

Comment from Special Counsel Jeffrey Lubbers on *Best Practices for Adjudication not Involving an Evidentiary Hearing*
October 9, 2023

Since I will not be able to join the meeting until about 2:30, I thought I would give you a few quick comments after reading the recommendation (and Professor Asimow's preferred changes).

I generally agree with his caution that we should try to avoid across-the-board recommendations that would increase the formalization of Type C Adjudications. There are degrees of informality even within the type C category. As his report points out on page 8:

On the trivial end of the spectrum, consider a forest ranger's decision about who gets the last campsite, a postal clerk's decision about the cost of mailing a package, or an agency's assignment of an employee to an undesirable parking space. These adjudicatory decisions are too trivial to merit adoption of required or recommended administrative procedures.

These don't warrant any additional formality. Thus we should either wall off these "trivial" ones or at least think whether each of the proposed recommendations really fit them. I'm also a little concerned that such a long list of recommendations for Type C adjudications might seem like overkill to some of our member agencies.

Some more specific points:

Footnote 1—I think it 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.

In line 42, why not footnote "ombuds" with "See Admin. Conf. of the U.S., Recommendation 2016-5, The Use of Ombuds in Federal Agencies, 81 Fed. Reg. 94316 (Dec. 23, 2016)."

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.

Recommendation #5: 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?

Recommendation #9. Shouldn't this apply in non-inquisitorial (i.e. adversary) proceedings even more so?

If “the heading “Administrative Review” is changed to “Notice” as Michael suggests, then perhaps recommendation 18 should be moved under this heading.

Recommendation 18(vi.) would seem to implicate section 558.

Recommendation 20 perhaps should say “notwithstanding section 553(b)(A)” (the procedural rule exemption from notice-and-comment rulemaking).

Not to be too picky, but Recommendation 23’s reference to the 2021 ACUS recommendation is preambular rather than a recommendation.

I look forward to catching up with the committee at around 2:30.