



# THE SPREADING UMBRELLA

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BRINGING HEARINGS REQUIRED BY  
STATUTE UNDER THE APA

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# The APA project

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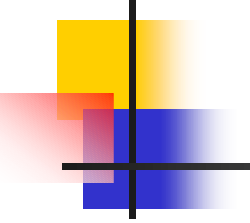
- ABA Administrative Law and Regulatory Practice:
- Descriptive (see A Guide to Federal Agency Adjudication)
- Prescriptive (House of Delegates recommendation to Congress to amend the APA)

# Existing APA:



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- Covers *all* federal agency rulemaking, judicial review, ADR, and government information (with specific exceptions) but NOT all adjudication.
- APA applies only “to every case of adjudication *required by statute* to be determined *on the record* after opportunity for an agency hearing.”  
[Type A adjudication]

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- Type A adjudication: APA provides for decision by an ALJ and an array of provisions for a formal hearing and protection of decision-maker independence such as separation of functions.
  - ALJs have variety of statutory protections of their independence concerning hiring, rotation, appraisals, compensation, discharge
  - Applies mainly to Social Security cases but also to Labor Department benefit cases and traditional regulatory agencies such as SEC, NLRB, FTC, FERC etc.



# Type B adjudication

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- Hearings required by statute (but do not meet the “on the record” standard for Type A adjudication under section 554(a))
- Hearings conducted by Presiding Officers (PO's).



# ALJs and AJs

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- There are approximately 1350 ALJs in federal service (the great majority of which are Social Security judges), but there are
- Approximately 3370 POs. Deciding about 556,000 cases each year.

# TYPE B ADJUDICATION INCLUDES



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- Immigration
- Veterans Benefits
- Merit Systems  
Protection Board  
(except ALJ cases)
- Government  
contracts
- Security clearances
- Nuclear Regulatory  
Commission
- Civil penalties—  
Clean Air Act  
Patent claims
- Etc. etc.

# Type B adjudication:



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- Defined as “agency evidentiary proceeding required by statute *other than* a Type A adjudication.”
- An “agency evidentiary hearing” means an agency proceeding that affords an opportunity for a decision *based on evidence submitted by the parties orally or in writing.*”
- Distinguishing Type A, Type B, and true “informal adjudication”
- Due process hearings; hearings required by procedural regulations

# Type B adjudication:



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- Existing APA's provisions for
  - Separation of functions
  - Ex parte contacts
  - Impartiality of decisionmaker
  - Fair notice
  - Presentation of case by evidence and cross-examination
  - Exclusive record for decision
  - Written decision
- But *not* decision by ALJ or numerous other adjudication provisions or Equal Access to Justice Act