



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Internet Evidence in Agency Adjudication

### Committee on Adjudication

#### Proposed Recommendation for Committee | September 26, 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.<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup> The exclusive record principle  
8 ensures that parties know and can meet the evidence against them; promotes accurate, evidence-  
9 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. “Independent  
13 research,” for purposes of this Recommendation, refers to an adjudicator’s search for,  
14 consideration of, or reliance on documentary materials other than materials submitted by a party  
15 or interested member of the public or adduced with a party’s participation, or materials consulted

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<sup>1</sup> 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>.

<sup>2</sup> 5 U.S.C. § 556(e) (2019).

<sup>3</sup> Recommendation 2016-4, *supra* note 1, ¶ 1. The Conference’s recent recommendations divided adjudications into three categories: those governed by the APA’s formal-hearing provisions of the APA (referred to as Type A the report accompanying Recommendation 2016-4, *supra* note 1); 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 for legal research purposes, for purposes of resolving a proceeding pending before the  
17 adjudicator.

18 This definition of independent research encompasses a diverse range of practices. Official  
19 notice offers the most familiar use of independent research practice. Official notice, which is the  
20 administrative corollary of judicial notice, permits an adjudicator to accept a fact as true without  
21 requiring a party to prove the fact through the introduction of evidence.<sup>4</sup> In appropriate  
22 circumstances, an adjudicator may do so on his or her own motion based on information  
23 identified through independent research.<sup>5</sup>

24 Besides official notice, adjudicators may, in appropriate circumstances, wish to conduct  
25 independent research to learn background information in preparation for a hearing; define the  
26 ordinary or technical meaning of terms; assess a party’s or witness’s credibility; determine an  
27 expert’s qualifications; assess the reliability of an expert’s opinion; or interpret or evaluate  
28 existing evidence. The facts identified through independent research may be adjudicative (i.e.,  
29 “the facts of the particular case”) or legislative (i.e., “those which have relevance to legal  
30 reasoning and the lawmaking process”).<sup>6</sup>

31 Congress, courts, agencies, and scholars have long debated the extent to which agency  
32 adjudicators may and should conduct independent research.<sup>7</sup> While some forms of independent  
33 research are firmly rooted in longstanding agency practices, others have proven more  
34 controversial in certain circumstances. The growth of the internet has amplified this debate in  
35 recent years as adjudicators now have quicker and easier access to vastly greater amounts of  
36 information.<sup>8</sup> Information that is now available to adjudicators includes online versions of

**Commented [JG1]:** The Committee may wish to consider whether the definition of “independent research” should exclude independent legal research. The Committee may also wish to consider what constitutes independent legal research and what distinguishes it from independent *factual* research (e.g., consulting dictionaries to interpret statutory or regulatory terms, agency guidance materials, the regulations or guidance materials of other agencies, foreign law, law review articles, etc.).

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

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

<sup>6</sup> FED. R. EVID. 201(a) Advisory Committee Note.

<sup>7</sup> 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).

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



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37 traditional print publications and public records, as well as newer forms of information such as  
38 openly editable encyclopedias, blogs, social media, and personal and professional websites.

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

44 Various sources of law may govern independent research by agency adjudicators.  
45 Perhaps the most important is constitutional due process. For example, an agency may take  
46 official notice of independently obtained factual information so long as it offers the parties a  
47 reasonable opportunity to show the contrary.<sup>9</sup> What constitutes a reasonable opportunity to show  
48 the contrary will depend on whether a fact is adjudicative or legislative and the degree to which  
49 it is disputed or critical to a case's outcome.<sup>10</sup> Constitutional due process also generally requires  
50 that an adjudicator be impartial.<sup>11</sup> Whether an act of independent research will render an  
51 adjudicator impartial or raise doubt about the integrity of a proceeding may depend on the  
52 specific features of an agency's adjudicatory program.<sup>12</sup>

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

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<sup>9</sup> Ohio Bell Tel. Co., 301 U.S. at 300-06.

<sup>10</sup> HICKMAN & PIERCE, *supra* note 4, § 9.6.1.

<sup>11</sup> 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>.

<sup>12</sup> See Recommendation 2018-4, *supra* note 11, ¶ 3.



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57 contrary.”<sup>13</sup> Materials identified through independent research may be hearsay.<sup>14</sup> Although  
58 hearsay is generally admissible in administrative hearings “up to the point of relevancy,”<sup>15</sup> the  
59 APA specifies that a party is entitled to “conduct such cross-examination as may be required for  
60 a full and true disclosure of the facts.”<sup>16</sup> Unless an exception applies, the APA also prohibits an  
61 employee who performed an investigative or prosecutorial function in a case from participating  
62 or advising in the decision or review of the same or a factually related case except as a witness or  
63 counsel.<sup>17</sup> Whether an act of independent research constitutes a prohibited investigation or  
64 prosecution may depend on the specific features of an agency’s proceedings.<sup>18</sup>

65 Additional legal requirements may derive from agency-specific statutes; agency rules of  
66 procedure, practice, and evidence, especially those that adopt or incorporate the *Federal Rules of*  
67 *Evidence*; and agency precedential decisions. Even when independent research would be legally  
68 acceptable, policy considerations may counsel in favor or against its exercise. Policy  
69 considerations include adjudicative best practices such as the need for accuracy, consistency, and  
70 administrative efficiency in agency decision-making.

71 Because adjudications vary widely in their purpose, scope, complexity, and effects, a  
72 one-size-fits-all-approach to independent research across federal adjudications is neither  
73 practicable nor desirable. Some adjudications are adversarial; others are non-adversarial. In some  
74 contexts, the government brings an action against a private party; in others, a private party  
75 petitions the government, or the government resolves a dispute between private parties. Some  
76 agencies have adopted the *Federal Rules of Evidence*; others have developed evidentiary rules to  
77 suit their specific needs. Adjudicators in some contexts have an affirmative duty to develop the

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<sup>13</sup> 5 U.S.C. § 556(e) (2019).

<sup>14</sup> 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).

<sup>15</sup> *Richardson v. Perales*, 402 U.S. 389, 410 (1971).

<sup>16</sup> 5 U.S.C. § 556(d) (2019).

<sup>17</sup> *Id.* § 554(d) (2019). This prohibition does not apply in determining applications for initial licenses; to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carrier; or to the agency or member or members of the body comprising the agency. *Id.*

<sup>18</sup> *Graboyes*, *supra* note 8, at X–X.



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78 record or assist unrepresented parties; adjudicators in other contexts have no such obligation.  
79 Some adjudicators play an active role questioning parties and witnesses and calling experts;  
80 others do not. Adjudicators vary in the degree to which they are viewed as subject-matter experts  
81 and the extent to which they have access to the expertise of agency policy makers.

82 This recommendation encourages agencies that conduct adjudications involving a legally  
83 required evidentiary hearing to develop appropriate rules on independent research. The rules  
84 could take different forms depending on the circumstances.<sup>19</sup> In some circumstances, an agency  
85 may consider publishing a legislative rule (which generally requires an agency to solicit public  
86 comment) or a rule of agency organization, procedure, or practice (which does not). In other  
87 circumstances, an agency pronouncement that is categorized as a “guidance document,”  
88 including an interpretative rule or general statement of policy, may be suitable. The appropriate  
89 form of an agency’s rule on independent research will depend on the rule’s substance and  
90 intended effect and on the unique circumstances of the agency’s adjudicatory program.

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

### RECOMMENDATION

The following recommendations offer best practices for agencies to consider when they identify patterns of independent research by agency adjudicators. Agencies should consider implementing the following best practices, as appropriate, in consultation with adjudicators.

#### Identifying the Need for Rules on Independent Research

- 94 1. If agencies find that adjudicators regularly conduct independent research on a specific  
95 subject, they should consider whether rules can be developed to resolve or reduce

<sup>19</sup> See 5 C.F.R. § 551(4) (2019) (defining a “rule” as “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requires of an agency”).

**Commented [JG2]:** The Committee may wish to consider the instrument by which the agency announces this policy (e.g., legislative rule, procedural rule, or guidance document).



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- 96 adjudicators' need for independently obtained information. In some cases, this may take  
97 the form of a legislative rule, for example one that defines a term or resolves uncertainty.
- 98 2. Agencies **should identify** those circumstances in which independent research is likely to  
99 result in actual or perceived bias or partiality, including personal animus against a party  
100 or group to which that party belongs or prejudgment of the adjudicative facts at issue in  
101 the proceeding, or otherwise result in unfairness. In determining whether particular  
102 exercises of independent research are likely to have those effects, agencies should  
103 consider the specific features of their adjudicative proceedings and institutional needs.  
104 For example, an adjudicator's recognized duty to develop the record may permit  
105 independent research in some instances in which independent research would otherwise  
106 place an undue or unfair burden on the subject of an agency enforcement action. Hearsay  
107 evidence may be more acceptable in some circumstances than in others.
- 108 3. Agencies should identify those circumstances in which independent research is likely to  
109 be inefficient or result in inaccurate outcomes making or inconsistencies across different  
110 cases. In determining whether particular exercises of independent research are likely to  
111 have those effects, agencies should consider the specific features of their adjudicative  
112 proceedings and institutional needs, including:
- 113 a. Whether sufficient resources are available for adjudicators or adjudicative staff to  
114 conduct independent research given an agency's adjudicative caseload volume  
115 and capacity and other administrative priorities;
  - 116 b. Whether it will be difficult or excessively time-consuming for adjudicators or  
117 adjudicative staff to locate certain information through independent research;
  - 118 c. Whether it will be difficult or excessively time-consuming for adjudicators or  
119 adjudicative staff to establish the authenticity and reliability of information for  
120 which independent research is being conducted;
  - 121 d. Whether an adjudicator can more accurately obtain the desired information from  
122 the parties or from an expert witness;
  - 123 e. Whether independent research will reopen a closed administrative record or  
124 require a supplemental hearing.

Commented [JG3]: See comment above.



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### **Developing Rules and Procedures for Independent Research**

- 125 4. If agencies identify reliable sources or categories of sources that it determines would be  
126 appropriate for adjudicators to independently consult, they should publish rules that  
127 identify the sources or categories of sources and state that adjudicators may  
128 independently consult them for purposes of an adjudication. These rules should clarify  
129 whether adjudicators may consult other, unenumerated resources related to the subject.
- 130 5. Agencies should promulgate rules on official notice. They should specific the procedures  
131 that an adjudicator must follow when an agency decision rests on official notice of a  
132 material fact and ensure that parties, in appropriate circumstances and upon timely  
133 request, are provided a reasonable opportunity to rebut the fact; rebut an inference drawn  
134 from the fact; and supplement, explain, or give different perspective to the fact. The  
135 precise nature of an opportunity for rebuttal may depend on factors such as whether a fact  
136 is general or specific to the parties, whether a fact is reasonably disputable or  
137 indisputable, whether a fact is central or peripheral to the adjudication, and whether a  
138 decision represents an initial or a final action of an agency.
- 139 6. If agencies intend that specific procedures will apply when adjudicators use  
140 independently obtained information for purposes other than official notice of a material  
141 fact, they should publish rules that clarify the distinction between official notice and other  
142 uses of information independently obtained by an adjudicator and describe the applicable  
143 procedures, if any. In particular, agencies should consider distinguishing, as appropriate,  
144 legal research from factual research; and material facts from facts that are not material,  
145 such as background facts.
- 146 7. Agency rules on independent research should specify when adjudicators must physically  
147 or electronically put independently obtained materials, especially internet materials, in an  
148 administrative record and explain what procedures adjudicators should follow to do so to  
149 ensure they preserve evidence in a stable, permanent form.
- 150 8. If agencies' rules permit adjudicators to independently consult sources that are not  
151 specifically designated in an agency rule, they should consider publishing rules to help



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152 adjudicators assess the authenticity and reliability of internet information. Agencies  
153 should consider including at least the following indicia of authenticity and reliability in  
154 such rules:

- 155 a. Whether the information was authored by an identifiable and easily authenticated  
156 institutional or individual author who is considered an expert or reputable  
157 authority on the subject;
- 158 b. Whether the author published the information for a purpose other than commerce,  
159 advocacy, or promotion;
- 160 c. Whether the author developed the information according to a sound methodology;
- 161 d. Whether the information references other authorities which help to corroborate its  
162 accuracy;
- 163 e. Whether the meaning and significance of the information is clear and not  
164 susceptible to misinterpretation;
- 165 f. Whether the information is published in a final format rather than a continuously  
166 or openly editable format;
- 167 g. Whether the information remains current;
- 168 h. Whether the information has been available for a long enough period to allow  
169 erroneous information to be corrected or potentially misleading information to be  
170 contextualized;
- 171 i. Whether the owner or administrator of the website on which the information  
172 appears is easily authenticated, is a recognized authority or resource, and  
173 maintains the website for a purpose other than commerce, advocacy, or  
174 promotion;
- 175 j. Whether information that appears on the website undergoes editorial or peer  
176 review;
- 177 k. Whether the information is of a type that ordinarily appears on the website or  
178 other, similar websites; and





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- 179 1. Whether other resources characterized by sufficient indicia of reliability contain  
180 the same information or cite to the original information as reliable or  
181 authoritative.

### **Providing Access to Sources Used for Independent Research**

- 182 9. When an agency rule designates a source that is appropriate for independent research, the  
183 agency should consider clearly identifying and providing access to the source on its  
184 website. Agencies should ensure that all sources that they host on their websites are kept  
185 up to date. If agencies provide hyperlinks to sources that are hosted on websites not  
186 maintained by the agency, they should ensure that both the hyperlinks on their own  
187 websites and the materials on third-party sites remain current and accurate.
- 188 10. When agencies provide access to sources on their websites or on a third-party website,  
189 they should include a plain-language statement that clearly explains how adjudicators and  
190 parties may use the information contained in those sources.
- 191 11. If an adjudicator intends to rely on an independently obtained source that is not available  
192 to the parties on or through an agency website, the adjudicator should ensure that the  
193 parties have reasonable access to the source or to a relevant excerpt from the source.