

SPREADING UMBRELLA—FOR AALS 1-05.DOC (PP1)

PP2: Commercial for the admin law § of ABA—networking, public service, publications, EU.

Explain the ABA's APA project: generate both descriptive (plug book) and prescriptive recommendations. This is the prescriptive part—suggestions for revamping the APA. It's a political document—many compromises. Now approved by Section, t/b considered by HOD in February. Discuss today only one part of the recommendation.

PP3 A. Existing APA: covers all RM & all JR & all ADR & govt info--with specific and narrow exceptions in each case. But it covers only a tiny--tho important--part of fedl govt adjn.

Only "to every case of adjn reqd by statute to be determined on the record after oppor for an agency hearing." Call this TYPE A ADJUDCN.

PP4 In Type A adjn, full panoply of protections--quite formal hearing--very important procedural protections--presided over by ALJ. The statute contains very strict regulation of all aspects of ALJ work designed to protect their independence. Ags employ ALJs but cannot control hiring, appraisal, rotation, compensation, discharge etc.

PP4 continued: This small--but vital--part of adjn includes ONLY Social security, certain labor dept benefit programs such as black lung, and the tradit. regul ags such as SEC, NLRB, FERC, etc. Very little expansion of the world of Type A Adjudic (that is, ALJ hearings) in recent years.

PP5 But leaves out huge areas of fedl govt adjn in which there IS a hearing reqd by statute: TYPE B adjudication. We call the judge a PO and there is NO overall protection at all for POs and no statutory provisions guaranteeing a fair hearing except what DP & the particular statute & procedural regs happen to supply. Judge Frey found 83 case types involving 343t cs annually in 1992. > 2x as many POs as ALJs.

In Judge Limon's recent updating of Frey's work, he found about 3300 PO's, as opposed to about 1350 ALJs, & about 556,000 cases decided each yr by PO's. There are at least as many Type B hearings each year as Type A, maybe a lot more.

Why has Congress repeatedly added Type B adjudication but very seldom added to Type A? It's about ALJs. Becuz when a new regulatory program is added, or a new agency is created, there is understandable resistance to losing control over the jj, particularly the hiring process.

Ags d/n want to turn hiring over to the excessively formalistic OPM process (with outrageous veterans and disabled preference that discriminate against women). But also rigidity of ALJ hiring —no ability to select for expertise; choose only top 3 from a list compiled after arduous but mechanical process; no performance evaluation, lifetime job with no probationary period, high compensation, well-organized union etc.

PP6 Type B includes:: (d/n/h/t read from the PPT slide)

Immigration
Veterans
NRC
Civil penalties--environmental
MSPB
Govt Ks
IRS CDP cs
Security clearance--MANY others.

Type B adjudication is NOT informal adjudication. A common misnomer. These cases are at least as formal as Type As (especially given that 80% of Type As are SS cases that are quite informal). Restrict “informal adjn” to cases in which NO hearing is required by statute

PP7:

Our proposal: the APA would contain 3 different categories of adjn. i) Type A adjn, same as now. ii) Type B adjn. iii) true informal adjn.

Type B adjudication" "all other [that is other than ALJ adjudication] cases of adjudication in which a statute establishes the right to an evidentiary hearing."

Obviously there are some serious problems delineating Type B on the upside from Type A; and from informal adjudication on the downside.. Type A: same as present law. Seacoast; W Chicago; Chemical Waste split in authority when statute calls for hearing w/o magic words. SCUS needs to clarify. We leave this as we found it.

However, the rec. also picks up an earlier ABA recommendation—PROSPECTIVELY if a statute calls for a hearing, it w/b a Type A hearing. But that d/n solve the problem for existing stats.

Type B: assuming you know what's in type A, the big problem is distinguishing Type B from informal adjudication. The idea here is that a statute must provide a right to an evidentiary hearing. A proceeding with an exclusive record. Not public hearings-blow off steam; or N&C type hearings; or investigatory type hearings; or hearings where there will be another de novo agency or crt hearing.

Type B does NOT extend it to hearings required by DP—(Wong Yang Sung too rigid)—or to hearings required by procedural regs (perverse incentives)

PP8 So what are we suggesting here?

The world of 2d best--ideally ALJs should decide all these cases but that isn't going to happen; some protections for the genl public are better than none. And this is legislatively achievable, incremental—unlike Rubin's proposals.

So core fair process protections: [dn/h/t read from the PPT slide]

XP

S/f

Impartiality

notice

present case by oral or documentary evidence & conduct x-x

Exclusive record

written decision

Idea is to decouple the idea of hearing protections from the need to do it through ALJs.

Therefore, it doesn't include various provisions relating to ALJs, such as hiring & evaluation, or command influence; provisions on evidence & BofP; elaborate provisions concerning agency head review of initial decisions; EAJA

we d/n think it w/disrupt or interfere or cause addl costs –d/n require costly reorganizations or even new procedures that aren't now followed.—this makes it legislatively achievable

If enacted, this would be the most far reaching change to the adjud §§ of the APA since it was adopted in 1946. It would honor the wishes of the drafters of the APA to make the adjudication sections as inclusive as possible and bring the guarantee of fair adjudicatory procedures into a huge new realm of disputes. It is incremental and achievable, yet extremely important: this legislation will bring APA adjudication into the 21st century and insure fair adjudicatory procedures to the generations that will come after us.