



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Independent Research by Agency Adjudicators in the Internet Age

Committee on Adjudication

Proposed Recommendation for Committee | October 16, 2019

1 A fundamental characteristic of agency adjudications that incorporate a legally required
2 evidentiary hearing is the existence of an exclusive record for decision making.¹ The exclusive
3 record in adjudications regulated by the formal-hearing provisions of the Administrative
4 Procedure Act (APA) consists of the “transcript of testimony and exhibits, together with all
5 papers and requests filed in the proceeding.”² Many other adjudications in which an evidentiary
6 hearing is required by statute, regulation, or executive order, though not governed by those
7 provisions, also rely on an exclusive record similarly constituted.³ The exclusive record principle
8 seeks to ensure that parties know and can meet the evidence against them; promotes accurate,
9 evidence-based decision making; and facilitates administrative and judicial review.

10 Although an exclusive record consists primarily of materials submitted by the parties to a
11 proceeding, it may be appropriate or beneficial in certain circumstances for adjudicators to use
12 information obtained through their own and their staffs’ independent research. An “adjudicator,”
13 here, means any agency official or employee who presides over a legally required evidentiary
14 hearing or provides administrative review following an evidentiary hearing. Depending on her
15 responsibilities, any of the following may be an adjudicator under this definition: an

¹ Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act 20–21* (report to the Admin. Conf. of the U.S.), available at <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.

² 5 U.S.C. § 556(e).

³ Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, ¶ 1, 81 Fed. Reg. 94,314 (Dec. 23, 2016). The Conference’s recent recommendations divided adjudications into three categories: those governed by the APA’s formal-hearing provisions (referred to as Type A in the report accompanying Recommendation 2016-4); those that incorporate a legally required evidentiary hearing not regulated by the APA’s formal-hearing provisions (referred to as Type B); and those not subject to a legally required evidentiary hearing (referred to as Type C). This recommendation addresses only Type A and Type B adjudications. It does not address Type C adjudications.



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16 administrative law judge, an administrative judge, an administrative appeals judge, an agency
17 head, or a member of a body which comprises an agency.

18 “Independent research,” here, refers to an adjudicator’s search for, consideration of, or
19 reliance on documentary materials other than materials submitted by a party or interested
20 member of the public or adduced with a party’s participation, or legal research materials
21 traditionally consulted by an agency’s adjudicators, for purposes of resolving a proceeding
22 pending before the agency. Traditional legal research materials may include, but are not
23 necessarily limited to, federal statutes; agency rules, orders, and notices; and decisions of federal
24 courts and administrative agencies.

25 This definition of independent research encompasses a diverse range of practices. Official
26 notice offers the most familiar use of independent research practice. Official notice, which is the
27 administrative corollary of judicial notice, permits an adjudicator to accept a fact as true without
28 requiring a party to prove the fact through the introduction of evidence.⁴ In appropriate
29 circumstances, an adjudicator may do so on his or her own motion based on information
30 identified through independent research.⁵

31 In addition, independent research is sometimes used, for example, to learn background
32 information in preparation for a hearing, define terms, assess a party’s or witness’s credibility,
33 determine an expert’s qualifications, assess the reliability of an expert’s opinion, or interpret or
34 evaluate existing evidence. The facts identified through independent research may be
35 adjudicative (i.e., “the facts of the particular case”) or legislative (i.e., “those which have
36 relevance to legal reasoning and the lawmaking process”).⁶

37 Congress, courts, agencies, and scholars have long debated the extent to which agency
38 adjudicators may and should conduct independent research.⁷ While some forms of independent

Commented [A1]: For discussion: To what extent should the recommendation apply to agency heads or their delegates? When should agency policies on independent research be the same for initial decisionmakers and agency heads, and when may they be different? Should agency policies on independent research by agency heads take the same form as, or a different form from, policies for initial decisionmakers?

⁴ 5 U.S.C. § 556(e); 2 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.6 (6th ed. 2019).

⁵ See *Ohio Bell Tel. Co. v. Pub. Utilities Comm’n*, 301 U.S. 292, 300-06 (1937).

⁶ FED. R. EVID. 201(a) Advisory Committee Note.

⁷ See FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 71-73 (1941); Kenneth Culp Davis, *Official Notice*, 62 HARV. L. REV. 537 (1949).



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39 research are firmly rooted in longstanding agency practices, others have proven more
40 controversial in certain circumstances. The growth of the internet has amplified this debate in
41 recent years as adjudicators now have quicker and easier access to vastly greater amounts of
42 information.⁸ Information that is now available to adjudicators includes online versions of print
43 publications and public records, as well as newer forms of information such as openly editable
44 encyclopedias, blogs, social media, and personal and professional websites.

45 Although information available on the internet can be just as reliable as information
46 available in print publications, the nature of internet publication can make it more difficult for
47 adjudicators to determine the authenticity and reliability of certain internet information. The
48 impermanence of web publication may also affect the compilation of an exclusive record for
49 administrative and judicial review.

50 Various sources of law may govern independent research by agency adjudicators.
51 Perhaps the most important is constitutional due process. With regard to one application of
52 independent research, official notice, the Supreme Court has held that an agency may offer
53 parties a reasonable opportunity to rebut an officially noticed fact.⁹ Constitutional due process
54 also generally requires that an adjudicator be impartial.¹⁰ Whether an act of independent research
55 will affect an adjudicator's impartiality or raise doubts about the integrity of a proceeding may
56 depend on the specific features of an agency's adjudicatory program.¹¹

57 The APA also governs independent research in adjudications conducted according to its
58 formal-hearing provisions. For example, with respect to official notice, the APA provides that
59 "[w]hen an agency decision rests on official notice of a material fact not appearing in the
60 evidence of record, a party is entitled, on timely request, to an opportunity to show the

⁸ See generally Jeremy Graboyes, Internet Evidence in Agency Adjudication X-X (<Date>) (report to the Admin. Conf. of the U.S.), available at <URL>.

⁹ Ohio Bell Tel. Co., 301 U.S. at 300-06.

¹⁰ Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019); Louis J. Virelli III, *Recusal Rules for Administrative Adjudicators 7-8* (Nov. 30, 2018) (report to the Admin. Conf. of the U.S.), available at <https://www.acus.gov/report/final-report-recusal-rules-administrative-adjudicators>.

¹¹ See Recommendation 2018-4, *supra* note 10, ¶ 3.



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61 contrary.”¹² Materials identified through independent research may be hearsay.¹³ Although
62 hearsay is generally admissible in administrative hearings “up to the point of relevancy,”¹⁴ the
63 APA specifies that a party is entitled to “conduct such cross-examination as may be required for
64 a full and true disclosure of the facts.”¹⁵ The APA generally prohibits an employee who presides
65 at the reception of evidence from “consult[ing] a person or party on a fact in issue, unless on
66 notice and opportunity for all parties to participate.”¹⁶ Unless an exception applies, the APA also
67 generally prohibits an employee who participates or advises in the decision or review of a
68 decision from performing an investigative or prosecutorial function in the same or a factually
69 related case.¹⁷

70 Additional legal requirements may derive from agency-specific statutes; agency rules of
71 procedure, practice, and evidence; and agency precedential decisions. Even when independent
72 research would be legally acceptable, policy considerations may counsel in favor or against its
73 exercise. Policy considerations include adjudicative best practices such as those that promote
74 accuracy, consistency, and administrative efficiency in agency decision-making.

75 Because adjudications vary widely in their purpose, scope, complexity, and effects, a
76 categorical approach to independent research across federal adjudications is neither practicable
77 nor desirable. Some adjudications are adversarial; others are non-adversarial. In some contexts,
78 the government brings an action against a private party; in others, a private party petitions the
79 government, or the government resolves a dispute between private or public parties. Some
80 agencies apply the *Federal Rules of Evidence*; most others have developed evidentiary rules to
81 suit their specific needs. Adjudicators in some contexts have an affirmative duty to develop the
82 record or assist unrepresented parties; adjudicators in other contexts have no such obligation.

¹² 5 U.S.C. § 556(e).

¹³ A statement is “hearsay” if it is an out-of-court statement offered in evidence to prove the truth of the matter asserted. FED. R. EVID. 801(c).

¹⁴ *Richardson v. Perales*, 402 U.S. 389, 410 (1971).

¹⁵ 5 U.S.C. § 556(d).

¹⁶ *Id.* § 554(d).

¹⁷ *Id.*



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83 Some adjudicators play an active role questioning parties and witnesses and calling experts;
84 others do not. Adjudicators vary in the degree to which they are viewed as subject-matter experts
85 and the extent to which they have access to the expertise of agency policymakers.

86 This Recommendation encourages agencies to develop appropriate policies to address
87 independent research conducted by adjudicators. The policies could take different forms
88 depending on the circumstances. In some circumstances, an agency may consider publishing a
89 legislative rule or a rule of agency organization, procedure, or practice.¹⁸ In other circumstances,
90 an agency pronouncement that is categorized as a “guidance document,” including an
91 interpretative rule or general statement of policy, may be suitable.¹⁹ The appropriate form of an
92 agency’s policy on independent research will depend on its substance and intended effect and on
93 the unique circumstances of the agency’s adjudicatory program.

94 Although the emphasis of this recommendation is the particular phenomenon of
95 independent internet research, its recommended best practices apply equally to independent
96 research by other means since the principles for both must be the same.

Commented [A2]: For discussion: Should the recommendation and/or preamble distinguish between policies that will bind the agency (and therefore be enforceable against the agency by a private party if an adjudicator conducts independent research or uses independently obtained information contrary to a stated policy) and policies that do not?

¹⁸ See generally Admin. Conf. of the U.S., Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30,102 (July 8, 1992).

¹⁹ See generally Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017).



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RECOMMENDATION

97 Given the possibility that independent research, especially that conducted on the internet, could
98 result in actual or perceived bias or result in errors or inefficiencies, agencies should consider
99 implementing the following best practices, as appropriate, in consultation with adjudicators.

- 100 1. If agencies identify reliable sources or categories of sources that they determine would be
101 generally appropriate for adjudicators to independently consult, they should publicly
102 designate those sources or categories of sources.
- 103 2. If agencies permit adjudicators to independently consult sources that are not specifically
104 designated, they should consider **reestablishing and** publishing policies to help
105 adjudicators assess the authenticity and reliability of information. Agencies should
106 consider including at least the following indicia of authenticity and reliability,
107 particularly with respect to internet information:
 - 108 a. Whether the information was authored by an identifiable and easily authenticated
109 institutional or individual author who is considered an expert or reputable
110 authority on the subject;
 - 111 b. Whether the author published the information for a purely informational or
112 scholarly purpose (i.e., not for a commercial, partisan, or promotional purpose);
 - 113 c. Whether the information references other authorities which help to corroborate its
114 accuracy;
 - 115 d. Whether the meaning and significance of the information is clear;
 - 116 e. Whether the information is published in a final format rather than as a draft or in a
117 publicly editable format;
 - 118 f. Whether the information is current;
 - 119 g. Whether the owner or administrator of the website on which the information
120 appears is easily authenticated, is a recognized authority or resource, and
121 maintains the website for a purely informational or scholarly purpose (i.e., not for
122 a commercial, partisan, or promotional purpose);

Commented [A3]: For discussion: Should the recommendation clarify that “publish” means “make publicly available”?



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- 123 h. Whether information that appears on the website or in the publication undergoes
124 editorial or peer review; and
- 125 i. Whether other reliable resources contain the same information or cite to the
126 original information as reliable or authoritative.
- 127 3. Agencies should promulgate rules on official notice. They should specify the procedures
128 that adjudicators must follow when an agency decision rests on official notice of a
129 material fact and ensure that parties, in appropriate circumstances and upon timely
130 request, are provided a reasonable opportunity to rebut the fact; rebut an inference drawn
131 from the fact; and supplement, explain, or give different perspective to the fact. The
132 precise nature of an opportunity for rebuttal may depend on factors such as whether a fact
133 is general or specific to the parties, whether a fact is reasonably disputable or
134 indisputable, whether a fact is central or peripheral to the adjudication, and whether a
135 decision represents an initial or a final action of an agency.
- 136 4. If agencies intend that specific procedures will apply when adjudicators use
137 independently obtained information for purposes other than official notice of a material
138 fact, they should publish rules that clarify the distinction between official notice and other
139 uses of information independently obtained by an adjudicator and describe the applicable
140 procedures, if any. In particular, agencies should consider distinguishing, as appropriate,
141 legal research from factual research; and material facts from facts that are not material,
142 such as background facts.
- 143 5. Agency rules on independent research should specify when adjudicators must physically
144 or electronically put independently obtained materials, especially internet materials, in an
145 administrative record and explain what procedures adjudicators should follow to do so to
146 ensure they preserve evidence in a stable, permanent form.
- 147 6. When agency rules designate a source that is appropriate for independent research,
148 agencies should consider clearly identifying and providing access to the source on its
149 website. Agencies should ensure that all sources that they host on their websites are kept
150 up to date. If agencies provide hyperlinks to sources that are hosted on websites not



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- 151 maintained by the agency, they should ensure that both the hyperlinks on their own
152 websites and the materials on third-party sites remain current and accurate.
- 153 7. When agencies provide access to sources on their websites or on a third-party website,
154 they should include a plain-language statement that clearly explains how adjudicators and
155 parties may use the information contained in those sources.
- 156 8. When adjudicators intend to rely on independently obtained sources that are not available
157 to parties on or through an agency website, they should ensure that the parties have
158 reasonable access to the sources or to relevant excerpts from the sources.
- 159 9. Agencies or agency adjudicators, as appropriate, should take steps to ensure that
160 adjudicative staff are aware of agency policies on independent research, particularly with
161 respect to independent internet research, and that they comply with those policies.

Commented [A4]: Additional section for discussion.