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*An APA-Default Presumption for Administrative Hearings: Some Thoughts on “Ossifying” the Adjudication Process*

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Abstract by Raymond R. Janairo

The American Bar Association’s Resolution 113 of 2002 (Resolution) urges Congress to consider and expressly determine whether administrative hearings for new or existing programs should be subject to the formal adjudication requirements of the Administrative Procedure Act (APA). Moreover, the Resolution proposes an amendment to the APA, which requires formal adjudication requirements to apply to future legislation containing provisions for administrative hearings, unless Congress expressly exempts such requirements. The author argues against this presumption by contending that such a proposal promotes formalistic considerations over the fifty-year evolution of the APA in response to “contemporary needs and practical experience.”

The author argues that the APA mandates formal adjudication only by explicit statutory decree or in situations where courts or agencies assume they are required. For the balance of agency adjudication, the author argues that the APA leaves agencies to determine the specific procedures they should use through “practical, evolutionary, situational resolution and development.” In reviewing the APA’s fifty-year history, the article argues that neither agency deference nor an APA-default presumption has controlled court determinations on agency adjudications. In response to arguments about the inadequacy of informal adjudication, the article asserts that informal adjudicatory proceedings contain procedural safeguards. To the extent these safeguards are insufficient, the author contends that making specific changes are more desirable than forcing formal adjudication in every situation. To counter a presumed uniformity in adjudicative procedure if Congress adopted the Resolution, the article provides examples of how formal adjudication can be idiosyncratic and just as easily respond to programmatic needs. The author also argues that implementing the Resolution would create “a host of new uncertainties.” One example is whether the presumption would apply only to new statutes, or if it would also apply to already existing adjudicative processes if Congress amends a portion of a statute in a section unrelated to such adjudicatory provisions. The author concludes the article by challenging proponents of the Resolution to provide examples that would warrant the adoption of the presumption. Moreover, the author recommends that creating minimum criteria for informal hearings offers a better solution.