ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Best Practices for Adjudication Not Involving an Evidentiary Hearing

Committee on Adjudication

Draft Recommendation for Committee | October 25, 2023

1 Federal administrative adjudications take many forms.[1] Many adjudications include a
2 legally required opportunity for an evidentiary hearing—that is, a proceeding "at which the
3 parties make evidentiary submissions and have an opportunity to rebut testimony and arguments
4 made by the opposition, and to which the exclusive record principle applies."[2] The
5 Administrative Conference has used the term "Type A adjudications" to refer to adjudications
6 that include such an opportunity and are regulated by the formal adjudication provisions of the
7 Administrative Procedure Act (APA).[3] Adjudications that include such an opportunity but are
8 not regulated by the APA's procedural provisions are referred to as "Type B adjudications." The

Commented [JL1]: I think [the footnote] would be better off without the last sentence. I think some of those actions on the border of adjudication and rulemaking are so unclear (mainly thanks to the inclusion of "particular applicability" in the definition of rule) that mentioning them creates more cloudiness than clarity. I like the definition in the first sentence, and things like priority-setting don't really involve a "dispute or claim." In addition, managing public lands could include camping permits and "land use decisions" mentioned as covered in the second paragraph of the preamble. So I suggest relying on the first sentence alone.

Commented [MW2]: Should the first sentence note that "legally required" means legally required by statute, regulation, or executive order? That might lay a better foundation for lines 11–12.

[1] The term "adjudication" as used in this Recommendation refers to the process for formulating an order that is "a decision by government officials made through an administrative process to resolve a claim or dispute between a private party and the government or between two private parties arising out of a government program." MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 8 (2019). ~~This definition excludes "policy implementation" actions—such as priority setting, managing public lands and institutions, and conducting environmental assessments—which are sometimes considered "adjudication" for purposes of the Administrative Procedure Act. *See id.* at 9–10; *cf.* 5 U.S.C. § 551(7) (defining "adjudication" more broadly to include licensing and any other agency action that is not a rule).~~

[2] Asimow, *supra* note 1, at 10. The "exclusive record principle" means that the decision maker is "confined to considering evidence and arguments from the parties produced during the hearing process (as well as matters officially noticed) when determining factual issues." *Id*.

[3] 5 U.S.C. §§ 554, 556–557.

Conference recommended best practices for Type B adjudications in Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*.[4]

In many federal administrative adjudications, however, no constitutional provision, statute, executive order, or regulation grants parties the right to an evidentiary hearing. Proceedings of this type, referred to in Recommendation 2016-4 as "Type C adjudications," include many agency decisions regarding applications for grants, actions taken in regulating banks, applications for licenses or permits to build pipelines or dams, certain decisions relating to immigration and naturalization, national security, land use decisions, and a wide variety of other discretionary decisions.

There are many policy reasons why adjudications might be conducted without a legally required opportunity for an evidentiary hearing, though such reasons are beyond the scope of this Recommendation. The stakes in disputes resolved through Type C adjudication vary widely, but whether they are low or high, each decision matters greatly to the parties. For many members of the public, Type C adjudication by government agencies is the face of justice. Accordingly, decision making in such cases must be accurate, efficient, and both fair and perceived to be fair, regardless of the stakes.

~~There is n~~No uniform set of procedures ~~that~~ applies to all Type C adjudications, nor could there be. Some characteristics are common, however. Type C adjudication often consists of document exchanges and submission of research studies, oral arguments, public hearings, conferences with staff, interviews, negotiations, examinations, and inspections, but not evidentiary hearings. Frequently, the decision maker in a Type C adjudication is involved in the underlying investigation or other preliminary proceedings. Ex parte communication between the parties and the decisionmakers is routine, and decision makers are free to rely on their own knowledge and consider materials not introduced as evidence.[5] ~~Most notably, a~~ Agencies that

Commented [JB3]: In the paragraph starting on line 24, I suggest switching the order so that the text leads with the positive, i.e. what agencies do and then concludes with the negative, what agencies do not do.

Commented [MNN4]: Doesn't this go without saying given what we've said above? Also note Russell's point about whether "often" modifies this phrase… I suggest deleting the phrase.

Commented [RW5]: Does "often" in line 29 modify "not evidentiary hearings" in line 31? That is, does the sentence say that Type C adjudication does not "often" consist of evidentiary hearings, implying that sometimes they do, contrary to the report and the title of the recommendation?

[4] 81 Fed. Reg. 94,314 (Dec. 23, 2016).

[5] Michael Asimow, Fair Procedure in Informal Adjudication (Sept. 29, 2023) (draft report to the Admin. Conf. of the U.S.)

33 engage in Type C adjudication typically employ dispute resolution methodologies that lack the
34 procedures typical of evidentiary hearings, including such as the opportunity to cross examine
35 witnesses, the prohibition of ex parte communications, the separation of adjudicative from
36 investigative and prosecutorial functions, and the exclusive record principle. In many cases, such
37 as inspections or sanctions, the party may receive a decision as the first step in the process. Type
38 C adjudication often consists of document exchanges and submission of research studies, oral
39 arguments, public hearings, conferences with staff, interviews, negotiations, examinations, and
40 inspections. It does not, however, but notinclude evidentiary hearings. Frequently, the decision
41 maker in a Type C adjudication is involved in the underlying investigation or other preliminary
42 proceedings. Ex parte communication between the parties and the decisionmakers is routine, and
43 decision makers are free to rely on their own knowledge and consider materials not introduced as
44 evidence.[6]

45 Type C adjudication differs from Types A and B adjudication in fundamental ways. In
46 Types A and B adjudication, agency staff members typically conduct an investigation of possible
47 sanctions against a private party or whether to grant an application from a private party for a
48 benefit or a license. The staff members then make a "front-line decision" that the agency should
49 impose a sanction or deny a benefit or a license. If the private party does not acquiesce, it is
50 entitled to an evidentiary hearing before a neutral decisionmaker. This decision might be called
51 the agency's "primary decision." Typically, the private party can seek "reconsideration" of the
52 primary decision within the agency, often by the agency heads. In Type C adjudication, however,
53 the staff member who makes the front-line decision often also makes the primary decision.
54 Typically, the private party is entitled to seek reconsideration of that primary decision within the
55 agency, often by a different staff member. These fundamental differences must be reflected in
56 recommendations for best practices in Type C adjudication.

57 Agencies rarely have unfettered discretion to craft and carry out procedures for Type C
58 adjudications.While not subject to the requirement that a decision be preceded by an evidentiary

Commented [MNN6]: I had to read this a couple times to be sure I was following, so there may be a better way to make this point. I've taken a stab...

Commented [MG7]: Committee on Style added this to provide context for Recommendation paragraphs 1 and 2 below.

Commented [RW8]: Does "often" in line 29 modify "not evidentiary hearings" in line 31? That is, does the sentence say that Type C adjudication does not "often" consist of evidentiary hearings, implying that sometimes they do, contrary to the report and the title of the recommendation?

Commented [MA9]: Proposed insertion.

[6] Michael Asimow, Fair Procedure in Informal Adjudication (Sept. 29, 2023) (draft report to the Admin. Conf. of the U.S.)

hearing. ~~The decision making process in~~ Type C adjudications may be~~is~~ subject to other legal requirements~~restraints other than the requirement that the decision be preceded by an evidentiary hearing~~. The Due Process Clause of the Constitution may require certain minimum procedures for Type C adjudications involving constitutionally protected interests in life, liberty, or property.[7] ~~And even when the Due Process Clause is not implicated~~In addition, agencies conducting Type C adjudication typically must observe certain general provisions of the APA, in particular 5 U.S.C. §§ 555~~,~~[8] and 558, and ~~may~~ are ~~be~~ subject to other generally applicable ~~and agency- or program-specific~~ statutes addressing the conduct of federal employees, rights of representation,[9] ombuds,[10] and other matters. The procedures employed by agencies conducting Type C adjudication are also subject to agency-specific statutes and procedural regulations. Finally~~Additionally~~, judicial review is available for many Type C adjudications.

~~At the same time, however, t~~These procedural constraints, however, may be minimal. Due process, the APA, and other external sources of law often ~~may~~ do not specifically prescribe the details of agency procedures ~~with great much, if any, specificity~~, and judicial review may be ~~impractical~~ unrealistic ~~given high caseloads or~~ because the costs of judicial review exceed the value of the interests at stake.[11]

Commented [JB10]: Agencies with the highest caseloads, e.g. social security and immigration, have judicial review and a high caseload is not, in my experience, a reason not to have judicial review. Maybe internal administrative review, but not judicial review.

For these reasons, agency-adopted rules and policies offer the best mechanisms for agencies to establish procedural protections for parties, ~~and~~ promote fairness and participant

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[7] Mathews v. Eldridge, 424 U.S. 319 (1976).

[8] PBG Corp. v. LTV Corp. 496 U.S. 633 (1990).

[9] See Asimow, supra note 5 at 62 for discussion of the right to representation before federal agencies, including the availability of lay representation under many agencies' procedural regulations.

[10] *See* Admin. Conf. of the U.S., Recommendation 2016-5, The Use of Ombuds in Federal Agencies, 81 Fed. Reg. 94316 (Dec. 23, 2016).

[11] Asimow, *supra* note 5, at 8-9.

77 satisfaction, and try to ensure the efficient and effective functioning of their adjudicative
78 systems. The public availability of such rules and policies also facilitates external oversight.

79 This Recommendation encourages agencies to adopt regulations describing their
80 procedures for Type C adjudication and identifies a set of best practices for Type C adjudication
81 that agencies can implement through regulations, guidance documents, ~~administrative~~ staff
82 manuals, and other ~~means~~procedural instructions. These practices are grounded in existing law
83 and procedural regulations and practices. Many agencies conducting Type C adjudications
84 already meet or exceed these best practices. Agencies considering adopting or modifying Type C
85 adjudication procedures should engage in a situation-specific analysis and tailor these best
86 practices to their individual systems.

RECOMMENDATION

Notice of Proposed Action

87 1. Agencies conducting Type C adjudications should notify parties of the staff's front-
88 line decision, including the reasons for rejecting the application or for imposing a
89 sanction.
90 2. Such notice should provide sufficient detail and be given in sufficient time to allow
91 parties to contest the front-line decisions and submit evidence to support their
92 position. This notice should provide parties with, as applicable:
93 i. Whether the party has a second chance to achieve compliance;
94 ii. The procedural details by which the agency's front-line decision can be
95 challenged before the agency decisionmaker and whether the decision is
96 subject to reconsideration by different staff members;
97 iii. The amount of time before further agency action or deadlines; and
98 iv. Access to materials in the agency's file when needed for presenting their
99 arguments.
100 3. Such notice should, as applicable, be provided in languages other than English and be
101 publicized to affected stakeholders other than the party.

Commented [RW11]: Or "facilitate" (as in the next sentence).

Commented [MW12]: I'm not sure that the recommendation is sufficiently clear and consistent in identifying the form of the legal pronouncement in which various matters should be addressed, especially matters that we think should be addressed in what the recommendation calls "regulations." See lines 52–55, 124–137, and 138–146. In several past adjudication-related recommendations, ACUS has specified exactly what matters should be addressed in regulations. See especially 2016-4, Evidentiary Hearings Not Required by the Administrative Procedure Act. (Some recommendations state that certain matters should be addressed in CFR-codified "rules of practice" rather than in regulations. See, e.g., 2020-3, Precedential Decision Making in Agency Adjudication § 17.)

"As part of their rules of practice, published in the Federal Register and codified in the Code of Federal Regulations, agencies should adopt rules regarding precedential decision making."

Commented [MW13]: The recommendation could be more consistent in identifying the relevant legal authorities in which adjudication procedures might be set forth. See especially lines 54-55 (listing regulations, guidance documents, and administrative staff manuals), lines 124-125 (listing regulations, guidance documents, staff manuals, and other procedural instructions), lines 126–127 (referring to agency rules or guidance), and lines 150–151 (listing guidance documents, staff manuals, procedural instructions, and FAQs). See, in addition to the above-cited recommendations, Recommendation 2018-5, Public Availability of Adjudication Rules, on terminology.

Commented [MG14]: The Committee asked the Committee on Style to modify this section to add more context to the procedural standing of Type C adjudications.

Commented [MG15]: The committee on style used this term, and "primary decision" below, to conform with Michael Asimow's proposed insertion in the preamble. If that insertion is not adopted by the Committee, the Committee on Style recommends alternative language here, such as "preliminary assessment" or "proposed decision" or both.

Opportunity to Submit Evidence and Argument

4. Agencies should allow parties in Type C adjudications to furnish decision makers with evidence and arguments. Depending on the stakes involved, the types of issues involved, as well as the agency's caseload and decisional resources, the process for furnishing evidence and argument may include written or electronic submissions, document exchanges, or informal conferences.
5. When credibility issues are presented, a party should be permitted an opportunity to rebut information provided by adverse witnesses.

Representation

6. Agencies should allow participants in their Type C adjudicative systems to be represented by a lawyer or a lay person with expertise in the program administered by the agency.
7. Agencies should allow participants in their Type C adjudicative systems to obtain assistance from a friend, family member, or other individual, including assistance in presenting their case to the agency.
8. Agencies should make their proceedings as accessible as possible to self-represented parties by providing plain language resources, such as FAQs, and other appropriate assistance, such as an agency office dedicated to helping the public navigate agency processes.

Decisionmaker Impartiality

9. Neutrality standards must be appropriately tailored to Type C adjudication systems that may be conducted by decision makers who engage in their own investigations or participate in investigative teams and may have prior involvement in the matter.
10. Agency regulations should require the disqualification of employees engaged in the adjudicatory process who have a financial interest in particular matters they are

Commented [MG16]: The Committee requested that the Committee on Style consider whether to include a footnote here referencing the Model Adjudication Rules (rev. 2018). The Committee on Style notes the Model Rules define "adjudication" as "a trial-type proceeding … that offers an opportunity for fact-finding before an adjudicator, whether or not an administrative law judge (ALJ)." As this definition does not apply to most if not all of the adjudications discussed in this Recommendation, the Committee on Style recommends not referencing the Model Rules.

Commented [JL17]: Recommendation #3 should acknowledge that section 555 already entitles a party "to appear in person or by or with counsel or other duly qualified representative in an agency proceeding." For that matter section 555 contains some other rights that would apply in a Type C adjudication. This can be handled in the preamble.

Commented [RW18]: Does this say the same thing with fewer words?

Commented [JL19]: When you say "an agency office dedicated to helping the public navigate agency processes," aren't you referring to an ombuds? Cross reference the later recommendations on ombuds?

Commented [MW20]: Should we reference Recommendation 2018-4, Recusal Rules for Administrative Adjudicators? (Compare § 23 (lines 157–165), which references and basically incorporates Recommendation 2021-10, Quality Assurance Systems in Agency Adjudication.) Accounting for any differences between adjudications that require a hearing (the subject of 2018-4) and adjudications that don't, is this recommendation otherwise consistent with 2018-4? One inconsistency I've spotted so far: 2018-4 uses the word "recusal" rather than disqualification. The terminology, as I recall, was debated extensively, and "recusal" used deliberately.

Commented [RW21]: As written, "inquisitorial rather than adversarial . . ." is an essential clause, so the sentence says that the standards must be appropriately tailored only for those Type C systems "that are inquisitorial . . . .". Is that the intended meaning? If not, make it "adjudication systems, which ~~that~~ are . . ."

124 investigating or deciding. Agencies should tailor their regulations on disqualification
125 to the specific ethics issues they confront.
126 11. Agency regulations should require disqualification of employees whom stakeholders
127 may reasonably view as not impartial.
128 12. Where Type C adjudication could involve serious sanctions, agencies should consider
129 adoption of internal separation of functions and limitations on ex parte
130 communication.

Statement of Reasons

131 13. Agencies conducting Type C adjudications should provide oral or written statements
132 that follow federal plain language guidelines setting forth the rationale for the
133 decision including the facts and other reasons upon which the decision is based.

Administrative Review

134 14. Agencies should provide for administrative review of their primary decisions by a
135 higher-level staff member or other reviewers, unless it is impracticable because of
136 high caseload, low stakes, lack of available staff, or time constraints.

Procedural Regulations

137 15. Agency regulations should specify the procedural details of each scheme of Type C
138 adjudication that the agency conducts. Notwithstanding section 553(b)(A), agencies
139 should use notice-and-comment rulemaking for the adoption of significant procedural
140 regulations to give affected stakeholders a chance to weigh in on the tradeoffs
141 necessarily inherent in adopting adjudicatory procedures.
142 16. Agencies should ensure their guidance documents, staff manuals, procedural
143 instructions, and FAQs addressing the Type C adjudication system are user-friendly,
144 follow federal plain language guidelines, and are easily accessible on the agency's
145 website.

Commented [JB22]: I wouldn't want to require agencies to require disqualification every time someone claims that the decisionmaker is not impartial.

Commented [MA23]: I think this is overbroad. It would change a lot of Type C functions like land use, bank regulation, or new drug regulation. Perhaps it should be limited to cases involving personal culpability and credibility issues.

Commented [JB24]: In recommendation number 10, I think we could convey the thought in simpler language as follows, in the first sentence. I also feel a bit queasy about the second sentence, it might be too much to expect and perhaps we should consider deleting it. The third sentence leaves the detail and formality to the agency based on the context, which I think is more appropriate than turning it into something like the concise general statement of basis and purpose.

Commented [MA25]: Paragraph 18 concerns notice, not procedural regulations.

Commented [MA26]: This is where procedural regulations starts.

Commented [MW27]: As I recall, ACUS recommendations generally include a cost-benefit qualification to the customary recommendation that agencies use notice and comment. (No exception is made for "significant regulations." This qualification goes back at least to Recommendation 92-1, The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements.

"[T]here can be costs to the agency in using notice-and-comment procedures including the time and effort of agency personnel, the cost of Federal Register publication, and the additional delay in implementation that results from seeking public comments and responding to them. For significant procedural rule changes, the benefits seem likely to outweigh the costs; but this may not be the case for minor procedural amendments. Thus, unless the costs outweigh the benefits, we strongly encourage agencies voluntarily to use notice and comment even where an APA exemption applies."

Commented [MW28]: Should regulations be among the documents written in plain English? Is the implied carve-out intended? If so, on what basis?

Ombuds

> **Commented [MG29]:** The Committee requested the Committee on Style to reconsider how it addressed Ombuds in the Recommendation.

146 17. Agencies with an ombuds program should ensure that the ombuds is empowered to
147 handle complaints about Type C adjudications.
148 18. Agencies without an ombuds program but with sufficient caseloads or significant
149 stakes in their adjudicative programs should establish such a program.
150 Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, provides best
151 practices for the establishment and standards of such programs.

> **Commented [JL30]:** Not to be too picky, but Recommendation 23's reference to the 2021 ACUS recommendation is preambular rather than a recommendation.

152 19. Agencies with smaller caseloads, lower stakes, or lack of available staff, should
153 consider sharing an ombuds program with other similarly situated agencies to address
154 resource constraints.
155 20. Agencies that do not have an ombuds program and do not choose to establish an
156 ombuds program should provide less formal procedures for allowing parties to submit
157 feedback or complaints, such as through an agency portal or dedicated email address.

Quality Assurance

158 21. Agencies with Type C adjudication systems should establish methods for assessing
159 and improving the quality of their decisions to promote accuracy, efficiency, fairness,
160 the perception of fairness, and other goals relevant to their adjudication systems.
161 Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*,
162 provides best practices for the design and implementation of such systems.
163 Depending on the caseload, stakes, and available staff of an adjudicative system, such
164 methods may include formal quality assessments and informal peer review on an
165 individual basis, sampling and targeted case selection on a systemic basis, and case
166 management systems with data analytics and artificial intelligence tools.

> **Commented [JL31]:** Not to be too picky, but Recommendation 23's reference to the 2021 ACUS recommendation is preambular rather than a recommendation.