170–71; Bremer, *Unwritten*, *supra* note 40.

417. FINAL REPORT, *supra* note 3, at 11.

418. See, e.g., *id.* (examining the "[a]dvantages of administration as compared with executive action").

419. *Id.*

420. *Id.* The Committee also viewed direct service provision, information-gathering, research, and promotion activities, such as those undertaken by many divisions of the Department of Commerce, as executive rather than administrative in character. See MONOGRAPH 10 (COMMERCE MARINE), *supra* note 138, at 1. This is why the Committee study narrowly focused on the Bureau of Marine Inspection and Navigation, while omitting many other divisions within the Department of Commerce. See *id.* at 1–2. The Committee omitted "the Business Advisory Council, the Coast and Geodetic Survey, the Lighthouse Service, the National Bureau of Standards, and the Bureau of the Census" from its study because "[t]he adjudicative and rule-making functions of these service organizations, to the extent that they exercise any such functions at all, are so scattered and incidental to the principal activities that they do not lend themselves to profitable inquiry into administrative procedures." *Id.* at 1. "The only extensive adjudication or rule making in the Department of Commerce is found in the Patent Office and in the Bureau of Marine Inspection and Navigation." *Id.* at 2. In its study of the latter, which was published in

kinds of governmental activities, Congress can either “establish an administrative tribunal for the task. Or it can make use of executive officers, charged with acting substantially as officers of business enterprises act.”⁴²¹ The Committee thus acknowledged the existence of both administrative agencies and executive agencies, but confined its study to the former.

In the Committee’s estimation, an administrative agency was distinguishable from an executive agency because it exercised *less discretion* in enforcing a statute that affected *private rights*. The Committee acknowledged that this manner of distinguishing between administration and executive action, which may surprise the modern reader,

is not easy of exact statement, yet it appears readily enough from a comparison of extremes. It can be illustrated by the contrast between the Works Progress Administration and the Veterans’ Administration. Both agencies disburse benefits. The former, however, proceeds in fluid executive fashion under a statute so framed that it confers upon individuals no “rights” to relief in stated circumstances. It issues no regulations giving notice of how it will act or limiting its own discretion. The latter, administering law embodied in statute and regulations, adjudicates “rights” by a relatively formal hearing procedure. The former the Committee has not regarded as an “administrative” agency falling within its purview; the latter it has. In this and analogous situations weighty reasons may often lead Congress to frame statutes upon the executive, more broadly discretionary, pattern. But the alternative of administrative adjudication, where practicable, insures greater uniformity and impersonality of action. In this area of Government, the administrative process, far from being an encroachment upon the rule of law, is an extension of it.⁴²²

The Committee’s charge was to examine administrative procedure, not executive action, and its conception of these alternatives pervasively influenced every aspect of its study, down to the selection of the agencies and agency activities included.⁴²³ Here, it excised any agency or division or function thereof that fit the “broadly discretionary” mold of executive action. Instead, it focused exclusively on “administrative” agencies, defined as those clothed with “the power to determine, either by rule or by decision,

the first group of thirteen monographs, the Committee noted that “[s]tudy of the Patent Office’s functions—granting patents for inventions and discoveries, including patents on plants and designs, and registering trade-marks—has been reserved until a later time.” *Id.* But none of the later monographs examines the Patent Office. If a reason for this omission was offered, I have not yet located it.

421. FINAL REPORT, *supra* note 3, at 11.

422. *Id.* at 11–12.

423. *See supra* Part II.A.

private rights and obligations.”⁴²⁴

This driving conception of the distinction between executive and administrative action is consistent with the Supreme Court’s then-recently decided case, *Humphrey’s Executor v. United States*.⁴²⁵ In *Humphrey’s Executor*, the Court famously upheld against constitutional challenge the for-cause removal protection Congress had afforded to FTC commissioners. To reach this holding, the Court had to distinguish *Myers v. United States*,⁴²⁶ which held “that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress.”⁴²⁷ It did so by distinguishing the purely executive character of a postmaster’s function from the administrative duties of an FTC commissioner, “an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.”⁴²⁸ Rather:

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.⁴²⁹

The FTC’s various statutory duties, explained the Court, are exclusively in aid of the legislative and judicial branches. “To the extent that [the FTC] exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.”⁴³⁰

Today, *Humphrey’s Executor* is remembered as a case about administration by independent agencies,⁴³¹ so why did the Committee extend the case’s conception of administrative action as fundamentally non-

424. FINAL REPORT, *supra* note 3, at 7. Despite the Committee’s careful scoping, the monographs still contain glimpses of executive activities that do not fit the Committee’s definitions of rulemaking or adjudication. *See, e.g.*, MONOGRAPH 4 (MARITIME COMM’N), *supra* note 132, at 24–25.

425. 295 U.S. 602 (1935).

426. 272 U.S. 52 (1926).

427. *Humphrey’s Executor*, 295 U.S. at 626.

428. *Id.* at 628.

429. *Id.*

430. *Id.*

431. The Supreme Court has so characterized it. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 687 (1988).

executive to *both* independent and executive agencies? This extension may have been necessitated by the larger legal-political context of the Committee's project.⁴³² The Committee was charged with responding to a broad attack on the New Deal administrative state by performing a similarly broad evaluation of administrative action. Both independent and executive agencies had to be included, but each presented a danger. For executive agencies, which lack the independence protections *Humphrey's Executor* describes as necessary for expert and impartial administration, the danger was suggesting they might be unsuited to performing administrative functions. For independent establishments, whose independence protections were constitutionally justified by the entities' exclusively administrative functions, the danger was revealing the reality that they performed many executive functions. Both of these dangers could be neutralized by looking through the institutions to the functions they performed. But neither the monographs nor the Committee's Final Report justify the Committee's conception of administrative action in these terms.⁴³³ And there is a simpler explanation for the Committee's choice.

In the late 1930s, the conception of administrative action now associated with *Humphrey's Executor* was not uniquely applied to independent agencies. All administrative action—regardless of the institutional structure of the governmental entity that wielded it—was understood as *only* quasi-legislative and quasi-judicial and fundamentally *not* executive.

In 1936, the Supreme Court invoked this conception in *Morgan v. United States*, a case involving ratemaking by an executive agency.⁴³⁴ The Secretary of Agriculture had issued an order under the Packers and Stockyards Act fixing rates for stockyard services at the Kansas City Stock Yards, and fifty suits were filed challenging the order as a violation of due process.⁴³⁵ The statute empowered the Secretary to issue ratemaking orders but only after first holding a "full hearing" and determining that the existing rate "is or will be unjust, unreasonable, or discriminatory."⁴³⁶ Although the Court did not cite *Humphrey's Executor*, it characterized the Secretary's ratemaking function in remarkably similar terms: as *not* executive, but rather as quasi-legislative and quasi-judicial in character. Beginning with ratemaking's quasi-legislative aspect, the Court explained:

The proceeding is not one of ordinary administration, conformable to the standards governing duties of a purely executive character. It is a

432. See *supra* Part II.A.

433. The monographs rarely refer to *Humphrey's Executor* or discuss agency independence or for-cause removal provisions. *But see* MONOGRAPH 19 (AERONAUTICS), *supra* note 147, at 3 n.11a.

434. 298 U.S. 468 (1936).

435. *Id.* at 471–72.

436. *Id.* at 473 (quoting 7 U.S.C. § 211).

proceeding looking to legislative action in the fixing of rates of market agencies. And, while the order is legislative and gives to the proceeding its distinctive character, it is a proceeding which by virtue of the authority conferred has special attributes. The Secretary, as the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed.⁴³⁷

These “standards and limitations” included the requirement that the Secretary first determine existing rates to be “unjust, unreasonable or discriminatory.”⁴³⁸ The Court explained that this duty is also “widely different from ordinary executive action” and accordingly “carries with it fundamental procedural requirements. There must be a full hearing.”⁴³⁹ Expanding upon the necessary elements of a “hearing,” the Court explained that:

A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi-judicial* character.⁴⁴⁰

The APA’s architects embraced this conception of administrative action as exclusively quasi-judicial and quasi-legislative and fundamentally not executive.⁴⁴¹ The case had demonstrable effect on the work of the Attorney General’s Committee. Several of the monographs discuss *Morgan*, and the case plainly influenced the pre-APA practices of agencies subject to statutory “hearing” requirements.⁴⁴²

Since the APA was enacted, however, administrative law has evolved to embrace the proposition that much administrative action is executive action.⁴⁴³ In *Arthrex*, the Court explained that “[t]he activities of executive officers may ‘take “legislative” and “judicial” forms, but they are exercises

437. *Id.* at 479 (citation omitted).

438. *Id.* at 479–80.

439. The statute requires only a “full hearing.” The Court identifies certain essential characteristics of a “hearing,” but does not clearly explain whether these characteristics are grounded in the statutory requirement or in constitutional due process. *Id.* at 479–81.

440. *Id.* at 480.

441. See Pat McCarran, *Foreword* to ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY iii (1946).

442. See, e.g., MONOGRAPH 11 (USDA STOCKYARDS), *supra* note 139, at 27–28, 33–34, app. D; MONOGRAPH 12 (POST OFFICE), *supra* note 140, at 19 n.72; MONOGRAPH 14 (FAIR LABOR), *supra* note 142, at 45; MONOGRAPH 15 (WAR), *supra* note 143, at 15–16; MONOGRAPH 23 (BITUMINOUS COAL), *supra* note 151, at 50 n.152.

443. See *Morrison v. Olson*, 487 U.S. 654, 688–92 (1988).

of—indeed, under our constitutional structure they must be exercises of—the “executive Power,” for which the President is ultimately responsible.”⁴⁴⁴ And in *Seila Law LLC v. Consumer Financial Protection Bureau*,⁴⁴⁵ the Supreme Court characterized the CFPB as “an independent agency that wields significant executive power.”⁴⁴⁶ This “executive power” included authority to “issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties,”⁴⁴⁷ as well as to “dictate and enforce policy for a vital segment of the economy affecting millions of Americans.”⁴⁴⁸ Many of these activities are squarely defined by the APA as administrative action and would not have been understood as “executive” in 1946.

For purposes of this Article, the most important point is that the APA’s conceptual foundation—which denied the executive character of administrative action—has become antiquated. This surely has significant consequences for administrative theory and the APA. Reviving adjudication’s staged structure makes this problem visible, but further examination of it must be left to future work.

CONCLUSION

There are many ways in which administrative law and procedure have evolved in the three-quarters of a century since the APA was enacted.⁴⁴⁹ Informal notice-and-comment rulemaking has replaced formal adjudication as the default policymaking device. Executive review of rulemaking has been firmly established and has taken on a commanding role in administrative governance. The courts have embraced agency procedural discretion, and agencies have innovated new ways to improve the process beyond the modest minimum requirements established by law. In short, much post-APA evolution, even if significant, has involved shifts among known procedural devices or tweaks or additions to the APA’s minimum procedural requirements.

This Article has identified two post-APA evolutions that are at once subtler and more crucial. The first is internal to the APA: administrative law has forgotten that adjudication under the APA is a staged process in which hearings are always last, infrequent, and formal. Reviving adjudication’s

444. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021) (quoting *Arlington v. FCC*, 569 U.S. 290, 305, n.4 (2013) (quoting Art. II, § 1, cl. 1)).

445. 140 S. Ct. 2183 (2020).

446. *Id.* at 2192.

447. *Id.* at 2203–04.

448. *Id.* at 2204.

449. See generally Daniel Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014).

staged structure makes the APA's regime clearer and more coherent. Once the APA's regime is brought into focus, a second and more profound evolution becomes apparent. The statute is revealed as a time capsule that has preserved a pre-APA conception of administrative action as quasi-judicial and quasi-legislative but fundamentally not executive. This contrasts unmistakably with modern administrative law, which has gradually come to accept that administrative action has some significant executive component. Although this evolution has occurred externally to the APA, it raises serious concerns for the statute's continued vitality.