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

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

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

“Independent research,” here, refers to an adjudicator’s search for, consideration of, or reliance on documentary materials other than materials submitted by a party or interested member of the public or adduced with a party’s participation, or legal research materials traditionally consulted by an agency’s adjudicators, for purposes of resolving a proceeding pending before the agency. Traditional legal research materials may include, but are not necessarily limited to, federal statutes; agency rules, orders, and notices; and decisions of federal courts and administrative agencies. [17]

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

In addition, independent research is sometimes used, for example, to learn background information in preparation for a hearing, define terms, assess a party’s or witness’s credibility, determine an expert’s qualifications, assess the reliability of an expert’s opinion, or interpret or evaluate existing evidence. The facts identified through independent research may be adjudicative (i.e., “the facts of the particular case”) or legislative (i.e., “those which have relevance to legal reasoning and the lawmaking process”). [19]

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

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6 Fed. R. Evid. 201(a) Advisory Committee Note.
research are firmly rooted in longstanding agency practices, others have proven more controversial in certain circumstances. The growth of the internet has amplified this debate in recent years as adjudicators now have quicker and easier access to vastly greater amounts of information.\textsuperscript{8} Information that is now available to adjudicators includes online versions of print publications and public records, as well as newer forms of information such as openly editable encyclopedias, blogs, social media, and personal and professional websites.

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

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

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

\textsuperscript{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>.

\textsuperscript{9} Ohio Bell Tel. Co., 301 U.S. at 300–06.


\textsuperscript{11} See Recommendation 2018-4, supra note 10, ¶ 3.
Materials identified through independent research may be hearsay. Although hearsay is generally admissible in administrative hearings “up to the point of relevancy,” the APA specifies that a party is entitled to “conduct such cross-examination as may be required for a full and true disclosure of the facts.” The APA generally prohibits an employee who presides at the reception of evidence from “consult[ing] a person or party on a fact in issue, unless on notice and opportunity for all parties to participate.” Unless an exception applies, the APA also generally prohibits an employee who participates or advises in the decision or review of a decision from performing an investigative or prosecutorial function in the same or a factually related case.

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

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

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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).
16 Id. § 554(d).
17 Id.
Some adjudicators play an active role questioning parties and witnesses and calling experts; others do not. Adjudicators vary in the degree to which they are viewed as subject-matter experts and the extent to which they have access to the expertise of agency policymakers.

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

Although the emphasis of this recommendation is the particular phenomenon of independent internet research, its recommended best practices apply equally to independent 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?
Given the possibility that independent research, especially that conducted on the internet, could result in actual or perceived bias or result in errors or inefficiencies, agencies should consider implementing the following best practices, as appropriate, in consultation with adjudicators.

1. If agencies identify reliable sources or categories of sources that they determine would be generally appropriate for adjudicators to independently consult, they should publicly designate those sources or categories of sources.

2. If agencies permit adjudicators to independently consult sources that are not specifically designated, they should consider establishing and publishing policies to help adjudicators assess the authenticity and reliability of information. Agencies should consider including at least the following indicia of authenticity and reliability, particularly with respect to internet information:
   a. Whether the information was authored by an identifiable and easily authenticated institutional or individual author who is considered an expert or reputable authority on the subject;
   b. Whether the author published the information for a purely informational or scholarly purpose (i.e., not for a commercial, partisan, or promotional purpose);
   c. Whether the information references other authorities which help to corroborate its accuracy;
   d. Whether the meaning and significance of the information is clear;
   e. Whether the information is published in a final format rather than as a draft or in a publicly editable format;
   f. Whether the information is current;
   g. Whether the owner or administrator of the website on which the information appears is easily authenticated, is a recognized authority or resource, and maintains the website for a purely informational or scholarly purpose (i.e., not for a commercial, partisan, or promotional purpose);

Commented [A3]: For discussion: Should the recommendation clarify that "publish" means "make publicly available"?
h. Whether information that appears on the website or in the publication undergoes editorial or peer review; and
i. Whether other reliable resources contain the same information or cite to the original information as reliable or authoritative.

3. Agencies should promulgate rules on official notice. They should specify the procedures that adjudicators must follow when an agency decision rests on official notice of a material fact and ensure that parties, in appropriate circumstances and upon timely request, are provided a reasonable opportunity to rebut the fact; rebut an inference drawn from the fact; and supplement, explain, or give different perspective to the fact. The precise nature of an opportunity for rebuttal may depend on factors such as whether a fact is general or specific to the parties, whether a fact is reasonably disputable or indisputable, whether a fact is central or peripheral to the adjudication, and whether a decision represents an initial or a final action of an agency.

4. If agencies intend that specific procedures will apply when adjudicators use independently obtained information for purposes other than official notice of a material fact, they should publish rules that clarify the distinction between official notice and other uses of information independently obtained by an adjudicator and describe the applicable procedures, if any. In particular, agencies should consider distinguishing, as appropriate, legal research from factual research; and material facts from facts that are not material, such as background facts.

5. Agency rules on independent research should specify when adjudicators must physically or electronically put independently obtained materials, especially internet materials, in an administrative record and explain what procedures adjudicators should follow to do so to ensure they preserve evidence in a stable, permanent form.

6. When agency rules designate a source that is appropriate for independent research, agencies should consider clearly identifying and providing access to the source on its website. Agencies should ensure that all sources that they host on their websites are kept up to date. If agencies provide hyperlinks to sources that are hosted on websites not
maintained by the agency, they should ensure that both the hyperlinks on their own
websites and the materials on third-party sites remain current and accurate.

7. When agencies provide access to sources on their websites or on a third-party website,
they should include a plain-language statement that clearly explains how adjudicators and
parties may use the information contained in those sources.

8. When adjudicators intend to rely on independently obtained sources that are not available
to parties on or through an agency website, they should ensure that the parties have
reasonable access to the sources or to relevant excerpts from the sources.

9. Agencies or agency adjudicators, as appropriate, should take steps to ensure that
adjudicative staff are aware of agency policies on independent research, particularly with
respect to independent internet research, and that they comply with those policies.

Commented [A4]: Additional section for discussion.