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*Taming the Tail That Wags the Dog: Ex Post and
Ex Ante Constraints on Informal Adjudication*

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Abstract by Raymond R. Janairo

The Administrative Procedure Act does not address nor does it prescribe procedures for informal adjudications. The APA does contain a few provisions that govern informal adjudications. For example, § 555, (entitled “Ancillary Matters”), acts as a catchall provision that defines “various procedural rights of private parties which may be incidental to rule making, adjudication, or the exercise of any other agency authority.” On the other hand, a person who is unhappy with the outcome of an informal adjudication does have ex post actions that he or she could pursue.

The author argues that these ex post measures – such as provisions in the APA itself, procedural and substantive due process challenges, and equal protection challenges – leave much to be desired. The absence of ex ante constraints on informal adjudication burdens a potential plaintiff’s ability to challenge irrational agency actions. The author advocates an amendment to § 554 of the APA that would provide minimal procedural safeguards in some informal adjudications. Taking into account the sheer volume of informal adjudications, the author advances criteria for limiting procedural safeguards to adjudications where individuals possess a concrete and particularized interest in the outcome of the proceeding. Concrete and particularized interests could include the initial grants or denials of benefits or rights of access to government facilities. The minimal procedural safeguards entail notice, opportunity to be heard, explanation of the agency’s decision and a method of internal agency appeal. Procedural regularity, respect for the administrative adjudicative system, and facility of judicial review are a few advantages the author presents in favor of imposing ex ante safeguards on informal adjudications.