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**INDEPENDENT RESEARCH BY AGENCY ADJUDICATORS  
IN THE INTERNET AGE**

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*This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views and recommendation expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.*

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**Report to the Administrative Conference of the United States**

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## INTRODUCTION

Kenneth Culp Davis observed in 1958 that “[n]o other major problem of administrative law surpasses in practical importance the problem of use of extra-record information in an adjudication. Yet no other major problem of administrative law is so little understood and so much misunderstood.”<sup>1</sup> At the time, an agency adjudicator who wished to conduct research for a proceeding was limited, in the moment, to manually perusing the physical texts in the hearing room, her office, or in the agency’s files and libraries. If she could not find an answer there, she or a member of her staff would need to take the time to visit a local library. There, she would need to identify likely sources for the information, physically retrieve them, and manually peruse them. If a potential resource was unavailable, she would need to wait for its return or request a copy through interlibrary loan. In the end, it was often easier just to ask the parties to provide the information themselves, or to simply go without.<sup>2</sup>

The “vast library” of the internet now comes instantaneously to the adjudicator.<sup>3</sup> Treatises, dictionaries, newspapers, magazines, directories, maps, and public records from around the world are available at the click of a mouse or the tap of a phone. Adjudicators can access newer forms of information, too—blogs, social media, personal and professional websites—that may shed light on the specific, disputed facts of a proceeding. In many cases, the parties themselves may have authored this information. Even the methods of research have changed, as search engines and find functions now permit researchers to quickly uncover useful information without needing to know where to look for it.<sup>4</sup>

The same trends have been observed and studied extensively in the federal and state courts. There is good empirical evidence of a correlation between internet access and the incidence of independent research among federal and state judges.<sup>5</sup> This increase has engendered intense debate,<sup>6</sup> the development of a robust academic literature, and modifications to state and model judicial codes.<sup>7</sup> Proponents of a broader role for independent judicial research argue that

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<sup>1</sup> KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 15.01 (1958), cited in Robert Muir, *The Utilization of Both Judicial and Official Notice by Administrative Agencies*, 16 ADMIN. L. REV. 333, 333 n.5 (1964).

<sup>2</sup> Cf. Coleen M. Barger, *On the Internet, Nobody Knows You’re a Judge: Appellate Courts’ Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 422-23 (2002).

<sup>3</sup> Cf. *ACLU v. Reno*, 521 U.S. 844, 853 (1997).

<sup>4</sup> See Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NW. U. L. REV. 1137, 1139 (2014); Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1007-08 (1997).

<sup>5</sup> See Barger, *supra* note 2, at 428-38; Allison Orr Larsen, 98 VA. L. REV. 1255, 1291 (2012); Layne S. Keele, *When the Mountain Goes to Mohammad: The Internet and Judicial Decision-Making*, 45 N.M. L. REV. 125, 157-59 (2014); Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 937-43 (2011); Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1, 3-7 (2009-2010); Schauer & Wise, *supra* note 4, at 1106-09; Adam J. Siegel, Note, *Setting Limits on Judicial Scientific, Technical, and Other Specialized Fact-Finding in the New Millennium* 86 CORNELL L. REV. 167, 196-98 (2000).

<sup>6</sup> See, e.g., *Rowe v. Gibson*, 798 F.3d 622, 623-44 (7th Cir. 2015); Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 139 (2008).

<sup>7</sup> The American Bar Association’s *Model Code of Judicial conduct* states: “A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.” MODEL CODE OF JUDICIAL CONDUCT r. 2.9(C) (AM. BAR ASS’N 2013). A comment to this rule clarifies

the practice improves the application of technical knowledge to decision making, and that the internet offers an “incredible compendium of data and a potentially invaluable resource.”<sup>8</sup> Critics argue that independent judicial research is often at odds with the adversarial system—a model fundamentally based on the presentation of evidence by the parties before a passive judge—and that judges are not necessarily effective researchers into factual matters in which they are not experts.<sup>9</sup> Proponents and critics both acknowledge that the low cost and impermanence of internet information poses challenges, such as for evaluating its authority and reliability.<sup>10</sup>

This report addresses these same questions in the administrative context, reconsidering Professor Davis’s “problem of use of extra-record information in an adjudication” in the internet age.<sup>11</sup> While independent research raises many of the same concerns in the administrative context as in the judicial context, there are also significant differences between the responsibilities, priorities, and institutional capabilities of adjudicators and judges. Although I have taken relevant insights from the case law and academic literature analyzing independent judicial research, this report studies independent internet research in administrative adjudication on its own terms without assuming that the same principles necessarily apply in both contexts.<sup>12</sup>

Part I of this report defines “independent research” and introduces the core legal and policy implications of independent research for agency adjudication. Parts II through VI explore these implications in greater depth. Parts II and III focus on two hallmarks of a fair hearing: the right to an unbiased tribunal, and the right to know and meet the evidence against oneself. Parts IV and V explore the effects of independent research on decisional accuracy and administrative efficiency, respectively. Part VI concludes with the implications of independent research for administrative review by appellate adjudicators.

This report concludes with recommended best practices that agencies should consider as they develop rules and guidance on independent research. Based on my research, I believe it would be neither feasible nor desirable to adopt a single, one-size-fits-all approach to independent internet research across federal agencies. Adjudications vary widely in their purpose, scope, complexity, and effects on parties and non-parties. In some cases, the government brings an action against a private party; in others, a private party petitions the government; in still others, the government mediates a dispute between private parties. Where legally sophisticated entities predominate in some contexts, unrepresented parties predominate in others. Agencies also face widely varying workloads, fiscal constraints, and external pressures.

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that the “prohibition against prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.” *Id.* A majority of states have since adopted identical or similar language in their own judicial codes. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 478 (2017).

<sup>8</sup> RICHARD A. POSNER, REFLECTIONS ON JUDGING 134 (2013); Edward K. Cheng, *Scientific Evidence as Foreign Law*, 75 BROOKLYN L. REV. 1095, 1107; Keele, *supra* note 5, at 134-138.

<sup>9</sup> Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1280-84 (2007).

<sup>10</sup> POSNER, *supra* note 8, at 140; Coleen M. Barger, *Challenging Judicial Notice of Facts on the Internet Under Federal Rule of Evidence 201*, 48 U.S.F. L. REV. 43, 49-55 (2013); Keele, *supra* note 5, at 162-67.

<sup>11</sup> The term “internet,” for purposes of this report, refers to the world wide web. It excludes other services built on the internet protocol suite, such as email, internet telephony, and file sharing, which facilitate ex parte communications with persons rather than independent research from preexisting documentary sources.

<sup>12</sup> *Cf.* Kenneth Culp Davis, *Official Notice*, 62 HARV. L. REV. 537, 537 (1949) (“A regulatory agency is less like a court than is usually supposed.”).

This report instead identifies the legal and policy issues associated with independent internet research and urges agencies to develop guidance to resolve those issues given their unique circumstances. Specifically, it recommends that agencies take stock of how adjudicators are using extra-record resources, address adjudicators' informational needs by developing rules that designate reliable extra-record resources in appropriate circumstances, and develop guidance to help adjudicators evaluate the reliability of internet information.

## I. BACKGROUND

### A. What Is Independent Research?

A challenge with evaluating independent research is that “independent research” means different things to different people. Most state and model judicial codes specify, for example, that “[a] judge shall not investigate facts in a matter independently.” Other guidance or judicial practice often clarifies that independent investigation of “facts” does not include (1) independent legal research, (2) independent research of “legislative” facts,<sup>13</sup> (3) independent research of indisputable adjudicative facts “that may properly be judicially noticed,”<sup>14</sup> or (4) background information that is not “of factual consequence in determining the case,”<sup>15</sup> even though the difference between these practices can involve difficult line-drawing questions.

Independent research is also closely identified with official notice.<sup>16</sup> When an adjudicator takes official notice of a fact, she accepts the fact as true without requiring proof of that fact through the introduction of evidence.<sup>17</sup> While a party may request that an adjudicator take official notice of a fact based on information she submits, adjudicators are also generally free, in appropriate circumstances, to take official notice on their own motion of information identified through their own independent research. Like judicial notice, official notice satisfies one party's burden of proving a fact and shifts the burden of rebutting that fact to another party. However, except as limited by statute or rule, official notice can extend to a broader range of facts than judicial notice, including facts within an agency's area of expertise.<sup>18</sup> Nevertheless, while official

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<sup>13</sup> Legislative facts are facts “which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.” FED. R. EVID. 201(a) Advisory Committee Note. Scholars contrast legislative with adjudicative facts, defined in the next note.

<sup>14</sup> Adjudicative facts are “the facts of the particular case.” *Id.* They are those which “concern[] the immediate parties—who did what, where, when, how, and with what motive or intent.” *Id.* Under the *Federal Rules of Evidence*, judges may only take judicial notice of adjudicative facts that are “not subject to reasonable dispute” because they are “generally known within the trial court's territorial jurisdiction” or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” FED. R. EVID. 201(b). The distinction between legislative facts and adjudicative facts is discussed at greater length in Part III.C.2.

<sup>15</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 478 (2017).

<sup>16</sup> Some agencies refer to official notice as “administrative notice” or as “judicial notice,” especially those that have adopted the *Federal Rules of Evidence*. For clarity's sake, I refer to any use of official notice, administrative notice, or judicial notice in agency adjudication as “official notice.” I use “judicial notice” to instead refer to the corollary practice in the federal courts.

<sup>17</sup> 2 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.6 (6th ed. 2019).

<sup>18</sup> See *infra* Part III.B.1.

notice offers adjudicators an important mechanism by which to rely on independently obtained information, it represents only one use of extra-record information.<sup>19</sup>

For purposes of this report, I define “independent research” more broadly to mean an adjudicator’s<sup>20</sup> search for, consideration of, or reliance on documentary materials related to a pending or impending proceeding other than controlling law, materials submitted by a party or interested member of the public, or materials adduced with a party’s participation. This definition includes at least the following uses of extra-record information:

- to obtain general background information or context for a hearing;
- to learn more about a party or the facts of a case to prepare for a hearing;
- to formulate questions for a party or witness at a hearing;
- to assess a party’s or witness’s credibility;
- to determine an expert’s qualifications;
- to determine the reliability of expert testimony;
- to locate evidence;
- to accept a matter as true without requiring proof (i.e., official notice);
- to evaluate evidence of record;
- to define terms or technical concepts;
- to evaluate changed circumstances since an earlier decision, such as on appeal;
- to understand or interpret controlling law;
- to evaluate the social or technical purpose or effect of an interpretation or application of controlling law; and
- to identify legal material that is not controlling but relates to a question of fact or a mixed question of fact and law.

Agency tribunals have developed independent research practices through regulations,<sup>21</sup> a variety of sub-regulatory guidance materials,<sup>22</sup> agency precedent, historical practice, training materials, informal conversations, and the practices of individual adjudicators.

Because “independent research” can refer to so many different uses of extra-record information, I recommend that agency policy makers and adjudicators not think of independent research in binary terms—as “good” or “bad”—and avoid developing policies that categorically prohibit or permit it. Some independent research is relatively uncontroversial, while other independent research has prompted significant debate. Policies that instead address specific categories, sources, and uses of extra-record information provide clearer and more transparent guidance for adjudicators, other agency officials, and members of the public.

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<sup>19</sup> As shorthand, I refer to materials, information, and facts identified through independent research as “extra-record,” regardless of whether they are later associated with the record of a proceeding. *See supra* note 1.

<sup>20</sup> For purposes of this report, “adjudicator” also includes staff assigned to assist an adjudicator.

<sup>21</sup> *See, e.g.*, 14 C.F.R. § 302.24(g) (2019) (DOT Aviation Economic Proceedings).

<sup>22</sup> *See, e.g.*, SOC. SEC. ADMIN., HEARINGS, APPEALS, AND LITIGATION LAW MANUAL §§ I-2-5-69, I-3-2-40 (2019) [hereinafter HALLEX].

## B. Why Do Adjudicators Conduct Independent Research?

Adjudicators sometimes require additional information to determine the facts of a case or to fairly and accurately apply controlling law to factual findings. That information may be specific to a party, such as the ownership of a factory, or general, such as the social and economic conditions of a foreign country. That information may be central to the dispute or simply background to enable the adjudicator to understand the basic facts of a case or their significance, such as the definition of a medical term. Because they are responsible for interpreting and applying law, adjudicators may also require information about a statute's or rule's purpose, meaning, and effect.

Many forms of independent research are relatively uncontroversial, such as an adjudicator's search for a controlling statute's legislative history. Others are more frequently the subject of controversy, such as an adjudicator's search for information that is both specific to a party and central to resolving a dispute. Distinguishing between controversial and noncontroversial practices involves line-drawing questions discussed throughout this report.

Adjudicators generally have three options when they need information to decide a case: (1) they can ask the parties to supply the information,<sup>23</sup> (2) they can receive information from an expert or other knowledgeable third party,<sup>24</sup> and (3) they can conduct independent research.<sup>25</sup> Each is appropriate in certain circumstances. However, the degree to which adjudicators feel free to choose the second or third option varies dramatically from agency to agency and sometimes even among adjudicators within a single adjudicative scheme.

When adjudicators conduct independent research, they do so to learn new information, to confirm no other relevant information exists, to corroborate existing information, or to confirm an intuition or conjecture. Every decision-making scheme—judicial or administrative—permits some degree of independent research to achieve fairness, accuracy, or efficiency.<sup>26</sup> In most federal and state courts, for example, judges may rely on legal information, legislative facts, background facts, and adjudicative facts subject to judicial notice that they identify through independent research.<sup>27</sup> Therefore, the debate over independent research, in both the judicial and administrative contexts, is concerned not with *whether* adjudicators may or may not conduct independent research but rather *when, how, and for what purposes* adjudicators may conduct independent research and rely on extra-record information.

## C. Why Does Independent Research Matter for Agency Adjudication?

“Adjudication” broadly means an “agency process for the formulation of an order,” an “order” referring to “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including

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<sup>23</sup> See 5 U.S.C. § 556(c).

<sup>24</sup> See *id.*

<sup>25</sup> See 5 U.S.C. § 556(e).

<sup>26</sup> See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1516 (1999).

<sup>27</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 478 (2017).

licensing.”<sup>28</sup> For purposes of this report, I consider only those adjudications that incorporate a legally required evidentiary hearing. This includes hearing and appeal proceedings conducting according to the formal-hearing provisions of the Administrative Procedure Act (APA) as well as those for which some other legal authority requires an evidentiary hearing. Using a taxonomy developed by Michael Asimow, the Administrative Conference of the United States (ACUS) refers to such proceedings, respectively, as Type A and Type B adjudications.<sup>29</sup> This definition excludes Type C adjudications, which do not incorporate a legally required evidentiary hearing.<sup>30</sup>

The purpose of Type A and Type B adjudication is twofold: (1) to provide an individual a meaningful opportunity to be heard before the government takes an action that directly affects her wellbeing, and (2) to adduce all information necessary to make an accurate decision.<sup>31</sup> A meaningful opportunity to be heard requires both an unbiased tribunal and the right to know and meet the evidence. The Supreme Court has found both elements to be fundamental to constitutional due process.<sup>32</sup> Accuracy requires that the adjudicator learn all relevant information, and that the parties be given the opportunity to rebut or contextualize that information. It is ordinarily in the government’s and public’s interest that this adjudication be as efficient as possible without sacrificing either fairness or accuracy.

The administrative process achieves the goals of fairness, accuracy, and efficiency in Type A and Type B adjudications through the compilation of an exclusive record. As a matter of constitutional due process, “[a] hearing is not judicial . . . unless the evidence can be known.”<sup>33</sup> The exclusive record principle ensures that parties know and can meet the evidence against them; promotes accurate, evidence-based decision making; and facilitates administrative and judicial review.<sup>34</sup> For Type A adjudications regulated by the APA’s formal-hearing provisions, the exclusive record consists of the “transcript of testimony and exhibits, together with all papers and requests filed in the proceeding.”<sup>35</sup> ACUS has recommended that agencies adopt similar regulations for evidentiary hearings not regulated by the APA’s formal-hearing provisions.<sup>36</sup> Agency-specific statutes, agency rules of procedure and evidence, and agency precedential decisions may impose additional requirements on the development of an exclusive record.

An exclusive record is developed through either an adversarial or a non-adversarial process. The adversarial model, in which the parties present information before a passive

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<sup>28</sup> 5 U.S.C. § 551(6)-(7) (2019).

<sup>29</sup> Admin. Conf. of the United States, Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

<sup>30</sup> *Id.*

<sup>31</sup> Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647, 662 (2012).

<sup>32</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); see also Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-80, 1282-87 (1975).

<sup>33</sup> *West Ohio Gas Co. v. Pub. Utilities Comm’n*, 294 U.S. 63, 69 (1935), *quoted in* *Ohio Bell Tel. Co. v. Pub. Utilities Comm’n*, 301 U.S. 292, 304 (1937).

<sup>34</sup> See Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act* Public 10 (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report> (emphasis omitted).

<sup>35</sup> 5 U.S.C. § 556(e) (2019).

<sup>36</sup> 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).



decision maker, is intended to promote fairness by ensuring a decision maker is neither advocate nor witness.<sup>37</sup> It is said to promote accuracy and efficiency by placing the responsibility for obtaining information on those with the greatest stake in a dispute's resolution.<sup>38</sup> Independent research seems at odds with the adversarial model because it renders a decision maker an active participant in locating relevant information.<sup>39</sup> In some contexts, however, independent research may play an important role in ensuring decisional fairness, accuracy, and efficiency in an otherwise adversarial process. It may be especially important to ensure inter-decisional consistency, especially when consistency is central to an agency's institutional legitimacy or the sound operation of a regulatory scheme it administers.

Non-adversarial proceedings are more common in contexts in which parties are frequently unrepresented by counsel, have less litigation experience, may have mental or other limitations, or lack the resources to obtain the information necessary to reach a fair and accurate decision.<sup>40</sup> Adjudicators in non-adversarial proceedings may play a greater role in developing the exclusive record for decision making. Nevertheless, even in non-adversarial proceedings, independent research may positively or negatively implicate concerns of fairness, accuracy, or efficiency and has provoked significant debate. Just as in adversarial proceedings,

The debate over independent research is largely concerned with the degree to which the exclusive record principle permits or encourages adjudicators to consider information not submitted by the parties. Two primary sources of legal obligation govern independent research in agency adjudication: the Fifth Amendment Due Process Clause and, for Type A adjudications, the APA's hearing provisions. Although not necessarily imposed by law, ethical considerations and concerns about the accuracy and efficiency of agency decision making may counsel in favor of or against independent research in particular circumstances.

#### **D. Why Does the Internet Matter for Independent Research?**

Independent research long predates the internet. The same arguments scholars have long made in favor or against independent research—that it is fair or unfair, that it is accurate or inaccurate, that it is efficient or inefficient—apply equally to independent internet research. However, the internet has altered the debate over independent research in four key ways.

First, the internet has made it far easier and more efficient for adjudicators to acquire extra-record information, which likely affects the frequency with which they do so. The simple fact that decision makers today can quickly and inexpensively access so much information means there is always at least the temptation to learn more, to corroborate a party's account, or to verify an intuition.<sup>41</sup> This is especially true in a world in which decision makers are increasingly

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<sup>37</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 478 (2017).

<sup>38</sup> Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975).

<sup>39</sup> Cheng, *supra* note 9, at 1280.

<sup>40</sup> The Social Security Administration and the Board of Veterans' Appeals administer the two largest non-adversarial adjudication systems in the federal government.

<sup>41</sup> *United States v. Bari*, 599 F.3d 176, 180-81 (2d Cir. 2010); RICHARD A. POSNER, REFLECTIONS ON JUDGING 134 (2013); Barger, *supra* note 2, at 422; Keele, *supra* note 5, at 128; Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 132, 133 (2008).

responsible for deciding complex cases grounded in technical knowledge and commercial practices.<sup>42</sup> One scholar of independent judicial research has observed that “general scientific principles . . . are the most likely to lead to judicial research.”<sup>43</sup>

The easy availability of internet information may have positive effects on agency adjudication. In-house research is more efficient now than in the past, either because researchers no longer need to use an agency’s physical collections or because they are no longer limited to the materials in an agency’s physical collections.<sup>44</sup> An adjudicator interviewed for this report also observed that unlike physical evidence, internet information is widely available, and unlike testimony, the quality of online information does not vary with time or a party’s or witness’s willingness to cooperate.<sup>45</sup> A party therefore has a greater incentive to be truthful and forthcoming knowing that an opposing party or adjudicator can easily verify her account or uncover falsehoods and omissions.

Nevertheless, there are also concerns that decision makers—who, like all of us, have become accustomed to using the internet for research in our everyday lives—may “lose sight” of the fact that independent internet research is still independent research.<sup>46</sup> A judge who instinctively knows not to physically visit a location relevant to a proceeding may be less sure about taking a virtual visit through Google Street View.<sup>47</sup>

Second, the comparatively low cost of publishing and distributing information on the internet has facilitated the development of new and unfamiliar sources of potentially useful extra-record information. As more and more of our lives, beliefs, and activities are documented online—by ourselves and by others about us—adjudicators gain easier access to information that may be central to resolving a dispute. Whether an adjudicator actually seeks out this information or not, its possible existence is at least a temptation to conduct independent research. The easy availability of information about the parties or facts of a case on social media, blogs, and personal and professional websites has reinvigorated questions about the extent to which decision makers may independently seek out and use such information for decision making.

Third, the low costs of producing, publishing, distributing, and accessing internet information make it more difficult to determine the authenticity and reliability of extra-record information.<sup>48</sup> This led one early judicial opinion to (infamously) characterize internet evidence

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<sup>42</sup> POSNER, *supra* note *supra* note 8, at 137-38; Richard B. Cappalli, *Bringing Internet Information to Court: Of Legislative Facts*, 75 TEMP. L. REV. 99, 123 (2002); Edward K. Cheng, *Scientific Evidence as Foreign Law*, 75 BROOKLYN L. REV. 1095, 1107 (2010); George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge’s Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 ST. JOHN’S L. REV. 291, 330-35 (1998); Thornburg, *supra* note 6, at 132.

<sup>43</sup> Thornburg, *supra* note 6, at 155.

<sup>44</sup> See *supra* notes 1-4 and accompanying text.

<sup>45</sup> *Accord* Bellin & Ferguson, *supra* note 4, at 1165.

<sup>46</sup> Thornburg, *supra* note 6, at 163; see also Bellin & Ferguson, *supra* note 4, at 1156.

<sup>47</sup> See Alaska Comm’n on Judicial Conduct, Advisory Op. No. 2014-01 (2014); Bellin & Ferguson, *supra* note 4, at 1166; Keele, *supra* note 5, at 125.

<sup>48</sup> “Any person with a computer connected to the Internet can ‘publish’ information” and immediately “address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers.” *Reno v. ACLU*, 42 U.S. 844, 853 (1997); see also Barger, *supra* note 2, at 423; Bellin & Ferguson, *supra* note 4, at 1166-67.

as “voodoo information” and condemn the new technology as “one large catalyst for rumor, innuendo, and misinformation.”<sup>49</sup>

It is worth emphasizing that the internet is “not a source itself” but rather a means of remotely accessing sources.<sup>50</sup> Some web resources are simply electronic or digitized versions of print resources (e.g., Google Books).<sup>51</sup> Others are self-authenticating, such as government websites, or presumptively reliable, such as widely accepted mapping services.<sup>52</sup> Other resources are less clearly reliable because they are openly-editable (Wikipedia), cheaply self-published (blogs and social media), or simply lack clear authority.<sup>53</sup> Agencies would “do well to avoid overbroad, normative assertions about the use of online resources” as a whole.<sup>54</sup> The shift to a world of low-cost internet publishing simply means that adjudicators require a new rubric to gauge the authenticity and reliability of information.<sup>55</sup>

Fourth, the impermanence of internet information creates new challenges for preserving extra-record information in a stable, permanent form.<sup>56</sup> Internet content changes (“reference rot”), moves, and disappears (“link rot”) without notice.<sup>57</sup> One study found that 84.6% of internet citations in federal judicial opinions from 1997 and 34% of internet citations in 2001 federal judicial opinions were no longer accessible in 2002.<sup>58</sup> A 2012 study found that nearly one-third of all websites cited in Supreme Court opinions no longer worked.<sup>59</sup> (The Supreme Court website now hosts portable document format (PDF) versions of webpages it cites in its opinions.<sup>60</sup>) Others have reached similar findings with regard to state court opinions.<sup>61</sup> Federal

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<sup>49</sup> St. Clair v. Johnny’s Oyster & Shrimp, 76 F. Supp. 2d 773, 774 (S.D. Tex. 1999).

<sup>50</sup> Keele, *supra* note 5, at 130.

<sup>51</sup> Erin G. Godwin, Note, *Judicial Notice and the Internet: Defining a Source Whose Accuracy Cannot Reasonably Be Questioned*, 46 CUMB. L. REV. 219, 238-39; Keele, *supra* note 5, at 165.

<sup>52</sup> Godwin, *supra* note 51, at 233-37; Gregory P. Joseph, *What Every Judge and Lawyer Needs to Know About Electronic Evidence: Authentication*, JUDICATURE 49, 50-51 (Autumn 2015).

<sup>53</sup> Barger, *supra* note 10, at 51; Barger, *supra* note 2, at 426.

<sup>54</sup> *See id.*

<sup>55</sup> *See generally* Noam Cohen, *Courts Turn to Wikipedia, but Selectively*, N.Y. TIMES (Jan. 29, 2007); Peoples, *supra* note 5; Lee F. Peoples, *The Citation of Blogs in Judicial Opinions*, 13 TULANE J. TECH. & INTELLECTUAL PROPERTY 39 (2010); Keele, *supra* note Keele, *supra* note 5, at 163 (2014); Jeffrey Bellin, *The Case for eHearsay*, 83 FORDHAM L. REV. 1317 (2014); Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7 (2013); Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331 (2012); Nicole Keefe, *Dance Like No One Is Watching, Post Like Everyone Is: The Accessibility of “Private” Social Media Content in Civil Litigation*, 19 VAND. J. ENT. & TECH. LAW 1027 (2017); Hon. M. Sue Kurita, *Electronic Social Media: Friend or Foe for Judges*, 7 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 184 (2017); Liesa L. Richter, *Don’t Just Do Something!: E-Hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process*, 61 AM. U. L. REV. 1657 (2012).

<sup>56</sup> Barger, *supra* note 2, at 438-45.

<sup>57</sup> Lee F. Peoples, *Is the Internet Rotting Oklahoma Law?*, 52 TULSA L. REV. 1, 19-20 (2016).

<sup>58</sup> Barger, *supra* note 2, at 438.

<sup>59</sup> Raizel Liebler & June Liebert, *Something Rotten in the State of Legal Citation: The Life Span of a United States Supreme Court Citation Containing an Internet Link (1996-2010)*, 15 YALE J.L. & TECH. 273, 273 (2013).

<sup>60</sup> *Internet Sources Cited in Opinions*, Supreme Court of the United States, [https://www.supremecourt.gov/opinions/cited\\_urls/](https://www.supremecourt.gov/opinions/cited_urls/) (last visited Aug. 15, 2019).

<sup>61</sup> Tina S. Ching, *The Next Generation of Legal Citations: A Survey of Internet Citations in the Opinions of the Washington Supreme Court and Washington Appellate Courts, 1999-2005*, 9 J. APP. PRAC. & PROC. 387, 398-400

agency decisions likely display the same phenomenon.<sup>62</sup> The inability to access information underlying a decision impedes administrative or judicial review and may undermine its precedential value.<sup>63</sup>

## E. Methodology

The information in this report is based on a review of the relevant academic literature; agency and judicial opinions; agency regulations and publicly available guidance documents, including administrative manuals and adjudicator benchbooks; and conversations with current and former adjudicators, other agency officials, representatives from adjudicator unions, and academicians with experience across a range of federal agencies.

While I studied the experience of as many agencies about which I could find information, particular attention was given to the Type A and B adjudicative schemes of the Board of Veterans' Appeals, the Department of Health and Human Services, the Department of Labor, the Drug Enforcement Agency, the Executive Office for Immigration Review, the Merit Systems Protection Board, the National Labor Relations Board, the Occupational Safety and Health Review Commission, the Securities and Exchange Commission, the Social Security Administration, the Trademark Trial and Appeal Board, and the United States Postal Service. Given these agencies' widely varying workloads and institutional circumstances, the experiences of adjudicators at these agencies provide a representative cross-section of agency practices.

Through conversations with government and non-government experts, I sought to gain insight into topics such as (a) the extent to which adjudicators perceive that their role permits or prohibits them from conducting independent research or using extra-record information; (b) existing agency guidance on independent research; (c) the extent to which adjudicators are aware of or follow broader discussions about independent research in federal and state courts; (d) the extent to which agency adjudicators have had internal discussions about independent research; (e) the implications of different regulatory formulations of official notice; (f) the use of extra-record information beyond official notice; (g) the procedures adjudicators follow when they conduct independent research or use extra-record information; and (h) the extent to which adjudicators perceive that online access to information has affected agency adjudication.

The information in this report is empirical insofar as it based on my own observations of agency and judicial decisions and discussions with experts. My intent is to elucidate how federal agency adjudicators conduct independent internet research and use extra-record information. Citations to particular agency decisions provide examples of specific phenomena or concepts and are not necessarily representative with regard to adjudicator practice within a specific agency or across federal agencies. I make no claims regarding the frequency with which adjudicators at specific agencies or across agencies engage in independent research at those specific agencies or across agencies more generally.

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(2007); Peoples, *supra* note 5, at 19-31; Arturo Torres, *Is Link Rot Destroying Stare Decisis As We Know It? The Internet-Citation Practice of the Texas Appellate Courts*, 13 J. APP. PRAC. & PROC. 269 (2012).

<sup>62</sup> See Edward Grodin, *Indicia of Reliability in the Information Age: An Overview of Internet Sources in Immigration Proceedings*, IMMIGRATION LAW ADVISOR 1, 11 (Nov. 2016).

<sup>63</sup> See *Davis v. Berryhill*, 2017 U.S. Dist. LEXIS 123512, at \*4-5 (S.D. Fla. Aug. 3, 2017).

The descriptions in this report rely heavily on observations drawn from agency decisions available through Lexis. In many decisions, it is clear that a cited web resource was submitted by a party or was independently obtained by an adjudicator. For cases in which the origin of a cited web resource is unclear, I relied on certain indicators as likely proxies for independent internet research, such as the inclusion of “last visited” or “last accessed” in a citation along with a visit or access date close in time to a decision date and the absence of a reference to an exhibit.

For agencies that publish no or relatively few decisions, I rely on judicial opinions. Judicial opinions tend to address instances of independent research in which a party objects to independent research; no agency appellate reviewer takes remedial action; and a party chooses to expend resources to challenge the independent research in federal court. As a result, the judicial opinions cited in this report skew heavily in favor of contested uses of independent research. They may not be representative of independent research generally, nor do they typically reflect situations in which independent research was considered unobjectionable or even beneficial.

## II. ENSURING THE RIGHT TO AN UNBIASED TRIBUNAL

An “unbiased tribunal” is an essential element of a fair hearing.<sup>64</sup> As the Administrative Conference of the United States has recommended, agency rules should “preserve the appearance of impartiality among its adjudicators.”<sup>65</sup> A common critique of independent research, both in the federal courts and in the administrative context, is that it carries the potential to render a decision maker non-neutral by interjecting her into a dispute, positioning her as an investigator, or resulting in prejudice or prejudgment. However, what constitutes an unbiased tribunal cannot be considered in isolation.<sup>66</sup> In the administrative context, the extent to which independent research raises questions of partiality will often depend on the existence or nonexistence of an adjudicator’s duty to participate in developing the evidentiary record. This Part first considers independent research as investigation then explores independent research as record development.

As agencies develop policies on independent research, they must consider the extent to which independent research is consistent with an adjudicator’s role within a specific adjudicative scheme. While adjudicators in some contexts have a long-recognized, affirmative duty to develop the record, adjudicators in other contexts view their role as closer to that of an Article III judge presiding over an adversarial proceeding. Of course, even Article III judges are “sharply divided” as to the appropriateness of independent research,<sup>67</sup> and agencies should expect disagreement even among adjudicators within the same adjudicative scheme.

As they develop policies on independent research, agencies should consider the purpose of an adjudicative scheme, the role of adjudicators within that scheme, and the degree to which

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<sup>64</sup> Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 (1975).

<sup>65</sup> Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules of Administrative Adjudicators* ¶ 3, 84 Fed. Reg. 2139, 2140 (Feb. 6, 2019). There can, of course, be significant disagreement as to what constitutes an impartial adjudicator, and concerns over what constitutes partiality vary according to the characteristics of particular adjudicative schemes. *Id.*; Friendly, *supra* note 64, at 1279.

<sup>66</sup> Friendly, *supra* note 64, at 1279.

<sup>67</sup> Thornburg, *supra* note 6, at 139; *see also* Rowe v. Gibson, 798 F.3d 622 (7th Cir. 2015); U.S. v. Harris, 271 F.3d 690 (7th Cir. 2001).

that role permits an adjudicator to conduct independent research. As discussed in the following sections, relevant factors may include the adversarial or non-adversarial nature of proceedings, the relationship between government and non-government parties in proceedings, the existence of a recognized duty to develop the record, the predominance of unrepresented parties, the probable effect of agency decisions on non-parties, and the relevance of an individual adjudicator’s personal expertise. Based on these and other relevant factors, agencies should clarify in public rules whether there are facts that are appropriate or inappropriate for independent research.

### A. Independent Research and Investigation

Constitutional due process generally requires that an adjudicator be unbiased and impartial.<sup>68</sup> Concerns that independent research will result in bias or partiality may arise in both adversarial and non-adversarial proceedings.

In adversarial proceedings, independent research may implicate the right to an unbiased tribunal when parties perceive that a decision maker has become an “an advocate for one side”<sup>69</sup> or acquired “personal knowledge of disputed evidentiary facts.”<sup>70</sup> The adversarial system is intended to ensure a decision maker’s impartiality by removing her from the processing of developing the record.<sup>71</sup> Independent research seems at odds with the adversarial system by rendering an adjudicator an active participant in seeking out relevant information.<sup>72</sup> For this reason, a majority of state judicial codes, modeled on the American Bar Association’s *Model Code of Judicial Conduct*, specify that judges “shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.”<sup>73</sup> This principle also appears in several state ethical codes for administrative law judges,<sup>74</sup> and the Administrative Conference has made a similar recommendation for adjudicators who preside over evidentiary hearings not required by the Administrative Procedure Act (APA).<sup>75</sup> The APA also imposes limitations on the blending of an agency’s investigative and adjudicative functions.<sup>76</sup>

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<sup>68</sup> See *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

<sup>69</sup> See *Vasha v. Gonzales*, 410 F.3d 863, 872-73 (6th Cir. 2005); *NLRB v. Tamper, Inc.*, 522 F.2d 781, 789-90 (1975); see also *Rowe v. Gibson*, 798 F.3d 622, 641 (7th Cir. 2015) (Hamilton, J., dissenting); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 478 (2017).

<sup>70</sup> See Code of Conduct for U.S. Judges Canon 3C(1)(a) (2019); see also Thornburg, *supra* note 6, at 137; Admin. Conf. of the U.S., Recommendation 2018-4, *supra* note 65, at ¶ 2.

<sup>71</sup> See *supra* notes 37-39.

<sup>72</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 478 (2017).

<sup>73</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.9(C) (AM. BAR ASS’N 2013); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 478 (2017).

<sup>74</sup> See, e.g., Illinois Administrative Law Judge Code of Professional Conduct r. 2.9(C) (Ill. Bur. Of Admin. Hearings 2017), available at [https://www2.illinois.gov/sites/AdministrativeHearings/Documents/ALJ\\_Code\\_ProfessionalConduct\\_3-2017.pdf](https://www2.illinois.gov/sites/AdministrativeHearings/Documents/ALJ_Code_ProfessionalConduct_3-2017.pdf).

<sup>75</sup> “[D]ecisionmakers should be limited to considering factual information presented in testimony or documents they received before, at, or after the hearing to which all parties had access, and to matters officially noticed.” Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, ¶ 1, 81 Fed. Reg. 94,314, 94,315 (Dec. 23, 2016).

<sup>76</sup> 5 U.S.C. § 554(d) (2019).

In non-adversarial proceedings, parties may still object that independent research has the potential to turn an impartial adjudicator “charged with developing the facts” into agency counsel<sup>77</sup> or is likely to result in “[p]rejudgment of the adjudicative facts at issue.”<sup>78</sup>

Even when an adjudicator is not consciously partial, the process of ex parte independent research may result in confirmation bias in favor of or against a party<sup>79</sup> or unwitting reliance on “facts and information discovered by them ex parte and not adduced at the hearing.”<sup>80</sup> Due to concerns that an investigative role may turn a decision maker into a “detective, whose purpose is to ferret out and establish a case,” and that the role of a prosecutor “may produce a state of mind incompatible with the objective impartiality which must be brought to bear in the process of deciding,”<sup>81</sup> the APA generally prohibits an employee who performed an investigative or prosecutorial function in a case from participating or advising in the decision or review of the same or a factually related case except as a witness or counsel.<sup>82</sup>

The process of independent *internet* research raises new concerns. Scholars question the degree to which methods of internet research—“making decisions on the fly about what links to click and what paths to follow” and using search engines which order results based on past user activity—risk injecting subconscious bias into decision making.<sup>83</sup> Parties may also feel that independent internet research, in particular, simply lacks transparency.<sup>84</sup>

Of course, not all independent research is investigation. Most critics of independent research acknowledge that certain independent research is appropriate, such as consulting a reliable dictionary to evaluate the ordinary meaning of a term or consulting a reliable map to understand the approximate distance between two locations. And many agencies that adjudicate cases have issued rules on official notice that permit independent research from certain sources or related to certain kinds of facts.<sup>85</sup>

Legal-ethical objections to independent research are especially potent in two situations: (1) when decision makers engage in open-ended research, and (2) when decision makers research information specific to the parties or disputed facts of a case.<sup>86</sup>

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<sup>77</sup> See *Richardson v. Perales*, 402 U.S. 389, 410 (1971).

<sup>78</sup> See Admin. Conf. of the U.S., Recommendation 2018-3, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019).

<sup>79</sup> Keele, *supra* note 5, at 143-45.

<sup>80</sup> See ATTORNEY GENERAL’S COMMITTEE, *supra* note 81, at 56.

<sup>81</sup> See FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 56 (1941) [hereinafter ATTORNEY GENERAL’S COMMITTEE].

<sup>82</sup> 5 U.S.C. § 554(d) (2019). This provision 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 carriers;” or “to the agency or member or members of the body comprising the agency.” *Id.*

<sup>83</sup> Keele, *supra* note 5, at 152-53; Larsen, *supra* note 5, at 1293-94; Elizabeth G. Thornburg, *The Lure of the Internet and the Limits on Judicial Research*, LITIGATION 41, 44-45 (Summer/Fall 2012).

<sup>84</sup> Keele, *supra* note 5, at 144-47; see also Thornburg, *supra* note 6, at 191-99.

<sup>85</sup> See *infra* Part IV.

<sup>86</sup> See ATTORNEY GENERAL’S COMMITTEE, *supra* note 81, at 72; Ernest Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 47 (1971); Thornburg, *supra* note 6, at 162-69; see also *Shipley v. Colvin*, 2015 U.S. Dist. LEXIS 140426, at \*15-16 (S.D. Ind. Sep. 24, 2015) (distinguishing between

A comparative advantage in the administrative context is that a case before an agency, unlike one before a court, “is rarely an isolated phenomenon, but is rather merely one unit in a mass of related cases . . . [which] often involve fact questions which have frequently been explored by the same tribunal.”<sup>87</sup> Agencies can often avoid the problems of open-ended research by designating a reliable resource or category of resources useful for resolving “a mass of related cases.” Several agencies have done so by rule, policy, or practice. For example, SSA adjudicators consider job data from the *Dictionary of Occupational Titles*,<sup>88</sup> and adjudicators in the Executive Office for Immigration Review consult State Department county reports.<sup>89</sup>

With regard to party- and case-specific information, the Attorney General’s Committee on Administrative Procedure observed that agencies should not interpret official notice as an invitation to “roam at will through [an agency’s] files, or elsewhere, after the hearing is closed.”<sup>90</sup> Of course, the internet makes it far easier to “roam at will” through an agency’s records, and “elsewhere” now encompasses fully searchable databases; news reports; personal websites; and social media.<sup>91</sup> The internet offers far easier access to information about the parties (some authored by the parties) and the disputed facts of a case. While this information can be quite relevant, it also has greater potential to result in prejudice or prejudgment.<sup>92</sup>

However, it is clearly not the case that adjudicators are prohibited from independently researching any party- or case-specific information. Like courts, agencies have sometimes held that the records of federal and state judicial and administrative proceedings may be appropriate for independent research,<sup>93</sup> although Social Security Administration sub-regulatory guidance specifies “it is not acceptable for an [adjudicator] to instigate an independent investigation of a claimant’s criminal history on the Internet.”<sup>94</sup> Adjudicators regularly cite databases publicly available through their agency’s website<sup>95</sup> or the website of another federal or state agency<sup>96</sup> for

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proper “internet research to gain general ‘knowledge about the world’” and improper internet research to gain “specific knowledge” about a party or the disputed facts of a case).

<sup>87</sup> Walter Gellhorn, *Official Notice in Administrative Adjudication*, 20 TEX. L. REV. 131, 136 (1941).

<sup>88</sup> 20 C.F.R. §§ 404.1566, 416.966 (2019).

<sup>89</sup> See *infra* notes 119-122.

<sup>90</sup> ATTORNEY GENERAL’S COMMITTEE, at 81, at 71-73.

<sup>91</sup> Cf. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 478 (2017); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 462 (2013).

<sup>92</sup> Keele, *supra* note 5, at 142-43.

<sup>93</sup> See *PATCO v. FLRA*, 685 F.2d 547, 578 (1982); see also *Shayesteh v. AG United States*, 627 Fed. Appx. 70, 73-74 (3d Cir. 2015); *Roemer Indus.*, 367 N.L.R.B. No. 133 (2019); Keith Patrick Sequeira, Exchange Act Release No. 85231, 2019 SEC LEXIS 286, at \*2 n.2 (Mar. 1, 2019); *Schneider v. Neuman*, CFTC No. 09-R013, 2009 CFTC LEXIS 43, at \*4 n.10 (June 4, 2009).

<sup>94</sup> HEARINGS, APPEALS, AND LITIGATION LAW MANUAL §§ I-2-5-69 C, I-3-2-40 C (2019) [hereinafter HALLEX].

<sup>95</sup> See, e.g., Clemenceau Theophilus Acquaye, Docket No. A-16-125, 2016 HHSDAB LEXIS 263, at \*9 n.4 (Oct. 31, 2016) (Inspector General fugitive profile); mPhase Technologies, Exchange Act Release No. 74187, 2015 SEC LEXIS 398, at \*7 n.14 (Feb. 2, 2015) (EDGAR); Liberty Petroleum Corp., 178 IBLA 121, 125 n.2 (2009) (Bureau of Land Management lease records); *Clutch Auto v. Int’l Touch Consolidator*, Docket Nos. 1880(F), 1885(F), 2008 FMC LEXIS 35, at \*6 n.6 (Nov. 13, 2008) (common carrier registration).

<sup>96</sup> See, e.g., *Palafox Pharm.*, 84 Fed. Reg. 18,320 (DEA Apr. 30, 2019) (taking official notice of a party’s medical licensure on a state website); *KCAP Financial*, IADB Act Release No. 1331, 2018 SEC LEXIS 3505, at \*7 n.18 (ALJ Dec. 12, 2018) (corporate registration); Mark Megalli, Initial Decisions Release No. 1253, 2018 SEC LEXIS 1270, at \*6 n.4 (ALJ May 31, 2018) (Bureau of Prisons inmate locator); Kalid Morgan Jones, Exchange Act Release



information about regulated entities or registered persons. These databases may include contact information, regulatory filings, licensure or operating statuses, prior violations and citations, and investigative reports.<sup>97</sup> Several agencies' procedural rules explicitly permit adjudicators to rely on such materials,<sup>98</sup> while some have questioned the practice.<sup>99</sup>

Adjudicators have considered information obtained from non-government databases for information such as professional qualifications, registration status, and financial information.<sup>100</sup> For example, the Federal Energy Regulatory Commission asserted in a 1998-1999 rule making that it may conduct "independent research" for purposes of its proceedings and take official notice of "[m]aterial appearing in the trade press, the general news media, and on publicly available Internet sites," "speeches and statements made to a large audience at a public forum," and "regulated companies' electronic bulletin boards such as [Open Access Same-Time Information System] sites in order to obtain market information."<sup>101</sup> Adjudicators rely on non-government databases for information on physicians' board certifications,<sup>102</sup> stock prices,<sup>103</sup> and mail delivery tracking.<sup>104</sup>

Adjudicators have also relied on information discovered on a party's professional website or the website of her employer,<sup>105</sup> or information posted by a party on her own personal website

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No. 80635, 2017 SEC LEXIS 1403, at \*3 n.4 (May 9, 2017) (real property records); Brody Mining, 36 FMSHRC 284, 307-08 (2014) (EDGAR); State of Kansas v. BIA, Docket Nos. 11-048, 11-049, 2013 I.D. LEXIS 4, at \*5 (IBIA Mar. 15, 2013) (real property records); Hope v. Dep't of Army, 2008 M.S.P.B. 13 (2008) (finding a party's medical licensure not appropriate for official notice); Chicago Bridge & Iron Co., 139 F.T.C. 553, 578 n.2 (2005) (EDGAR); see also John J. Mulrooney, II & Katherine E. Legel, *Current Navigation Points in Drug Diversion Law: Hidden Rocks in Shallow, Murky, Drug-Infested Waters*, 101 MARQ. L. REV. 333, 432-33 (2017).

<sup>97</sup> See, e.g., Hecla Ltd., 38 FMSHRC 2117, 2124 n.14 (2016); see also Tang Tun v. Edsell, 223 U.S. 673, 680-81 (1912) ("it would be extraordinary indeed to impute bad faith or improper conduct to the executive officers because they examined the records or acquainted themselves with former official action").

<sup>98</sup> See *infra* notes 272-279.

<sup>99</sup> See Mulrooney & Legel, *supra* note 95, at 432-33.

<sup>100</sup> See, e.g., Kiniti-Wairimu v. Holder, 312 Fed. Appx. 907, 908-09 (9th Cir. 2009); Weeks v. Colvin, 2014 U.S. Dist. LEXIS 157231, at \*20-21 (D. Conn. Sep. 29, 2014); Bolzan v. Colvin, 2014 U.S. Dist. LEXIS 139692, at \*16-18 (D. Ariz. Sep. 30, 2014); E-Waste Systems, Initial Decisions Release No. 1352, 2019 SEC LEXIS 180, at \*5 (ALJ Feb. 14, 2019) (OTC Link); Docket No. 04-38 228, 2017 BVA LEXIS 21669 (June 5, 2017) (Ancestry.com); Robert D. Tucker, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at \*1 n.1 (Nov. 9, 2012) (FINRA BrokerCheck); Beck v. Jonasson, CFTC No 08-R027, 2009 CFTC LEXIS 9, at \*1 n.5 (Feb. 4, 2009) (National Futures Association BASIC); Citicasters Co., 166 IBLA 111, 118 (2005) (www.radio-locator.com); Precision Ratios v. Man Financial, CFTC No. 01-R96, 2003 CFTC LEXIS 164 (Dec. 11, 2003), at \*5 n.1 (NYBOT).

<sup>101</sup> Regulations Governing Off-the-Record Communications, 64 Fed. Reg. 51,222, 51,224, 51,231 (Sep. 22, 1999); Regulations Governing Off-the-Record Communications, 63 Fed. Reg. 51,312, 51,316 (Sep. 25, 1998).

<sup>102</sup> See, e.g., Boggs v. Catalytic, 47 Ben. Rev. Bd. Servs. 1093 n.7 (2013).

<sup>103</sup> See, e.g., E-Waste Systems, Initial Decisions Release No. 1352, 2019 SEC LEXIS 180, at \*5 (ALJ Feb. 14, 2019).

<sup>104</sup> See, e.g., Anadarko Petroleum Corp., 187 IBLA 77, 84 n.10 (2016); 2013 Immig. Rptr. LEXIS 9651, at \*2-3 (Mar. 21, 2013); Busalacchi v. Potter, Appeal No. 0120101022, 2010 EEOPUB LEXIS 1782, at \*1 n.1 (June 10, 2010); Stevenson v. USPS, Case No. SF-0752-10-0051-I-1, 2010 MSPB LEXIS 2334, at \*13 n.13 (May 13, 2010); see also Bellin & Ferguson, *supra* note 4, at 1160.

<sup>105</sup> See, e.g., Tudisco v. Comm'r of Soc. Sec., 2017 U.S. Dist. LEXIS 105292 (W.D.N.Y. 2017); May v. Colvin, 2013 U.S. Dist. LEXIS 179107, at \*19-20 (D. Utah Dec. 19, 2013); Docket No. 14-39 003A, 2018 BVA LEXIS 79931 (May 30, 2018); Verucci Motorcycles v. Senator Int'l Ocean, Docket No. 06-05, 2009 FMC LEXIS 16, at

or social media account.<sup>106</sup> Although a federal magistrate judge found no authority prohibited an SSA ALJ from “seeking information available to the general public—information arguably germane to the disability determination,”<sup>107</sup> a district court judge found in a factually similar case that “it is generally improper for an ALJ to use outside evidence.”<sup>108</sup> On appeal, the Seventh Circuit held that neither judges nor adjudicators “violate the Constitution by learning ‘adjudicative facts’ about the litigants in pending cases” so long as they “put in the record what they believe they have learned and permit the litigants to reply.”<sup>109</sup> Current SSA guidance prohibits adjudicators and their staff from “us[ing] Internet sites and social media networks to obtain information about claimants to adjudicate cases,”<sup>110</sup> but some have argued social media information may be useful to ensure decisional accuracy or root out fraud.<sup>111</sup>

## B. Independent Research and Record Development

Courts, scholars, and agency officials have long observed that administrative adjudicators may have an “affirmative obligation . . . to take the initiative in aggressively finding the truth.”<sup>112</sup> Unlike federal court judges, who adopt a passive stance and rely on the parties to submit evidence, adjudicators at some agencies are said to have a “well-established affirmative duty to develop the record.”<sup>113</sup> There are several reasons why such an affirmative duty may exist.

Though judicial in form, administrative adjudication is not necessarily an exercise of judicial power.<sup>114</sup> Scholars have long contrasted a court’s role in resolving “a mere contest between private litigants playing the game in accordance with established rules of court” with an agency’s role in deciding “an inquiry in which the state or the nation itself has an interest in seeing that full justice is done and sufficient intelligence to arrange that disinterested testimony is presented.”<sup>115</sup> The success of the administrative process may sometimes require that

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\*25 (Jan. 14, 2009); *Mansfield v. NMB*, 2006 M.S.P.B. 227, 238 n.3 (2006); *Klamath Siskiyou Wildlands Ctr. Siskiyou Project*, 155 IBLA 347, 352 n.6 (2001).

<sup>106</sup> *See Dean*, 585 Fed. Appx. at 905; *Ostborg v. Comm’r of Soc. Sec.*, 610 Fed. Appx. 907, 912, 917-18 (11th Cir. 2015); *Dean v. Colvin*, 2013 U.S. Dist. LEXIS 138003, at \*22-23 (S.D. Ind. 2013); *Sweet v. Astrue*, 32 F. Supp. 3d 303, 311-12 (N.D.N.Y. 2012).

<sup>107</sup> *Sweet*, 32 F. Supp. 3d at 311-12.

<sup>108</sup> *Id.*

<sup>109</sup> *Dean*, 585 Fed. Appx. at 905.

<sup>110</sup> HALLEX §§ I-2-5-69, I-3-2-40 (2019).

<sup>111</sup> *See, e.g., D. Randall Frye, Fixing Disability Courts*, N.Y. TIMES (Jan. 19, 2014).

<sup>112</sup> *Kenneth Culp Davis, An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 383 (1942).

<sup>113</sup> 2 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 5.25 (3d ed. 2010); *Davis, supra* note 16, at 537.

<sup>114</sup> *Oil States Energy Servs. v. Greene’s Energy Grp.*, 138 S. Ct. 1365 (2018).

<sup>115</sup> *Max Thelen, Practice and Procedure Before Administrative Tribunals*, 16 CALIF. L. REV. 208, 218 (1928); *see also Davis, supra* note 112, at 423-24; *Frank B. Faris, Judicial Notice by Administrative Bodies*, 4 IND. L.J. 167, 181 (1928); *Edmund Morgan, Judicial Notice*, 57 HARV. L. REV. 269, 271-72 (1944); *Reginald Parker, Why Do Administrative Agencies Exist? A Reappraisal*, 45 GEO. L.J. 331 (1957); *Note, Administrative Law—The Scope of Official Notice*, 17 VAND. L. REV. 638, 638-39 (1964).

“controversies be decided as ‘rightly’ as possible, independently of the formal record the parties themselves produce.”<sup>116</sup>

In some cases, such as rate-setting or licensing, a case’s disposition may have a relatively direct impact on persons other than the parties to a proceeding. Recognizing this fact, the Interstate Commerce Commission (ICC) stated in its 1908 annual report that it could “seldom, if ever, decide a case merely upon the evidence presented to it” because “every decision of the Commission involves the rights of parties who are not present.”<sup>117</sup> Other agencies have sometimes asserted a responsibility to “consider all relevant facts” in similar circumstances.<sup>118</sup>

The disposition of individual cases may also affect broader government priorities. The Executive Office for Immigration Review has explained that it is proper for immigration adjudicators in removal and asylum cases to consult State Department country reports because the agency’s responsibility “is not merely one involving a discrete set of benefits and penalties, but implicates, in conjunction with the Secretary of State, the vast external realm of foreign relations,” including “relationships of the United States with other countries.”<sup>119</sup> While not “binding on adjudicators,”<sup>120</sup> courts have recognized that these reports “often provide a useful and informative overview of conditions in the applicant’s home country”<sup>121</sup> and are “usually the best available source of information.”<sup>122</sup>

Congress has frequently cited the need for specialization as a reason for delegating the regulation and determination of public rights to administrative agencies.<sup>123</sup> Unlike courts, agencies are “veritable information centers both in their accumulations of factual materials and in their organizations of specialized personnel.”<sup>124</sup> Given their situation within agencies,

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<sup>116</sup> JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 38-39 (1938); accord ATTORNEY GENERAL’S COMMITTEE, *supra* note 81, at 72 (describing “demands that decisions be as correct as possible”).

<sup>117</sup> Davis, *supra* note 112, at 423-24.

<sup>118</sup> See, e.g., Official Notice of Facts, Docket No. R-318, 37 F.P.C. 700 (Mar. 31, 1967) (citing *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965)); see also Davis, *supra* note 12, at 537-38 (“When parties fail to produce needed facts, the regulatory agency typically must take the initiative in aggressively making its own factual investigation.”).

<sup>119</sup> Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,877, 54,882 (Aug. 26, 2002). It is “well-settled” that immigration adjudicators may go outside the record established by the parties to research current events and foreign country conditions. *Mendoza-Garcia v. Barr*, 918 F.3d 498, 504 (6th Cir. 2019); *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102-03 (8th Cir. 2014); *Delgado v. Mukasey*, 508 F.3d 702, 706 (2d Cir. 2007); *Zhi Wei Pang v. BCIS*, 448 F.3d 102, 111 (2d Cir. 2006); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464-65 (8th Cir. 2004); *Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002); *Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000).

<sup>120</sup> *Tu Lin v. Gonzales*, 446 F.3d 395, 400 (2d Cir. 2006).

<sup>121</sup> *Tian-Yong Chen v. U.S. INS*, 359 F.3d 121, 130 (2d Cir. 2003).

<sup>122</sup> *Xiao Ji Chen v. U.S. DOJ*, 471 F.3d 315, 341-42 (2d Cir. 2006) (quoting *Zamora v. INS*, 534 F.2d 1055, 1062 (2d Cir. 1976) (Friendly, J.)).

<sup>123</sup> Ernest Gellhorn, *supra* note 86, at 44; Karen Petroski, *Texts versus Testimony: Rethinking Legal Uses of Non-Legal Expertise*, 35 U. HAW. L. REV. 81, 104-05 (2013).

<sup>124</sup> Davis, *supra* note 12, at 545; see also Richard R. Sigmon, *Rules of Evidence Before the I.C.C.*, 31 GEO. WASH. L. REV. 258, 270-71 (1962).

adjudicators have reliable access to such information.<sup>125</sup> In some circumstances, adjudicators may even have better access to relevant information than the parties.<sup>126</sup> Individual adjudicators also gain expertise through the “cumulative experience” of deciding cases raising a comparatively narrow range of factual and legal issues.<sup>127</sup>

As agencies and agency adjudicators “necessarily acquire special knowledges in their sphere of activity,” facts become “as obvious and notorious” to them “as facts susceptible of judicial notice are to judges.”<sup>128</sup> Indeed, there is a long history of adjudicators conducting independent research within their agency’s area of specialization. In 1941, the Attorney General’s Committee on Administrative Procedure observed that Veterans Administration adjudicators noticed “various military facts—dates of wars, battles, embarkations, and the like” and the “disabling effects of diseases and injuries;” the Employees’ Compensation Commission noticed the disabling effects of various diseases; the ICC and Railroad Retirement Board noticed “railroad facts;” and adjudicators elsewhere independently considered agency reports and prior orders, tariffs and agreements on file with the agency, unpublished data in their own files, and their own “knowledge of the specific facts of the case.”<sup>129</sup>

In appropriate circumstances, an adjudicator’s reliance on such information is not only appropriate but desirable. Courts have long recognized this fact through its official notice jurisprudence,<sup>130</sup> and Congress’s explicit incorporation of that doctrine in the formal-hearing provisions of the APA suggests congressional recognition of the idea that adjudicators can, and in some cases should, rely on a broader range of extra-record information than judges.<sup>131</sup>

Courts have recognized an especially strong affirmative duty to develop the record in contexts in which unrepresented parties have historically predominated. In non-adversarial adjudication before the Social Security Administration, the administrative law judge (ALJ) “acts as an examiner charged with developing the facts.”<sup>132</sup> The ALJ is said to wear three “hats,” acting not only as decision maker but also as representative for both the government and an unrepresented party.<sup>133</sup> The Department of Veterans Affairs has a duty to assist claimants in

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<sup>125</sup> See Davis, *supra* note 12, at 545; Ernest Gellhorn, *supra* note 86, at 44; Note, *The Relationship of Official Notice to the Substantial-Evidence Rule in the Judicial Review of Administrative Adjudications*, 60 HARV. L. REV. 620, 621 (1947).

<sup>126</sup> See, Yang v. McElroy, 277 F.3d 158, 163 (2d Cir. 2002); Kerner v. Fleming, 283 F.2d 916, 922 (2d Cir. 1960).

<sup>127</sup> See NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953); see also Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945); Hoxhallari v. Gonzales, 468 F.3d 719, 186-87 (2d Cir. 2006); Rinaldi v. Ribicoff, 305 F.2d 548, 550 (2d Cir. 1962).

<sup>128</sup> See ATTORNEY GENERAL’S COMMITTEE, *supra* note 81, at 71.

<sup>129</sup> ATTORNEY GENERAL’S COMMITTEE, *supra* note 81, at 398-403.

<sup>130</sup> See U.S. v. Pierce Auto Freight Lines, 327 U.S. 515, 530-31 (1946).

<sup>131</sup> See *infra* Part IV.A; see also KOCH, *supra* note 113, at § 5:55[1]; Davis, *supra* note 12, at 538 (1949); Muir, *supra* note 1, at 336.

<sup>132</sup> Richardson v. Perales, 402 U.S. 389, 410 (1971).

<sup>133</sup> See Rausch v. Gardner, 267 F. Supp. 4, 6 (E.D. Wis. 1967); see also Hawkins v. Chater, 113 F.3d 1162, 1168 (10th Cir. 1997); Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983); Lashley v. Sec’y of HHS, 708 F.2d 1048, 1051-52 (6th Cir. 1983); Smith v. Harris, 644 F.2d 985, 989 (3d Cir. 1981); McConnell v. Schweiker, 655 F.2d 604, 606 (5th Cir. 1981); Cox v. Califano, 587 F.2d 988 (9th Cir. 1978).

obtaining evidence.<sup>134</sup> Courts have recognized a similar duty in adversarial proceedings before immigration judges.<sup>135</sup>

Of course, a duty to develop the record necessarily permit or require wide-ranging independent research. Under a broader view, adjudicators may use and take the initiative to locate any “information that will be useful in making the decision.”<sup>136</sup> Under a narrower view, an adjudicator satisfies the duty to develop by taking part in questioning parties and witnesses, calling experts, adducing expert testimony, directing the course of hearings, and helping parties to obtain evidence upon request.<sup>137</sup> As discussed later in this report, there may also be good reasons of accuracy or efficiency for an adjudicator not to conduct independent research even when her role permits it.<sup>138</sup>

Reviewing courts have reached conclusions that could reasonably support either stance. Where one court found it was “[t]o her credit” that an IJ independently searched the internet for information about an unfamiliar religion,<sup>139</sup> another court characterized an IJ’s “sua sponte introduction of evidence” as one of “a number of other peculiarities . . . that raise concerns about the impartiality of the proceedings.”<sup>140</sup> Where one court found no reversible error when an SSA adjudicator independently searched for information about the funeral of a party’s uncle,<sup>141</sup> another court held that an IJ “engaged in improper behavior . . . by searching for information about a [party’s] grandmother and then admitting her obituary into the record.”<sup>142</sup>

### **III. ENSURING THE RIGHT TO KNOW AND MEET THE EVIDENCE**

It is definitional to a fair hearing that the parties “be fully apprised of the evidence submitted or to be considered” and given the opportunity to “inspect documents and to offer evidence in explanation or rebuttal.”<sup>143</sup> Under the Administrative Procedure Act, the “exclusive record” for decision making consists of the “transcript of testimony and exhibits, together with all papers and requests filed in the proceeding.”<sup>144</sup> In addition to ensuring that parties know and

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<sup>134</sup> 38 C.F.R. § 21.1032 (2019).

<sup>135</sup> See *Mendoza-Garcia v. Barr*, 918 F.3d 498, 504 (6th Cir. 2019); *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102-03 (8th Cir. 2014); *Delgado v. Mukasey*, 508 F.3d 702, 706 (2d Cir. 2007); *Zhi Wei Pang v. BCIS*, 448 F.3d 102, 111 (2d Cir. 2006); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464-65 (8th Cir. 2004); *Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002); *Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000).

<sup>136</sup> See *Castillo-Villagra v. INS*, 972 F.2d 1017, 1027 (9th Cir. 1992); *Banks v. Schweiker*, 654 F.2d 637, 640-41 (1981).

<sup>137</sup> See, e.g., SSR 17-4p, 82 Fed. Reg. 46,339, 46,341 (Oct. 4, 2017) (describing an SSA ALJ’s duty to “make every reasonable effort to help individuals obtain medical evidence from their own medical sources and entities that maintain medical evidence when the individual gives us permission to request the information.”).

<sup>138</sup> See *infra* Parts IV and V.

<sup>139</sup> *Cosa v. Mukasey*, 543 F.3d 1066, 1068 (9th Cir. 2008).

<sup>140</sup> *Alcius v. Holder*, 374 Fed. Appx. 583, 590 (6th Cir. 2010).

<sup>141</sup> *Weeks v. Colvin*, 2014 U.S. Dist. LEXIS 157231, at \*20-21 (D. Conn. Sep. 29, 2014).

<sup>142</sup> *Kiniti-Wairimu v. Holder*, 312 Fed. Appx. 907, 908-09 (9th Cir. 2009).

<sup>143</sup> *ICC v. Louisville & N. R.R.*, 227 U.S. 88, 93 (1913); *Friendly*, *supra* note 64, at 1282; see also *Ohio Bell Tel. Co. v. Pub. Utilities Comm’n*, 301 U.S. 292, 304-05 (1937); *W. Ohio Gas. Co. v. Pub. Utilities Comm’n*, 294 U.S. 63, 69 (1935); *Crowell v. Benson*, 285 U.S. 22, 48 (1932); *U.S. v. Abilene & S. Rwy.*, 265 U.S. 274, 288 (1924).

<sup>144</sup> See 5 U.S.C. § 556(e).

are able to meet the evidence against them, the exclusive record principle promotes evidence-based decision making and facilitates meaningful administrative and judicial review.<sup>145</sup>

### A. Hearsay and the Right to Cross-Examination

One objection to the use of certain extra-record information is that it is hearsay—that is, an out-of-court statement offered in evidence to prove the truth of the matter asserted.<sup>146</sup> Except as limited by statute or agency rules, hearsay is admissible in the administrative context “up to the point of relevancy”<sup>147</sup> so long as it bears “satisfactory indicia of reliability,” it is “probative,” and it is “fundamentally fair” to use the information.<sup>148</sup> Adjudicators thus have greater freedom than federal judges to rely on information obtained from extra-record documentary sources rather than through oral testimony during a hearing.<sup>149</sup>

Nevertheless, parties are entitled to “conduct such cross-examination as may be required for a full and true disclosure of the facts.”<sup>150</sup> When information is general, such as a description of a medical test in a reputable treatise, cross-examination of the treatise’s author is ordinarily unnecessary because a party can rebut the information by introducing additional evidence or expert testimony.<sup>151</sup> When information is specific to a party or the disputed facts of a case and lacks indicia of reliability, due process may require that an adjudicator give the party the opportunity to cross examine its author.<sup>152</sup>

As they develop independent research policies, agencies should consider the hearsay nature of extra-record information and clarify when a party is entitled to cross-examine its author. Even in cases in which parties are not entitled to cross-examination, agencies should consider when it is acceptable for adjudicators to seek expertise from documentary materials or when it is more appropriate to adduce oral or written testimony from an expert witness.

### B. Official Notice of a Material Fact

Official notice is the administrative corollary of judicial notice in that it permits an adjudicator to accept a matter as true without requiring proof of that fact through the introduction

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<sup>145</sup> See *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991); see also *Biestek v. Berryhill*, 139 S. Ct. 1148, 1162-63 (2019) (Gorsuch, J., dissenting).

<sup>146</sup> FED. R. EVID. 801(c).

<sup>147</sup> *Richardson v. Perales*, 402 U.S. 389, 409-10 (1971).

<sup>148</sup> *Calhoun v. Bailar*, 626 F.2d 146, 148-49 (9th Cir. 1980), cert. denied, 462 U.S. 906 (1981); *Woolsey v. NTSB*, 993 F.2d 516, 520 n.11 (5th Cir. 1993) (quoting *Calhoun*); *Keller v. Sullivan*, 928 F.2d 227, 230 (7th Cir. 1991); *Johnson v. U.S.*, 628 F.2d 187, 180-91 (D.C. Cir. 1980); *School Bd. v. HEW*, 525 F.2d 900, 905-06 (5th Cir. 1976).

<sup>149</sup> See *Cornelius J. Peck, Regulation and Control of Ex Parte Communications with Administrative Agencies*, 76 HARV. L. REV. 246 (1962); *Petroski*, supra note 123, at 104-07. Compare this rule with *Federal Rule of Evidence* 803(18), which permits reliance on a “statement contained in a treatise, periodical, or pamphlet” if it is “called to the attention of an expert witness or cross-examination or relied on by the expert on direct examination.”

<sup>150</sup> *Id.* at § 556(d).

<sup>151</sup> See *U.S. ex rel. Dong v. Shaughnessy* 166 F. Supp. 745, 749 (S.D.N.Y. 1953); see also *U.S. v. Fla. E.C. R.*, 410 U.S. 224, 240-42 (1973); *S. Cal. Edison Co. v. FERC*, 717 F.3d 177 (D.C. Cir. 2013).

<sup>152</sup> See *Sweet v. Astrue*, 32 F. Supp. 3d 303, 312-13 (N.D.N.Y. 2012) (citing *Townley v. Heckler*, 748 F.2d 109, 114 (2d Cir. 1984)); *KOCH*, supra note 113, § 5:55[2](b). But see *Richardson v. Perales*, 402 U.S. 389, 409-10 (1971).

of evidence.<sup>153</sup> By avoiding laborious proof of information that is “obvious and notorious” to an agency, official notice can be a powerful tool for accuracy, inter-decisional consistency, and efficiency.<sup>154</sup> However, given the potential for overuse or abuse, the courts and Congress have identified substantive and procedural restrictions on its use.<sup>155</sup>

## 1. The Substantive Scope of Official Notice

Not all material facts are appropriate for official notice.<sup>156</sup> There is universal agreement that official notice encompasses all matters subject to judicial notice.<sup>157</sup> Under a minority view, adjudicators may also take official notice of any useful adjudicative facts they know so long as it is fair, under the circumstances, to shift the burden of proving the fact from one party to the other.<sup>158</sup> (Because official notice represents the presumption of a fact, when an adjudicator takes official notice of a fact, it has the effect of absolving one party from proving the fact and shifts the burden to the other party to rebut it.) Under the predominant view, adjudicators may take official notice of “matters as to which the agency by reason of its functions is presumed to be expert, such as technical or scientific facts within its specialized knowledge”<sup>159</sup> because it would be unfair to absolve a party of the burden of proving a fact except where an adjudicator reliably knows the fact to be true. Courts have sometimes found official notice of a fact outside an agency’s area of expertise to be improper.<sup>160</sup> Because the substantive scope of official notice is closely tied to decisional accuracy, I discuss it further in Part IV.

## 2. The Procedural Requirements for Official Notice

Constitutional due process permits an adjudicator to take official notice of an extra-record fact supplied by a party or identified through independent research so long as the parties are given a meaningful opportunity to rebut it.<sup>161</sup> The Administrative Procedure Act (APA) adopts this constitutional test, providing that an adjudicator may take “official notice of a material fact not appearing in the evidence in the record” so long as she provides the parties an “opportunity to show the contrary” upon “timely request.”<sup>162</sup>

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<sup>153</sup> Walter Gellhorn, *supra* note 87, at 136.

<sup>154</sup> *See infra* Parts IV and V.

<sup>155</sup> *S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 187 (D.C. Cir. 2013) (citing *Union Elec. v. FERC*, 890 F.2d 1193, 1202 (D.C. Cir. 2013)).

<sup>156</sup> *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1202 (D.C. Cir. 1989) (“the information noticed must be appropriate for official notice.”).

<sup>157</sup> *See* ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 79 (1947) [hereinafter APA MANUAL]; *Dayco Corp. v. FTC*, 362 F.2d 180, 186 (6th Cir. 1966).

<sup>158</sup> *Davis*, *supra* note 12, at 547; Ernest Gellhorn, *supra* note 86, at 43; *Muir*, *supra* note 1, at 343. The APA specifies that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d) (2019).

<sup>159</sup> APA MANUAL, *supra* note 157, at 79; *see also* *Kapacia v. INS*, 944 F.2d 702, 705 (10th Cir. 1991); *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1202-03 (D.C. Cir. 1989); *McLeod v. INS*, 802 F.2d 89, 93 n.4 (3d Cir. 1986).

<sup>160</sup> *See, e.g., Ye v. Att’y Gen.*, 178 Fed. Appx. 57 (2d Cir. 2006) (finding error where an immigration judge took official notice of a medical fact).

<sup>161</sup> *See Ohio Bell Tel. Co. v. Pub. Utilities Comm’n*, 301 U.S. 292, 303-06 (1937).

<sup>162</sup> 5 U.S.C. § 556(e) (2019).

While the APA’s official notice provision is “sufficiently malleable to permit agency decision makers to adopt different approaches to official notice depending on the nature of the fact at issue,” there are essentially four key elements to the rule: (1) notice to the parties, (2) a party’s timely request to show the contrary, (3) the opportunity to show the contrary, and (4) association of the extra-record fact with the record.

As discussed in the following sections, the precise procedures for official notice may reasonably vary according to the circumstances, including the context of the proceeding, the materiality of the officially noticed fact, the general or specific nature of the fact, and the fact’s disputability.<sup>163</sup> Nevertheless, as part of policies on independent research, agencies should consider clarifying how and when adjudicators should notify parties of the intent to take official notice or that official notice has been taken; the temporal and substantive requirements of a timely request to rebut or explain a noticed fact; what information parties should include with a request; and the scope of an opportunity to show the contrary.

#### **a. Notice to the Parties**

There are several points during a proceeding at which a party can receive notice that an adjudicator has taken or intends to take official notice of a material fact. An adjudicator may provide notice of the intent to take official notice before the hearing. For example, a representative notice of hearing in a Department of Labor Black Lung adjudication reads:

If necessary, the court will take official notice of (1) occupational exertion requirements described in the Dictionary of Occupational Titles, available at <https://www.oalj.dol.gov/LIBDOT.HTM>; (2) altitudes of particular testing locations, available at [www.city-data.com](http://www.city-data.com); (3) historical and current B reader lists, available at [https://www.oalj.dol.gov/PUBLIC/BLACK\\_LUNG/REFERENCES/REFERENCE\\_WORKS/Current\\_B\\_Reader\\_List\\_11\\_27\\_2017.pdf](https://www.oalj.dol.gov/PUBLIC/BLACK_LUNG/REFERENCES/REFERENCE_WORKS/Current_B_Reader_List_11_27_2017.pdf) and <https://www.cdc.gov/niosh/topics/chestradiography/breader-list.html>, respectively; and (4) and mine type, available via the Mine Data Retrieval System at <https://arlweb.msha.gov/drs/drshome.htm>.<sup>164</sup>

Because parties and their representatives typically have internet access, agencies should consider hosting common extra-record resources on their own websites or providing internet addresses for resources available on other websites when they routinely provide advance notice of the intent to take official notice of certain extra-record material facts.

When an adjudicator intends to engage in more open-ended research prior to a hearing, an alternative approach is to “give advance notice to the parties of the subject of the . . . proposed investigation” and “afford the parties a reasonable opportunity to object to the research, and to respond to the information the judge obtains through the judge’s investigation.”<sup>165</sup> By involving

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<sup>163</sup> See *Gebremichael v. INS*, 10 F.3d 28, 39 (1st Cir. 1993) (citing *Mathews v. Eldridge*, 424 U.S. 319, 324 (1976)).

<sup>164</sup> Notice of Hearing and Prehearing Order, *Adams v. IVA Coal Inc.*, Case Nos. 2018-BLA-5228, 2018-BLA-5236 (DOL May 8, 2018).

<sup>165</sup> Thornburg, *supra* note 6, at 191-92; see also *Boykin v. 1 Prospect Park ALF, LLC*, 993 F. Supp. 2d 264, 269 (E.D.N.Y. 2014) (employing a similar approach); *Boykin v. 1 Prospect Park ALF, LLC*, 293 F.R.D. 308 (E.D.N.Y. 2013); Jack B. Weinstein, *Limits on Judges Learning, Speaking, and Acting—Part I—Tentative First Thoughts: How May Judges Learn?*, 36 ARIZ. L. REV. 539, 560 (1994).



parties in establishing the scope, methodology, and interpretation of independent research, this approach may help settle parties' concerns that independent research is nontransparent.<sup>166</sup>

Adjudicators sometimes first notify parties of extra-record information at the hearing itself.<sup>167</sup> In at least two cases, an adjudicator conducted an internet search during the hearing, with the parties' assent, to verify facts relevant to a party's testimony.<sup>168</sup> In still other cases, a statement in a hearing decision is the first indication that an adjudicator has taken official notice.

When an appellate adjudicator intends to take official notice of a material fact, she may do so at either of two points: prior to issuing a decision or in the final decision of the agency. However, courts in some contexts have found that providing notice in a final agency decision conflicts with the right to an opportunity to show the contrary.<sup>169</sup>

#### **b. Timely Request to Show the Contrary**

Agency rules rarely, if ever, make explicit what action by a party constitutes a timely request to show the contrary. An "illustrative rule" from the 1953 report of the President's Conference on Administrative Procedure may provide a helpful (if verbose) model:

Any party may controvert a request or a suggestion that official notice of a material fact be taken at the time the same is made if it be made orally, or by a pleading, reply or brief in response to the pleading or brief or notice in which the same is made or suggested. If any decision is stated to rest in whole or in part upon official notice of a material fact which the parties have not had a prior opportunity to controvert, any party may controvert such facts by appropriate exceptions if such notice be taken in an initial or intermediate decision or by a petition for reconsideration if notice of such fact be taken in a final report. Such controversion shall concisely and clearly set forth the sources, authority and other data relied upon to show the existence or non-existence of the material fact assumed or denied in the decision.<sup>170</sup>

Consistent with this model, agencies should consider addressing the manner in which a party may request an opportunity to rebut an officially noticed material fact as well as the information the party should submit with that request. Agencies may wish to require, for example, that parties who object to the taking of official notice make a preliminary, written showing with the request that they can contest the officially noticed fact.<sup>171</sup> Agencies should also consider specifying the time frame in which such a request must be made.

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<sup>166</sup> Thornburg, *supra* note 6, at 192-99.

<sup>167</sup> See, e.g., Dean v. Colvin, 585 Fed. Appx. 904, 905 (7th Cir. 2014); Chen v. Holder, 380 Fed. Appx. 31, 33 n.1 (2d Cir. 2010).

<sup>168</sup> See Chouhan v. Holder, 580 Fed. Appx. 547, 547 (9th Cir. 2014); Zamora v. Berryhill, 2018 U.S. Dist. LEXIS 60831, at \*33-34 (C.D. Cal. Apr. 9, 2018).

<sup>169</sup> See *infra* Part III.B.2.c.

<sup>170</sup> REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE 31 (1953). The President's Conference on Administrative Procedure is a direct predecessor to the Administrative Conference of the United States.

<sup>171</sup> See BNSF v. STB, 453 F.3d 473, 486 (D.C. Cir. 2006); KOCH, *supra* note 113, § 5:55[2](b).

### c. Opportunity to Show the Contrary

The opportunity to show the contrary includes not only the opportunity to rebut a fact but also the opportunity to challenge the inferences that an adjudicator draws from it, even if the fact itself is undisputed.<sup>172</sup> In addition to promoting fairness and transparency, the opportunity to “supplement, explain, and give different perspective to the facts upon which the agency relies” is a powerful procedural safeguard and promotes substantive accuracy.<sup>173</sup> For example, in a case in which a Social Security Administration adjudicator concluded a disability applicant was working based on an active business website identified through independent research, the applicant testified he was unaware the website was still available, stating “[i]t should have been shut down . . . because I didn’t pay the renewal fees.”<sup>174</sup>

As to the timing of the opportunity to show the contrary, when an adjudicator notifies the parties before an evidentiary hearing that he or she intends to officially notice a fact, the hearing itself offers an opportunity to show the contrary. Regulations at several agencies encourage adjudicators to handle official notice matters at pre-hearing conferences.<sup>175</sup>

When a party first learns at a hearing that an adjudicator intends to take official notice of material, extra-record information, she may object that it is an “improper surprise” for an adjudicator to first confront a party with extra-record information at a hearing and expect a rebuttal or explanation on the spot.<sup>176</sup> Whether a “surprise” is improper will depend on the type of information, its disputability, and its author (i.e., the party who objects or someone else).<sup>177</sup>

Challenges arise more frequently when an adjudicator discovers relevant extra-record information after the hearing and relies on it in a decision. In some cases, the right to challenge the officially noticed fact on appeal to an agency reviewer may provide sufficient opportunity to show the contrary.<sup>178</sup> In other cases, it may be incumbent on the adjudicator to offer the parties an opportunity to show the contrary, either orally or in writing depending on the circumstances.<sup>179</sup> As a general rule, the “critical variables are the degree to which the facts are adjudicative or legislative, the degree of doubt or certainty, and the degree of effect on the decision.”<sup>180</sup> Kristin Hickman and Richard Pierce note:

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<sup>172</sup> *Chhetry v. U.S. DOJ*, 490 F.3d 196, 200 (2d Cir. 2007) (citing *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1099 (10th Cir. 1994); *Rogue v. INS*, 954 F.2d 769, 773 (D.C. Cir. 1992)); *S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 187 (D.C. Cir. 2013) (citing *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1202 (D.C. Cir. 1989); *Kapcia v. INS*, 944 F.2d 702, 705-06 (10th Cir. 1991); *accord* ATTORNEY GENERAL’S COMMITTEE, *supra* note 81, at 72.

<sup>173</sup> *See* ATTORNEY GENERAL’S COMMITTEE, *supra* note 81, at 72.

<sup>174</sup> *Tudisco v. Comm’r of Soc. Sec.*, 2017 U.S. Dist. LEXIS 105292, at \*23-24 (W.D.N.Y. July 7, 2017).

<sup>175</sup> *See, e.g.*, 12 C.F.R. § 308.31(b)(3) (2019);

<sup>176</sup> *See Sweet v. Astrue*, 32 F. Supp. 3d 303, 311-12 (N.D.N.Y. 2012); *but see Dean*, 585 Fed. Appx. at 905.

<sup>177</sup> *See Am. Trucking Ass’ns v. Frisco*, 358 U.S. 133, 144 (1958).

<sup>178</sup> *See Kapcia v. INS*, 944 F.2d 702, 705-06 (10th Cir. 1991).

<sup>179</sup> *See, e.g., Sykes v. Apfel*, 228 F.3d 259, 273 (3d Cir. 2000).

<sup>180</sup> HICKMAN & PIERCE, *supra* note 17, § 9.6.1.

When facts are adjudicative, disputed, and critical, nothing less than the opportunity to present evidence at a hearing will normally suffice. When the facts are legislative, the [adjudicator] may still choose to provide an opportunity to show the contrary through evidence at a hearing, but they are not required to do so.<sup>181</sup>

Similar questions arise when an *appellate* adjudicator takes official notice. There is a longstanding circuit split in the immigration context as to whether a reopening request provides a suitable means to show the contrary when the Board of Immigration Appeals (BIA) relies on official notice of an extra-record fact, or whether the BIA must offer an opportunity to show the contrary before it issues its decision.<sup>182</sup> The Court of Veterans Appeals has held that before the Board of Veterans' Appeals relies on independently obtained evidence to decide a disability claim, it must "provide a claimant with reasonable notice of such evidence and of the reliance proposed to be placed on it, and a reasonable opportunity for the claimant to respond to it."<sup>183</sup> Regardless of the constitutional and statutory requirements for official notice, agencies should consider providing an opportunity to show the contrary before publication in contexts in which publishing a final decision prior to an opportunity to show the contrary could reasonably impact a party's reputation or wellbeing.<sup>184</sup>

#### **d. Association of the Extra-Record Fact with the Record**

Because internet information is impermanent and comparatively unstable,<sup>185</sup> agencies should also develop or clarify their procedures for preserving extra-record internet evidence and associating it with an administrative record when necessary, to ensure meaningful administrative and judicial review.<sup>186</sup> Adjudicators sometimes associate copies of extra-record internet resources with the record and sometimes provide uniform resource locators (URL) instead. If a court is unable to review extra-record information pertinent to a factual finding, it may consider remanding the case to the agency.<sup>187</sup> At a minimum, adjudicators should record the information's URL; its date of publication; and the date and time it was accessed or printed.<sup>188</sup> Adjudicators should preserve a copy of the extra-record source and ensure it is "complete" and "legible, with

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<sup>181</sup> *Id.*

<sup>182</sup> The First, Fifth, Seventh, and District of Columbia Circuits have held that a motion to reopen offers a sufficient opportunity to show the contrary. *See* Gebremichael v. INS, 10 F.3d 28, 38-39 (1st Cir. 1993); Gutierrez-Rogue v. INS, 954 F.2d 769, 773 (D.C. Cir. 1992); Kaczmarczyk v. INS, 933 F.2d 588, 595-97 (7th Cir. 1991); Rivera-Cruz v. INS, 948 F.2d 962, 968 (5th Cir. 1991). The Second, Ninth, and Tenth Circuits require BIA to offer parties the opportunity to show rebut an officially noticed fact before it issues a decision. *Chhetry v. United States DOJ*, 490 F.3d 196, 201 (2d Cir. 2007); *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1100 (10th Cir. 1994); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1029-30 (9th Cir. 1992).

<sup>183</sup> *Thurber v. Brown*, 5 Vet. App. 119, 126 (1993).

<sup>184</sup> *See* Mulrooney & Legel, *supra* note 96, at 439 (arguing that publication of a final decision prior to providing an opportunity to show the contrary "puts the information in the public domain for the respondent's patients, customers, peers, colleagues, and families to see before any dispute is resolved"); *see also* Paul v. Davis, 424 U.S. 693 (1976).

<sup>185</sup> *See supra* notes 57-63.

<sup>186</sup> TRADEMARK TRIAL AND APPEAL BOARD MANUAL § 704.08(b) provides a useful model.

<sup>187</sup> *See* Myrie v. AG United States, 855 F.3d 509, 514 (3d Cir. 2017); *Ostborg v. Comm'r of Soc. Sec.*, 610 Fed. Appx. 907, 912, 917 (11th Cir. 2015); *Caushi v. AG of the United States*, 436 F.3d 220, 231 n.7 (3d Cir. 2006); *Davis v. Berryhill*, 2017 U.S. Dist. LEXIS 123512, at \*4-5 (S.D. Fla. Aug. 3, 2017); *Stinson v. Colvin*, 2016 U.S. Dist. LEXIS 13920, at \*9-10 (N.D. Ind. Feb. 4, 2016).

<sup>188</sup> TRADEMARK TRIAL AND APPEAL BOARD MANUAL § 704.08(b) (June 2019) [hereinafter TBMP].

each page displayed so it can be read from top to bottom.”<sup>189</sup> Agencies may also find helpful the suggested practices of the Judicial Conference of the United States for the use of internet materials in judicial opinions.<sup>190</sup>

### **C. Other Uses of Extra-Record Information**

The Administrative Procedure Act’s (APA) official notice provision applies only when a decision “rests” on “official notice” of a “material” “fact” without defining these terms. By omission, it does not regulate other uses of extra-record information,<sup>191</sup> such as official notice of legal information, the use of material information for purposes other than the official notice, or the use of non-material information. This raises two issues. First, there is a need to define which uses of extra-record information fall within the scope of this provision and which do not. Second, there is need to clarify what procedures, if any, adjudicators must follow when they make use of extra-record information in a manner that does not fall within the provision’s scope.

This section considers the scope of the statutory terms “rests,” “official notice,” “material,” and “fact” and the procedures agency adjudicators follow when they use extra-record information that falls outside that scope. As they develop guidance on independent research, agencies should consider clarifying the meaning of these terms for purposes of their adjudications and defining what specific procedures, if any, adjudicators must follow when they use extra-record information for a purpose other than official notice of a material fact.

#### **1. When a Decision “Rests” on an Officially Noticed Material Fact**

The APA’s official notice provision applies only when an agency decision “rests” on an officially noticed material fact. However, adjudicators sometimes also seek out background or specific information, for example to prepare for a hearing or to question a party or a witness, without independently relying on the information in a decision or adding it to the record.<sup>192</sup>

An adjudicator’s failure to disclose extra-record information may raise concerns about transparency. When an adjudicator discloses her consideration of extra-record information but does not explicitly rely on the information to render her decision, parties may still question the extent to which the extra-record information influenced the adjudicator’s decision making. Nevertheless, because federal courts review agency decisions to determine whether they are supported by substantial evidence of record, it is unclear that an adjudicator’s non-use of independently obtained information has any meaningful effect on a party’s right to know and meet the evidence.

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<sup>189</sup> *Id.* at § 704.08(b) (June 2019); *see also* Bellin & Ferguson, *supra* note 4, at 1174.

<sup>190</sup> *See* Report of the Proceedings of the Judicial Conference of the United States 10-11 (Mar. 17, 2009), available at <https://www.uscourts.gov/sites/default/files/2009-03.pdf>; *see also* SUPREME CT. OF THE U.S., INTERNET SOURCES CITED IN OPINIONS, [https://www.supremecourt.gov/opinions/cited\\_urls/18](https://www.supremecourt.gov/opinions/cited_urls/18) (last visited Aug. 1, 2019).

<sup>191</sup> *Cf.* Ernest Gellhorn, *supra* note 86, at 46.

<sup>192</sup> *See* Martin, *supra* note 224, at 1355.

The Third Circuit found in one case that an immigration judge (IJ) did not err by questioning a party about the content of two independently obtained internet articles because the judge “did not rest his decision on these two articles.”<sup>193</sup> Where an IJ admitted to “conduct[ing] an Internet search” that “cast doubt” on a party’s affidavit, the Third Circuit found no due process violation where the IJ did not “rely” on the information in his decision.<sup>194</sup> Reviewing a Social Security Administration (SSA) decision, a federal magistrate judge held that an administrative law judge did not err when she conducted independent internet research to learn the about the side effects of the medication acitretin but “did not use her independent internet research to support her findings.”<sup>195</sup> And in a case where an SSA adjudicator researched a party’s employer, the court found no error where the adjudicator “did not base her decision on anything beyond the scope of what [the party] herself had testified to at the hearing.”<sup>196</sup>

The right to an unbiased tribunal, however, may provide a separate ground for challenging an adjudicator’s independent research if an adjudicator conducts inappropriate independent research and the research itself or the information identified through the research is unduly prejudicial to a party.<sup>197</sup>

An adjudicator may also improperly use independently obtained information to question a party, even if she does not rely on the information in her decision. For example, a reviewing court found it inappropriate where an immigration judge used Wikipedia not just to gain background information but to test a party’s knowledge of Sikhism<sup>198</sup> and in another case “quizzed” a party “about the custom of bride-price, comparing her answers to a Wikipedia article he had in front of him.”<sup>199</sup>

Agencies should consider clarifying what it means for an agency to “rest” on an officially noticed material fact. Agencies should also consider clarifying whether an adjudicator must conform to any specific procedures when she considers extra-record information but does not affirmatively rely on it, such as disclosing such consideration to the parties or adding the extra-record information to the record.

## **2. Official Notice and Non-Official Notice of Material Facts**

Official notice is “concerned with the process of proof” rather than the “evaluation of evidence.”<sup>200</sup> However, it is often difficult to distinguish between proof and evaluation in practice, such as when an adjudicator relies on extra-record information to “refute the

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<sup>193</sup> *Ozmen v. A.G. of the United States*, 219 Fed. Appx. 125, 128-29 (3d Cir. 2007).

<sup>194</sup> *Singh v. AG of U.S.*, 705 Fed. Appx. 134, 137 (3d Cir. 2017).

<sup>195</sup> *Shiple v. Colvin*, 2015 U.S. Dist. LEXIS 140426, at \*15-16 (S.D. Ind. Sep. 24, 2015).

<sup>196</sup> *May v. Colvin*, 2013 U.S. Dist. LEXIS 179107, at \*20 (D. Utah Dec. 19, 2013).

<sup>197</sup> *See supra* Part I.

<sup>198</sup> *Singh v. Holder*, 720 F.3d 635, 644-45 (7th Cir. 2013).

<sup>199</sup> *Sibanda v. Holder*, 778 F.3d 676, 680-81 (7th Cir. 2015).

<sup>200</sup> *Id.*; *see also* *Dixie Fuel Co. v. OWCP*, 820 F.3d 833 (6th Cir. 2016); KOCH, *supra* note 113, § 5:55[2]; Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act* 20 (Nov. 10, 2016), <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.

unequivocal findings” of an expert<sup>201</sup> or relies on extra-record information about an expert to weigh her opinion.<sup>202</sup> As a result, adjudicators and courts often interpret official notice broadly to encompass the use of extra-record information both to prove a fact and to evaluate evidence.<sup>203</sup>

If agencies wish to distinguish between official notice and other uses of extra-record facts, or between the procedures applicable to such uses, they should do so clearly and explicitly.

### 3. Material and Immaterial Facts

Under the APA’s official notice provision, “[w]hen an agency decision rests on official notice of a *material* fact not appearing in the evidence in the record, a party is entitled to an opportunity to show the contrary.”<sup>204</sup> By omission, the APA does not mandate that agencies follow the same procedures when they rest on official notice of facts that are not material.<sup>205</sup> Unfortunately, the APA does not define which facts are material and which are not.

One way to think about materiality is by reference to the nature of the fact itself. For nearly 80 years, courts and scholars have accepted a distinction between adjudicative and legislative facts. Adjudicative facts are the “facts of a particular” case: “who did what, where, when, how, and with what motive or intent.”<sup>206</sup> Legislative facts are those which have relevance to legal reasoning . . . , whether in the formulation of a legal principle or ruling by a judge . . . or in the enactment of a legislative body.”<sup>207</sup>

The distinction between adjudicative and legislative facts was first drawn in the administrative context, when, in a seminal 1942 article, Kenneth Culp Davis argued that “[t]he rules of evidence for finding facts which form the basis for creation of law and determination of policy [i.e., legislative facts] should differ from the rules for finding facts which concern only the parties to a particular case [i.e., adjudicative facts].”<sup>208</sup> Davis argued that agencies “must be free to go outside the record and beyond the limits of judicial notice in informing itself of facts which enter into its judgment in molding law and formulating policy,” and that the procedural safeguards for official notice are ordinarily unnecessary for legislative facts, even reasonably disputable legislative facts, because they do not relate to the individual parties.<sup>209</sup>

For decades, the distinction between adjudicative and legislative facts has underlain the rule of judicial notice in the *Federal Rules of Evidence* (FRE). By its terms, FRE 201, which requires procedures similar to those in the APA’s official notice provision, applies only to

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<sup>201</sup> See *McDaniel v. Celebrezze*, 331 F.2d 426, 428-30 (4th Cir. 1964).

<sup>202</sup> See *Hicks v. Comm’r of Soc. Sec.*, 909 F.3d 786, 805-806 (6th Cir. 2018).

<sup>203</sup> See Ernest Gellhorn, *supra* note 86, at 43-44; *The Relationship of Official Notice to the Substantial-Evidence Rule in the Judicial Review of Administrative Adjudications*, *supra* note 125, at 622-24.

<sup>204</sup> 5 U.S.C. § 556(e) (emphasis added).

<sup>205</sup> See Ernest Gellhorn, *supra* note 86, at 46.

<sup>206</sup> FED. R. EVID. 201(a) Advisory Committee Note; see also Davis, *supra* note 12, at 549.

<sup>207</sup> FED. R. EVID. 201(a) Advisory Committee Note; Davis, *supra* note 12, at 549.

<sup>208</sup> Davis, *supra* note 112, at 402.

<sup>209</sup> Davis, *supra* note 112, at 402-410; see also Ernest Gellhorn, *supra* note 86, at 47.

*adjudicative* facts.<sup>210</sup> The Advisory Committee Notes to FRE 201 make clear that “[n]o rule deals with judicial notice of ‘legislative’ facts,”<sup>211</sup> and scholars have explored in depth the extent to which federal courts, especially appellate courts, rely on extra-record legislative facts without following the procedural rules of FRE 201.<sup>212</sup> Agencies that adopt the FRE and rely on federal court practice to define the scope of official notice may be likely to draw the same distinction.<sup>213</sup> Even those agencies that do not adopt the FRE may be guided by the same principle,<sup>214</sup> essentially viewing adjudicative facts to be “material” and legislative facts not to be “material.”

This taxonomy can be problematic for several reasons. First, as a purely textual matter, the APA’s official notice provision refers only to “material” facts rather than distinguishing between adjudicative and legislative facts, even though scholars had already recognized that distinction by the time of the APA’s enactment. Kristin Hickman and Richard Pierce write that unlike FRE 201, the APA’s official notice provision “applies to notice of all contested material facts, adjudicative or legislative.”<sup>215</sup> Beyond the APA context, the Supreme Court has held that an agency may take official notice may take notice of *legislative* facts within its area of expertise “as long as a party has an opportunity to respond.”<sup>216</sup>

Second, while courts and scholars universally accept the conceptual distinction between adjudicative and legislative facts, there is significant confusion over the nature of its parts. Following Davis, Hickman and Pierce define adjudicative facts narrowly to be those specific to the parties or facts of a case.<sup>217</sup> They write that while general facts may help the court determine adjudicative facts, they “do not for that reason become adjudicative facts.”<sup>218</sup> However, one need only look at judicial opinions and treatises on the law of evidence to see that judges often define adjudicative facts more broadly or at least apply FRE 201 to a broader set of facts.<sup>219</sup> Hickman and Pierce note that even though FRE 201 is inapplicable to legislative facts, judges cite the rule most often in the context of legislative facts.<sup>220</sup>

Third, even accepting the distinction between legislative and adjudicative facts, the line between them is blurry at best.<sup>221</sup> Hickman and Pierce counter that a “degree of vagueness may be affirmatively desirable” in some instances to the extent that vagueness forces adjudicators to focus on “the context of the problem, including especially the consequences of the classification” rather than focusing narrowly on the mechanical distinction between adjudicative and legislative

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<sup>210</sup> FED. R. EVID. 201(a).

<sup>211</sup> FED. R. EVID. 201(a) Advisory Committee Note.

<sup>212</sup> See generally Larsen, *supra* note 5.

<sup>213</sup> See, e.g., NAT’L LABOR RELATIONS BD., DIV. OF JUDGES, BENCH BOOK: AN NLRB TRIAL MANUAL 163 (2019) [hereinafter NLRB TRIAL MANUAL] (distinguishing among legislative, adjudicative, and background facts and citing ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 478 (2017)).

<sup>214</sup> See, e.g., 29 C.F.R. § 18.201 (2019).

<sup>215</sup> HICKMAN & PIERCE, *supra* note 17, § 9.6.1. But see KOCH, *supra* note 113, § 5:55[2](a) (concluding the APA’s official notice procedures “are clearly required for adjudicative facts but not for legislative facts”).

<sup>216</sup> City of Erie v. Pap’s A.M., 529 U.S. 277, 298 (2000) (emphasis added).

<sup>217</sup> HICKMAN & PIERCE, *supra* note 17, § 9.6.1.

<sup>218</sup> *Id.*

<sup>219</sup> See generally 1 MARK S. BRODIN ET AL. WEINSTEIN’S FEDERAL EVIDENCE § 201.12 (2019).

<sup>220</sup> HICKMAN & PIERCE, *supra* note 17, § 9.6.1.

<sup>221</sup> See generally Larsen, *supra* note 5; see also Keele, *supra* note 5, at 131-32; Thornburg, *supra* note 6, at 153-154.

facts.<sup>222</sup> Indeed, several scholars have recommended that adjudicators should as a matter of practice follow the procedures for official notice even for legislative facts because legislative facts can be especially critical to agency decision making.<sup>223</sup> The uses of vocational information in the Social Security disability context and country condition information in the immigration context provide good examples of the potential importance of legislative facts in adjudication.<sup>224</sup>

Given these considerations, focusing on a given fact's importance in a particular proceeding may offer a more workable model for adjudication than attempting in each case to categorize an extra-record fact as either adjudicative or legislative. A "background" fact (which defines basic, undisputed concepts or improve reader comprehension) or "coloring-book" fact (which serve the primarily rhetorical function of enlivening a written opinion) is less likely to be material than a general or party-specific fact that goes to the heart of a claim or dispute.<sup>225</sup> Courts have distinguished, for example, between an adjudicator's citation to an American Psychiatric Association diagnostic manual to explain the Global Assessment of Functioning scale and a citation to the same text for the conclusion that a party's poor social functioning was "volitional."<sup>226</sup>

Of course, focusing on the relative importance of a fact will raise difficult line-drawing questions. While adjudicators frequently cite online authority as a means to simply confirm or bolster facts they would previously have attributed to common knowledge,<sup>227</sup> it can be more difficult in other cases to distinguish background facts from more material ones.<sup>228</sup> There is also a risk that a search for one kind of fact may inadvertently expose the adjudicator to other information that is inappropriate for independent research.<sup>229</sup> Nevertheless, as part of a broader policy on independent research, agencies should attempt to clarify which facts are "material" for independent research purposes and whether adjudicators should follow any specific procedures when they use facts that are not "material." If agencies do wish to distinguish between factual categories, they should do so clearly.

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<sup>222</sup> HICKMAN & PIERCE, *supra* note 17, § 9.6.1.

<sup>223</sup> KOCH, *supra* note 113, at § 5:55[1]; Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 49, 102 (2005).

<sup>224</sup> See David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1282-85 (1990); see also Susan K. Kerns, Note, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOBAL LEG. STUDIES 197, 209-10 (2000); Vicente A. Tome, Note, *Administrative Notice of Changed Country Conditions in Asylum Adjudication*, 27 COLUM. J.L. & SOC. PROBS. 411, 463-64 (1994); HICKMAN & PIERCE, *supra* note 17, § 9.6.1.

<sup>225</sup> Cf. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 478 (2017); POSNER, *supra* note 8, at 137; Thornburg, *supra* note 6, at 151-52.

<sup>226</sup> Compare *Blon v. Colvin*, 2016 U.S. Dist. LEXIS 66625, at \*8-9 (W.D. Pa. May 20, 2016), with *Prince v. Colvin*, 2015 U.S. Dist. LEXIS 10547, at \*15-18 (Jan. 29, 2015); see also NLRB TRIAL MANUAL, *supra* note 213, at 163.

<sup>227</sup> See, e.g., *Jones v. Rocky Mtn. Reg. Dir.*, BIA, 54 IBIA 40 (2011) (providing a definition of "surveying" from a Bureau of Land Management webpage and adding a copy of the webpage to the record).

<sup>228</sup> Jonathan B. Amarilio & Jillian S. Cole, *The Rowe Over Rowe: What To Do With Facts Between the Record*, LITIGATION 53, 55 (Summer 2016); see also *Pessoa Construction Co.*, 2013 NLRB LEXIS 794, at \*23 n.13 (taking "judicial notice" of definitions of medical terms on the National Institute of Health website).

<sup>229</sup> Cf. Keele, *supra* note 5, at 161; Thornburg, *supra* note 6, at 174-82.



#### 4. Facts and Non-Facts

Lawyers distinguish between two informational inputs to decision making: “law” and “fact.”<sup>230</sup> Independent legal research has long been recognized as within the province of federal and state judges.<sup>231</sup> For example, the *Federal Rules of Civil Procedure* permits judges to independently research foreign law,<sup>232</sup> and many state codes explicitly permit judges to take judicial notice of certain enumerated legal materials without following any specific procedures.<sup>233</sup> The 1953 report of the President’s Conference on Administrative Procedure suggested agencies adopt the same approach.<sup>234</sup>

The use of “facts” in the APA’s official notice provision likely serves to exclude official notice of legal matters and suggests that agencies are free to craft their own procedures, or no procedures, to govern such practice.<sup>235</sup> That much is relatively uncontroversial. Unfortunately, as many scholars and courts have described, it is difficult to distinguish between fact and law in practice.<sup>236</sup>

While some materials are clearly “law” in the administrative context—such as controlling substantive and procedural rules and agency decisions designated as controlling precedent—other agency guidance materials that are said to lack the force of law may nevertheless bind certain employees or represent an authoritative interpretation of a statute or an agency’s rules.<sup>237</sup> In other circumstances, agency adjudicators may need to consult state, tribal, or foreign legal codes or the rules of state or other federal agencies, for example to resolve factual questions or mixed questions of law and fact such as to determine whether a licensee acted in accordance with professional standards, whether an alien has a well-founded fear of persecution upon return to her country of origin, or the procedures prescribed by state law.<sup>238</sup>

Agency decisions cite interpretive rules and policy statements;<sup>239</sup> administrative manuals, field guides, handbooks, and practitioner guides;<sup>240</sup> organization charts;<sup>241</sup> informal guidance and

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<sup>230</sup> Thornburg, *supra* note 6, at 174.

<sup>231</sup> Morgan, *supra* note 115, at 270; Frederick Schauer, *The Decline of the Record: A Comment on Posner*, 51 DUQ. L. REV. 51, 53 (2013); *see also* Rowe v. Gibson, 798 F.3d 622, 640 (7th Cir. 2015) (Hamilton, J., dissenting).

<sup>232</sup> FED. R. CIV. P. 44.1; ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 478 (2017).

<sup>233</sup> *See, e.g.*, N.Y. C.P.L.R. 4511 (CONSOL. 2019).

<sup>234</sup> REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE, *supra* note 170, at 28-31.

<sup>235</sup> *Cf.* Peck, *supra* note 149, at 243-46.

<sup>236</sup> *See* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1769-70 (2003); Thornburg, *supra* note 6, at 174-79.

<sup>237</sup> *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., *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).

<sup>238</sup> *See* *Mushayama v. Holder*, 469 Fed. Appx. 443, 456-57 (6th Cir. 2012); *Niagara Mohawk Power Corp. v. E. Area Dir.*, BIA, 32 IBIA 276 n.1 (1998).

<sup>239</sup> *See, e.g.*, *O’Connell Elec. Co.*, 23 OSHC 1851 (2011).

<sup>240</sup> *See, e.g.*, *Samuels v. VA*, Docket No. NY-0752-14-0293-I-1, 2016 MSPB LEXIS 4631, at \*46 (Aug. 8, 2016).

<sup>241</sup> *See, e.g.*, *U.S. Postal Service*, 365 NLRB No. 51 (2017).

letters;<sup>242</sup> press releases, alerts, and educational campaign materials;<sup>243</sup> and public statements of agency officials.<sup>244</sup> Federal law provides that publication of a document in the *Federal Register* creates a rebuttable presumption that it was “duly issued, prescribed, or promulgated” but is silent as to the truth of the matter asserted in the *Federal Register* notice.<sup>245</sup> Many other guidance documents are not published in the *Federal Register* but are made available on agency websites.<sup>246</sup> Other agency decisions reference state agency guidance materials of varying formality published in state official journals or on state agency websites.<sup>247</sup>

As part of a policy on independent research, agencies should consider clarifying which materials constitute “law” for purposes of official notice and what procedures, if any, adjudicators should follow when they take consult or take official notice of information from legal materials. An “illustrative rule” in the 1953 report of the President’s Conference on Administrative Procedure and state evidentiary codes may provide a helpful model.<sup>248</sup>

#### IV. ACHIEVING DECISIONAL ACCURACY

##### A. When Are Adjudicators Institutionally Equipped to Conduct Factual Research?

A common objection to independent research in the federal courts is that judges, who are generalist attorneys, may not be institutionally equipped to undertake consistently high-quality independent factual research.<sup>249</sup> Courts, parties, and observers have sometimes raised the same concern in the administrative context as well. For example, reviewing courts have repeatedly held that even though Social Security Administration (SSA) adjudicators routinely decide cases that turn on medical facts, they are not medical experts and should not rely on extra-record medical information to “make their own independent medical findings” or “supplant[] the medical expert.”<sup>250</sup> Instead, SSA adjudicators rely on the testimony of medical experts and on policy statements developed by agency policy makers which provide treatise- or official notice-like guidance on the nature, severity, and effects of medical impairments.<sup>251</sup>

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<sup>242</sup> See, e.g., *Arnold E. v. Lynch*, Appeal No. 0120121034, 2015 EEOPUB LEXIS 2793, at \*30 n.5 (Oct. 14, 2015).

<sup>243</sup> See, e.g., *Gregory Bartko*, Exchange Act Release No. 71666, 2014 SEC LEXIS 841, at \*57 n.2 (Mar. 7, 2014).

<sup>244</sup> See, e.g., *Robert Weeks*, Initial Decisions Release No. 199, 2002 SEC LEXIS 3433, at \*153 (ALJ Feb. 4, 2002).

<sup>245</sup> 44 U.S.C. § 1507 (2019).

<sup>246</sup> See generally Cary Coglianesi, Public Availability of Agency Guidance Documents (May 15, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/consultant-report-public-availability-agency-guidance-documents>.

<sup>247</sup> See, e.g., *Arthur H. Bell*, D.O.; Decision and Order, 80 Fed. Reg. 50,035 (Aug. 18, 2015).

<sup>248</sup> See REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE, *supra* note 170, at 28.

<sup>249</sup> *Cheng*, *supra* note 9, at 1283-84; see also *Rowe v. Gibson*, 798 F.3d 622, 642-43 (2015) (Hamilton, J., dissenting).

<sup>250</sup> See *Rohan v. Chater*, 98 F.3d 966, 970 (7th Cir. 1996); *Ness v. Sullivan*, 904 F.2d 432, 435 (8th Cir. 1990); *Williams v. Richardson*, 458 F.2d 991, 992 (5th Cir. 1972); *Nelms v. Gardner*, 386 F.2d 971, 973 (6th Cir. 1967); *Colwell v. Gardner*, 386 F.2d 56, 71-72 (6th Cir. 1967); *Sayers v. Gardner*, 380 F.2d 940, 954-55 (6th Cir. 1967); *Ross v. Gardner*, 365 F.2d 554, 557-58 (6th Cir. 1966); *Hall v. Celebrezze*, 314 F.2d 686, 690 (6th Cir. 1963); see also *Felegi v. Astrue*, 2011 U.S. Dist. LEXIS 145836, at \*10-11 (D. Ark. 2011) (finding error where “[i]nstead of further developing the record by contacting Plaintiff’s treating sources, the ALJ “Googled” Plaintiff’s illnesses and found her impairments were not disabling”).

<sup>251</sup> Social Security Rulings (SSR) address the evaluation of disorders such as postpolio sequelae, reflex sympathetic dystrophy syndrome/complex regional pain syndrome, visual field loss and automated static threshold perimetry,

However, adjudicators may be better positioned than federal judges to undertake independent research in certain circumstances. First, because adjudicators only decide a comparatively narrow range of factual and legal issues, they gain familiarity with not only the general principles of their cases but also the resources helpful to their resolution.<sup>252</sup> Certainly one historical reason for the creation of agency adjudicative schemes has been to have decisions “made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration.”<sup>253</sup> And it is well established that while adjudicators may be limited in their ability to independently supplement the record, they can rely on their specialized expertise to evaluate, weigh, and draw conclusions from the evidence.<sup>254</sup>

At a personal level, it may even be difficult or “unnatural” for an adjudicator to “disregard known facts and fail to resort to available sources of facts” or “to resist the temptation to make full use of his specialized expertise.”<sup>255</sup> This is especially true in mass adjudication systems in which adjudicators almost repetitively encounter the same kinds of evidence and information. It may also be true that specialist decision makers are particularly attentive to legal and factual developments within their area of specialization; immigration judges, for example, may closely follow international current events. As extra-record information becomes “obvious and notorious” to an adjudicator, relying on that information can promote accurate decision making.<sup>256</sup> Prohibiting adjudicators from consulting known resources not submitted by a party may have the unintended effect of promoting decision making based on conjecture or half-remembered notions over verifiable and transparent documentary information.<sup>257</sup>

Second, adjudicators have comparatively easy access to greater amounts of specialized information curated by agency experts or housed in agency collections.<sup>258</sup> It is for this reason that while the scope of “judicial notice properly depends upon what is already in the court’s possession, official notice logically should depend upon what is already in the agency’s possession.”<sup>259</sup> Both Supreme Court case law and the Administrative Procedure Act’s official notice provision lend support to the idea that agency adjudicators have greater capacity to research “matters as to which the agency by reason of its functions is presumed to be expert, such as technical or scientific facts within its specialized knowledge.”<sup>260</sup>

Third, while the federal courts have limited ability to “prescribe general rules of practice and procedure and rules of evidence,” there are easier mechanisms for agency policy makers and

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fibromyalgia, drug addiction and alcoholism, chronic fatigue syndrome, diabetes mellitus, interstitial cystitis, genetic test results, sickle cell disease, and obesity. Other SSRs address the occupational effects of specific physical and mental limitations. SSRs are issued by the Commissioner of Social Security, published in the *Federal Register*, and made publicly available on SSA’s website.

<sup>252</sup> See *supra* note 127.

<sup>253</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 800 (1945).

<sup>254</sup> *NLRB v. Link-Belt Co.*, 311 U.S. 584, 597 (1941); Asimow, *supra* note 200, at 20.

<sup>255</sup> Davis, *supra* note 112, at 413.

<sup>256</sup> ATTORNEY GENERAL’S COMMITTEE, *supra* note 81, at 72.

<sup>257</sup> Cf. *Thornburg*, *supra* note 6, at 190 (citing Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 953 (1955)).

<sup>258</sup> See *supra* notes 124-125.

<sup>259</sup> Davis, *supra* note 12, at 548.

<sup>260</sup> APA MANUAL, *supra* note 157, at 79.

adjudicative bodies to develop procedural rules and policies to guide independent research.<sup>261</sup> While no agency appears to have developed a comprehensive rule or policy on how adjudicators should or should not conduct independent research, more than 200 regulations on official notice and scattered statements in sub-regulatory guidance materials regulate its practice across the federal government. I discuss these approaches in the following section.

## B. Agency Policies on Subjects Appropriate for Independent Research

Existing agency policies on independent research are largely limited to official notice of facts and silent as to other uses of extra-record information. These policies tend to exhibit three major approaches to guiding independent research.

First, some agencies import the concept of judicial notice under the *Federal Rules of Evidence*, either directly or using substantially similar language.<sup>262</sup> Adjudicators in these agencies frequently rely on federal court precedent and practice to determine the scope of official notice rather than developing an agency-specific approach. A contemporary problem is “the haphazard and poorly theorized method by which courts apply judicial notice rules to the Internet.”<sup>263</sup>

Second, some agencies designate by rule or sub-regulatory policy those categories of information that are appropriate or inappropriate for independent research. I call this a *subject matter-based approach*. For example, some agency rules permit agency adjudicators to take official notice of (a) matters known within the adjudicator’s jurisdiction or area of expertise;<sup>264</sup> (b) matters within the “general knowledge” of the agency as an expert body or “generally known” within the agency’s expertise;<sup>265</sup> (c) matters of “technical or scientific fact” within the agency’s area of expertise;<sup>266</sup> (d) facts derived from “a not reasonably questioned scientific, medical or other technical process, technique, principle or explanatory theory” within the agency’s area of expertise;<sup>267</sup> (e) matters of “technical, scientific, or commercial fact of established character;”<sup>268</sup> and (f) matters that “can be verified.”<sup>269</sup> In sub-regulatory guidance, the Social Security Administration’s (SSA) *Hearings, Appeals, and Litigation Law Manual* (HALLEX) prohibits adjudicators from “us[ing] Internet sites and social media networks to obtain information about claimants to adjudicate cases.”<sup>270</sup> SSA adjudicators may rely on internet information about a party only if it a specialized investigative unit corroborates it.<sup>271</sup>

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<sup>261</sup> Compare 28 U.S.C. § 2072 (2019) with 5 U.S.C. § 553 (2019).

<sup>262</sup> See, e.g., 12 C.F.R. § 1081.303 (2019) (CFPB); 29 C.F.R. § 101.10 (2019) (NLRB) (implementing 20 U.S.C. § 160); *Id.* at § 2200.71 (OSHR); 37 C.F.R. § 2.122 (2019) (TTAB).

<sup>263</sup> Bellin & Ferguson, *supra* note 4, at 1164-65.

<sup>264</sup> 49 C.F.R. § 511.43 (2019) (NHTSA).

<sup>265</sup> 16 C.F.R. § 3.43 (2019) (FTC).

<sup>266</sup> 10 C.F.R. §§ 2.337 (2019) (NRC); *cf.* Admin. Conf. of the U.S., Model Adjudication Rules § 323 (2018).

<sup>267</sup> 29 C.F.R. § 18.201 (2019) (DOL).

<sup>268</sup> 7 C.F.R. § 1.141 (2019) (USDA).

<sup>269</sup> 5 C.F.R. § 1201.64 (2019) (MSPB).

<sup>270</sup> HALLEX §§ I-2-5-69, I-3-2-40 (2019); see also *The Social Security Administration: Is It Meeting Its Responsibilities to Save Taxpayer Dollars and Serve the Public?: Hearing Before the Sen. Comm. on Finance*, 112th Cong. 19-20 (2012) (Statement of Social Security Commissioner Michael J. Astrue).

<sup>271</sup> *Id.* §§ I-2-5-69, I-3-2-40 (2019).

(This restriction provides a rare example of an agency rule on independent research that goes beyond official notice.)

Third, some agencies enumerate by rule or sub-regulatory policy those sources or categories of sources that contain facts that are appropriate or inappropriate for official notice. I call this a *source-based approach*. For example, agency rules permit adjudicators to take official notice of (a) agency proceedings;<sup>272</sup> (b) the agency’s “public official records”;<sup>273</sup> (c) “official public records of any Federal or state government agency”;<sup>274</sup> (d) “official documents”;<sup>275</sup> (e) “any reasonably available public document”;<sup>276</sup> and (f) any “non-privileged document required by law or regulation to be filed with or published by a duly constituted government body.”<sup>277</sup>

Some agencies have developed rules that permit adjudicators to take official notice of facts contained in specific government or non-government publications. For example, Department of Transportation and Surface Transportation Board regulations authorize adjudicators to take official notice of data and publications as government and non-government entities make them available;<sup>278</sup> Social Security Administration regulations take “administrative notice” of “reliable job information” in the *Dictionary of Occupational Titles*;<sup>279</sup> and a Department of Defense regulation authorizes adjudicators to take official notice of “rates set by the Office of Management and Budget” and published in the *Federal Register*.<sup>280</sup>

Some agencies have also adopted source-based approaches (for official notice or other purposes) in sub-regulatory guidance, for example:

- ***Social Security Administration.*** The *Hearings, Appeals, and Litigation Law Manual* (HALLEX) directs adjudicators to consider certain earnings record information compiled by the Social Security Administration (SSA), Department of Health and Human Services, and Internal Revenue Service;<sup>281</sup> permits adjudicators to verify a medical source’s professional qualifications using the “resources found in [the agency’s] Digital Library,”<sup>282</sup> a psychologist’s licensure status using a state website designated by agency policy experts,<sup>283</sup> or inmate information on websites identified by designated officials;<sup>284</sup> and discourages adjudicators from using “[m]edical texts or publications as the authority for resolving an issue.”<sup>285</sup>

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<sup>272</sup> 40 C.F.R. § 179.95 (2019) (EPA).

<sup>273</sup> 17 C.F.R. § 201.323 (2019) (SEC).

<sup>274</sup> 12 C.F.R. § 308.36 (2019) (FDIC).

<sup>275</sup> 8 C.F.R. § 1003.1(d)(3)(iv) (2019) (EOIR, BIA).

<sup>276</sup> 15 C.F.R. § 904.204 (2019) (NOAA).

<sup>277</sup> *Id.*

<sup>278</sup> 14 C.F.R. § 302.24(g); 49 C.F.R. § 1180.4(h).

<sup>279</sup> 20 C.F.R. §§ 404.1566, 416.966 (2019).

<sup>280</sup> 32 C.F.R. § 842.11 (2019).

<sup>281</sup> HALLEX §§ I-2-5-74, I-3-2-12 (2019).

<sup>282</sup> *Id.* at § I-2-1-30.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at §§ I-2-5-69, I-3-2-40.

<sup>285</sup> *Id.* at § I-2-8-25.

- **Executive Office for Immigration Review.** The Board of Immigration Appeals *Practice Manual* allows BIA to officially notice State Department country reports in removal and asylum proceedings.<sup>286</sup> Country reports provide useful background information as well as information useful to determining whether an applicant has a well-founded fear of persecution upon return to her country of origin.<sup>287</sup>
- **Department of Labor.** The *Judges' Benchbook: Black Lung Benefits Act* maintained by the Office of Administrative Law Judges specifies that adjudicators may take official notice of occupational information in the *Dictionary of Occupational Titles*; physician credentials from sources such as the *Directory of Medical Specialists*; and judicial records and investigative reporting related to physician misconduct.<sup>288</sup>
- **Trademark Trial and Appeal Board.** The *Trademark Trial and Appeal Board Manual of Procedure* (TBMP) specifies that the Trademark Trial and Appeal Board (TTAB) may take official notice of “dictionary definitions, including definitions in technical dictionaries, translation dictionaries and online dictionaries which exist in printed format or that have regular fixed editions” as well as “slang dictionaries;” “encyclopedia entries;” “census data;” “standard reference works;” and “commonly known facts.”<sup>289</sup> The Board will “generally not take [official] notice of definitions or entries found only in online dictionaries or reference works not available in a printed format.”<sup>290</sup> The TBMP also permits the Board to consider “[a]n applicant’s materials, such as its website or advertisements describing its goods or services, or specimens showing use of its mark” in ex parte proceedings, but it is unclear to what extent TTAB adjudicators independently obtain such information.<sup>291</sup>
- **Department of Health and Human Services.** The *Medicare Benefit Policy Manual*, published by the Centers for Medicare and Medicaid Services, directs adjudicators to consider off-label use of drugs and biologicals in anti-cancer chemotherapeutic regimens described in “peer-reviewed medical literature appearing in the regular editions” of twenty-six enumerated journals.<sup>292</sup> The Social Security Act requires the Secretary of Health and Human Services to develop and maintain a list of compendia “appropriate for identifying medically accepted indications for drugs.”<sup>293</sup>

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<sup>286</sup> BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 67 (2019); *see also* Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,877, 54,882 (Aug. 26, 2002). The BIA maintains the *Practice Manual* “for the information and convenience of the general public and for parties that appear before the Board.” BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL at 1.

<sup>287</sup> *See* 8 C.F.R. § 1208.13.

<sup>288</sup> JUDGES’ BENCHBOOK: BLACK LUNG BENEFITS (2013).

<sup>289</sup> TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 1208.4 (2019) [hereinafter TBMP]. The TBMP compiles “statutory, regulatory, and decisional authority . . . as a guide for both the Board and practitioners.” *Introduction to TBMP*.

<sup>290</sup> *Id.* § 1208.4. *But see* Alice A. Wang, *Googling for Meaning: Statutory Interpretation in the Digital Age*, 125 Yale L.J. F. 267, 269 (2016) (“The Internet has made traditional dictionaries obsolete. . . . Macmillan Publishers decided to stop printing its dictionaries in 2012, and the Oxford English Dictionary may never be printed again.”).

<sup>291</sup> *Id.* § 1208.5.

<sup>292</sup> MEDICARE BENEFIT POLICY MANUAL § 50.4.5.B (2019).

<sup>293</sup> 42 U.S.C. 1395x(t)(2)(B)(ii) (2019).

Both subject matter-based and source-based approaches serve the same purpose of defining facts that adjudicators are likely to be well-positioned to research. However, while subject matter-based definitions leave it to individual adjudicators (and reviewing courts) to determine what information and sources are appropriate and inappropriate for independent research, source-based definitions rely on policy makers to designate, consistently across an adjudicative scheme, which resources they know to contain reliable information.

Historically, both approaches would likely have yielded similar results. Before the internet was widely available, adjudicators were largely limited, as a practical matter, to an agency's accumulated factual materials: its rules and sub-regulatory guidance; its files, data, reports, and studies; and specialized collections curated by agency librarians.<sup>294</sup> Because there was far less institutional capacity to conduct research outside those materials, these "accumulations of factual materials" represented the real-world manifestation of agency expertise available to an adjudicator.<sup>295</sup>

Today, however, the internet provides adjudicators with a world of potentially relevant information outside the four walls of an agency. Whether or not they take advantage of the ability, adjudicators and their staff report they are now able to engage in more and better in-house research. This raises questions of both accuracy and inter-decisional consistency.

Just as courts have had to grapple with new questions about what constitutes a "source whose accuracy cannot be questioned,"<sup>296</sup> agency adjudicators must now decide what materials represent agency expertise. In a previous time in which agency experts had greater control over the physical materials available to an adjudicator, a subject matter-based approach may have been sufficient. However, internet access raises serious questions about the suitability of subject matter-based approaches.

Because source-based approaches empower policy experts to designate the materials that should be available to adjudicators, they essentially replicate an earlier library-based model of independent research in a virtual space. As a result, they may offer an approach that is well-suited for today's less constrained informational environment. Source-based approaches promote accuracy by ensuring that adjudicators rely on reliable resources and inter-decisional consistency by ensuring that adjudicators across an adjudicative scheme consult the same resources for the same information. Source-based approaches also promote efficiency by decreasing the need for individual adjudicators to identify reliable sources for extra-record information and by focusing administrative and judicial review on the use of extra-record information rather than its accuracy or reliability. Source-based approaches also promote transparency by providing specific notice to parties of the information that may be used in their cases.

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<sup>294</sup> Ernest Gellhorn, *supra* note 86, at 42 ("extra-record facts usually have been developed by the agency's expert staff or accumulated from agency decisions").

<sup>295</sup> *Cf.* Larsen, *supra* note 5, at 1290 (describing the effect of the "digital revolution" on the Supreme Court's institutional capacity to conduct independent research).

<sup>296</sup> Barger, *supra* note 10, at 65-67; Bellin & Ferguson, *supra* note 4, at 1167; Godwin, *supra* note 51; Thornburg, *supra* note 6, at 159.

Of course, agencies should take care that source-based approaches are sufficiently detailed to be useful. As individuals and entities publish greater amounts of information on their websites, they should consider which materials are appropriate for independent research. Vague designations such as the “public” or “official” documents of an agency are generally less helpful than reference to specific agency materials or categories of agency materials.

Certain sources are especially appropriate for designation. As the Board of Alien Labor Certification Appeals noted, the “vast majority of use of [official] notice . . . has been to take notice of information contained in government publications.”<sup>297</sup> For example, federal adjudicators rely on vocational information available through the *Dictionary of Occupational Titles*, O\*NET, and the *Occupational Outlook Handbook*;<sup>298</sup> data available through the Census Bureau website;<sup>299</sup> medical and health information available through the websites of the National Institutes of Health and Centers for Disease Control;<sup>300</sup> Department of Agriculture cost-of-living information;<sup>301</sup> a Department of Energy fuel economy calculator;<sup>302</sup> prevailing wage data collected by the Bureau of Labor Statistics (BLS) and made publicly available through the Foreign Labor Certification Data Center Online Wage Library;<sup>303</sup> miners’ wage information developed by the Office of Workers’ Compensation Programs;<sup>304</sup> Mine Safety and Health Administration Fatalgrams;<sup>305</sup> and many other databases, reports, alerts, press releases, public statements, and educational materials available through federal agency websites.<sup>306</sup>

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<sup>297</sup> Albert Einstein Medical Ctr., 2011 BALCA LEXIS 1577 (Nov. 21, 2011). Federal courts have also frequently taken judicial notice of information on government websites. Bellin & Ferguson, *supra* note 4, at 1159-60.

<sup>298</sup> See Albert Einstein Medical Ctr., 2011 BALCA LEXIS 1577.

<sup>299</sup> See, e.g., Kipling Apparel, Case Nos. 86356569, 86356608, 2018 TTAB LEXIS 371 (Sep. 28, 2018) (number of Americans with the surname “Kipling”); De Luca v. USPS, Docket No. DE-0353-10-0123-I-1, 2010 MSPB LEXIS 4477 (July 30, 2010) (percentage of city residents who commute by private vehicle, carpool, or public transit).

<sup>300</sup> See, e.g., St. Anthony’s Nursing and Rehabilitation Ctr. v. CMS, Docket No. C-16-203, 2016 HHSDAB LEXIS 342, at \*7-8 (HHS Aug. 29, 2016); Pirkkala v. DOJ, 2016 M.S.P.B. 16 (2016); Shipley v. Colvin, 2015 U.S. Dist. LEXIS 140426, at \*15-16 (S.D. Ind. Sep. 24, 2015); Angel Kidney Care of Inglewood v. CMS, Docket No. C-15-2799, 2016 HHSDAB LEXIS 211, at \*3-4 (Aug. 1, 2016); Case No. 10-34 734, 2014 BVA LEXIS 38245 (Aug. 27, 2014); MikLin Enterps., 361 NLRB No. 27 n.20 (Aug. 21, 2014); 2014 Immig. Rptr. LEXIS 2169 (Apr. 28, 2014); Ricca v. Dyncorp Int’l, 45 Ben. Rev. Bd. Serv. 917 (2011); Collins v. Jackson, Appeal No. 0120081048, 2011 EEOPUB LEXIS 195 (Jan. 21, 2011); Smith v. DOI, 2009 M.S.P.B. 165 (2009); Kelley v. Washington Group Int’l, 39 Ben. Rev. Bd. Serv. 104 (2005); Tornbom v. Premier Chems., 26 FMSHRC 414 (2004).

<sup>301</sup> See, e.g., Brown v. OPM, Case No. SF-0845-15-0606-I-1, 2015 MSPB LEXIS 7829, at \*19 (Sep. 21, 2015).

<sup>302</sup> See, e.g., Owens v. OPM, Case No. SF-0845-16-0277-I-1, 2016 MSPB LEXIS 3299 (June 2, 2016).

<sup>303</sup> See, e.g., 2014 Immig. Rptr. LEXIS 3457 at \*22-23 (May 28, 2014).

<sup>304</sup> See, e.g., Johnson v. Island Creek Coal, Case No. 2016-BLA-06009 (DOL Mar. 26, 2019).

<sup>305</sup> See, e.g., MSHA v. Leeco Inc., 38 FMSHRC 2377 (2016); MSHA v. Ky. Fuel Corp., 37 FMSHRC 1831 (2015).

<sup>306</sup> See, e.g., Docket No. 15-06 627A, 2018 BVA LEXIS 111345 (Aug. 20, 2018) (public health report); Meg Scherch Peterson, 193 IBLA 255 (2018) (recreational area webpages); Wong v. DOC, Docket No. DC-0752-17-0298-I-2, 2018 MSPB LEXIS 419, at \*17-18 (Jan. 31, 2018) (federal government operating status); J and M Miller Construction, 26 BNA OSHC 1242 (No. 14-1765, 2016) (*Nail Gun Safety: A Guide for Construction Contractors*); Cooper Tire & Rubber Co., No. 11-1588, 2015 OSAHRC LEXIS 14, at \*50 (Mar. 23, 2015) (Chemical Safety Board investigative report); Anthony Fields, Exchange Act Release No. 74344, 2015 SEC LEXIS 662, at \*5 n.3 (Feb. 20, 2015) (*How Prime Bank Frauds Work*); Trenton Indian Serv. Area v. BIA, 54 IBIA 298 (2012) (audit report); Collins v. USDA, Docket No. SF-3443-05-0163-I-1, 2005 MSPB LEXIS 7117, at \*22-23 n.8 (Nov. 18, 2005) (USDA pay calendar).



Agencies should also consider designating standard internet resources for facts traditionally subject to judicial notice in the federal courts, such as maps,<sup>307</sup> the elevation of geographical locales,<sup>308</sup> dictionaries,<sup>309</sup> weather,<sup>310</sup> calendars,<sup>311</sup> and exchange rates.<sup>312</sup>

In developing source-based approaches, agencies should consider whether it is preferable for adjudicators to reference a specific version or edition of extra-record information or to consult the most current version or edition as it becomes available.<sup>313</sup> One solution may be for agencies themselves to provide adjudicators and parties with online and up-to-date access to designated resources.<sup>314</sup> For example, the website of the Department of Labor’s Office of Administrative Law Judges provides public web access to several resources regularly noticed by agency adjudicators,<sup>315</sup> and adjudicators regularly direct parties in hearing notices to access those and other materials online.<sup>316</sup> SSA is currently working with BLS to develop a new occupational reference tool for disability adjudication, which it will make available to adjudicators and parties through a “web-based, publicly available, information technology platform.”<sup>317</sup>

A particularly good example is the Executive Office for Immigration Review’s Virtual Law Library. EOIR’s Law Library and Immigration Research Center (LLIRC) maintains Country Pages on the Virtual Law Library, “Country Conditions Research.”<sup>318</sup> LLIRC staff

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<sup>307</sup> See, e.g., *Bud Antle, Inc.*, 359 NLRB No. 140 n.3 (2013) (Google Maps); *Black v. Logistec of Conn.*, 40 Ben. Rev. Bd. Servs. 462 (2006) (Yahoo! Maps).

<sup>308</sup> See, e.g., *Dean v. Williams Mtn. Co.*, Case No. 2012-BLA-05596 (DOL Aug. 19, 2015).

<sup>309</sup> See, e.g., *Koch v. White*, 251 F. Supp. 3d 162, 173 (D.D.C. 2017) (Merriam-Webster); *Roemer Industries*, 367 NLRB No. 133 (2019) (Collins English Dictionary); *Hamel v. DHS*, Case No. DE-0752-15-0039-I-2, 2017 MSPB LEXIS 3311 (July 31, 2017) (Urban Dictionary); *Lashawna C. v. Perez*, Appeal No. 0720160020, 2017 EEOUPB LEXIS 214 (Feb. 10, 2017) (American Heritage); *I & S Healthcare Servs.*, Case No. A-13-42, 2013 HHS DAB LEXIS 343 (June 24, 2013) (Macmillan); *Yakima Valley School*, Docket No. A-11-85, 2011 HHS DAB LEXIS 248 (Nov. 22, 2011) (Encarta World English Dictionary).

<sup>310</sup> See, e.g., *Century Communities*, 27 BNA OSHC 1336 (No. 17-0455, 2018) (NOAA); *West Coast Mobile Orthopedics v. CMS*, Docket No. C-14-420, 2014 HHS DAB LEXIS 242, at \*6 n.1 (May 28, 2014) ([www.friendlyforecast.com](http://www.friendlyforecast.com)); *Cowart v. USPS*, Docket No. SF-0752-11-0465-B-1, 2012 MSPB LEXIS 6561, at \*64 n.26 (Nov. 5, 2012) ([www.worldexecutive.com](http://www.worldexecutive.com)); Docket No. 04-15 421, 2010 BVA LEXIS 23105 (May 12, 2010) ([www.tutitempo.net](http://www.tutitempo.net)).

<sup>311</sup> See, e.g., *Mandujano v. USPS*, Case No. SF-0752-18-0083-C-1, 2019 MSPB LEXIS 922 (Mar. 28, 2019).

<sup>312</sup> See, e.g., *Munoz v. Sallyport Global Servs.*, 52 Ben. Rev. Bd. Servs. 135 n.11 (Feb. 8, 2018) (XE); *Gruenberg-Reisner v. Overseas Moving Specialists*, Case No. 1947(I), 2017 FMC LEXIS 9, at \*4 n.2 (May 17, 2017) (Oanda); *Veliz v. SOC-SMG*, 50 Ben. Rev. Bd. Servs. 855 n.3 (Oct. 24, 2016) (Bloomberg); *Odur v. Moveone FZE*, 50 Ben. Rev. Bd. Servs. 135 (Feb. 17, 2016) (Bank of Uganda); *Izzat v. Reep Inc.*, 46 Ben. Rev. Bd. Servs. 781 n.10 (Sep. 5, 2012) (Bank of Canada); *E. M. v. Dyncorp Tech. Servs.*, 43 Ben. Rev. Bd. Servs. 498 n.2 (May 28, 2009) (European Central Bank and United Nations).

<sup>313</sup> See generally Admin. Conf. of the U.S., Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (Jan. 17, 2012). Note that under Office of the Federal Register regulations, agencies may in some cases be “legally required to identify the specific version of material incorporated by reference and are prohibited from incorporating material dynamically.” *Id.*

<sup>314</sup> See generally Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019).

<sup>315</sup> DOL, OFFICE OF ADMINISTRATIVE LAW JUDGES, <https://www.oalj.dol.gov> (last visited July 31, 2019).

<sup>316</sup> See *supra* note 164 and accompanying text.

<sup>317</sup> SOC. SEC. ADMIN., OCCUPATIONAL INFORMATION SYSTEM PROJECT, [https://www.ssa.gov/disabilityresearch/occupational\\_info\\_systems.html](https://www.ssa.gov/disabilityresearch/occupational_info_systems.html) (last visited July 29, 2019).

<sup>318</sup> EOIR, VIRTUAL LAW LIBRARY, <https://www.justice.gov/eoir/virtual-law-library> (last visited July 10, 2019).

compile and update Country Pages, which provide adjudicators and members of the public with access to “an accurate, up to date, balanced and impartial compilation of relevant materials” for each country, including State Department reports and reports by other governmental and non-governmental entities.<sup>319</sup> This model tracks a 1990 recommendation by the Administrative Conference of the United States that the agency establish a “documentation center, staffed with regional specialists” tasked with “maintain[ing] current and detailed information on country conditions, from both governmental and nongovernmental sources.”<sup>320</sup>

As they designate resources as reliable or unreliable, agencies should seek input from interested members of the public as they develop source based-approaches. Public input can prove valuable in obtaining feedback regarding which extra-record resources are reliable or unreliable. For example, when the Civil Aeronautics Board first pursued a source-based approach in 1961, it specifically added three additional categories of documents in response to comments from regulated entities and civic organizations.<sup>321</sup> More recently, in response to a proposal that SSA adjudicators consider disability claimants’ social media posts,<sup>322</sup> claimants’ representatives and disability advocates have questioned the reliability of such information for disability adjudication purposes.<sup>323</sup>

### **C. Developing Guidance on Assessing the Reliability of Internet Information**

A review of federal agency decisions indicates adjudicators currently rely on a variety of resources that have not been publicly designated as reliable by agency experts. These include:

- web versions of print publications;<sup>324</sup>
- encyclopedias and general reference sources;<sup>325</sup>
- the websites of non-governmental organizations (NGO), non-profit advocacy groups, and charitable foundations;<sup>326</sup>

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<sup>319</sup> *Id.*

<sup>320</sup> See Admin. Conf. of the U.S., Recommendation 89-4, *Asylum Adjudication Procedures*, 54 Fed. Reg. 28,970 (July 10, 1989).

<sup>321</sup> Rules of Practice in Economic Proceedings, 26 Fed. Reg. 6306 (July 14, 1961).

<sup>322</sup> *Considering Social Media in Evaluating Disability Claims*, OFFICE INFO. & REG. AFF., <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=0960-AI42> (last visited Aug. 28, 2019).

<sup>323</sup> Robert Pear, *On Disability and on Facebook? Uncle Sam Wants to Watch What You Post*, N.Y. TIMES (Mar. 10, 2019).

<sup>324</sup> See, e.g., *Palm Garden of Sun City v. CMS*, Docket No. C-10-878, 2011 HHS DAB LEXIS 124, at \*19 (Sep. 19, 2011) (J. Am. Med. Ass’n); Case No. 09-11 781, 2011 BVA LEXIS 20470 (May 25, 2011) (Merck Manual).

<sup>325</sup> See, e.g., *Cuomo v. Trevcon Construction Co.*, 47 Ben. Rev. Bd. Servs. 1215 (Jan. 8, 2014) (WiseGEEK); *Angel v. OPM*, Docket No. SF-844E-09-0292-I-1, 2009 MSPB LEXIS 6933, at \*28 (Oct. 19, 2009) (Wikipedia); *M. K. v. Holmes & Narver*, 43 Ben. Rev. Bd. Serv. 604 (July 14, 2009) (Britannica); Case No. 04-01 390, 2008 BVA LEXIS 39863 (Oct. 16, 2008) (Answers); Case No. 05-11 091, 2006 BVA LEXIS 143816 (Sep. 7, 2006) (About).

<sup>326</sup> See, e.g., *Ogayonne v. Mukasey*, 530 F.3d 514, 518 (7th Cir. 2008) (Amnesty Int’l, United Nations Office for the Coordination of Humanitarian Affairs); *Ibrahim v. AG United States*, 708 Fed. Appx. 740 (3d Cir. 2017) (Swedish Int’l Develop. Cooperation Agency); Docket No. 13-34 403, 2018 BVA LEXIS 8021 (Feb. 23, 2018) (Int’l Atomic Energy Agency); Docket No. 04-08 675, 2016 BVA LEXIS 31169 (June 20, 2016) (Glaucoma Research Foundation); *Complainant v. Carter*, Appeal No. 0120120713, 2015 EEO PUB LEXIS 2139, at \*1 n.1 (Aug. 7, 2015) (Turner Syndrome Foundation); *Wilson v. Bell County Coal Corp.*, 2015 DOLBRB LEXIS 86, at \*26-27 (May 29, 2015) (Int’l Labour Org.); *Serv. Employees Int’l v. Dir., OWCP*, 47 Ben. Rev. Bd. Serv. 19 n.1 (Feb. 15, 2013)

- research and educational institution websites;<sup>327</sup>
- news media websites;<sup>328</sup>
- professional association websites;<sup>329</sup>
- web magazines and edited blogs;<sup>330</sup>
- general medical reference resources;<sup>331</sup>
- industry resources;<sup>332</sup>
- for-profit business websites;<sup>333</sup> and

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(GBS/CIDP Foundation); *Angel v. OPM*, Docket No. SF-844E-09-0292-I-1, 2009 MSPB LEXIS 6933, at \*30 n.12 (Oct. 19, 2009) (World Health Org.); 2008 *Immig. Rptr.* LEXIS 14405 (Arthritis Foundation).

<sup>327</sup> See, e.g., *Milowski v. DHS*, Docket No. AT-0752-19-0238-I-1, 2019 MSPB LEXIS 1885, at \*12 n.4 (May 31, 2019) (Johns Hopkins Medicine); *Eureka County, Nevada*, 193 IBLA 193 (2018) (National Academy of Sciences); Docket No. 05-36 676, 2016 BVA LEXIS 39891 (Aug. 24, 2016) (University of Chicago Medicine); *Complainant v. Brennan*, Appeal No. 0120131091, 2015 EEOPUB LEXIS 1147, at \*1 n.1 (Mar. 20, 2015) (Mayo Clinic); *Lilly v. Calvert Coal Co.*, Case No. 2013-BLA-05412 (DOL July 28, 2014) (Cleveland Clinic); Docket No. 10-45 283, 2014 BVA LEXIS 8055 (Jan. 28, 2014) (Cedars-Sinai); *Jarrett v. OPM*, Docket No. DC-844E-08-0617-I-1, 2008 MSPB LEXIS 4313, at \*9 n.5 (Sep. 26, 2008) (PennState Health).

<sup>328</sup> See, e.g., *Malik v. AG of the United States*, 315 Fed. Appx. 407, 409 (3d Cir. 2009); *Chhetry v. United States DOJ*, 490 F.3d 196, 199-00 (2d Cir. 2007); *Myrie v. AG United States*, 855 F.3d 509, 514 (3d Cir. 2017); *Ozmen v. Attorney General*, 219 Fed. Appx. 125, 128 (3d Cir. 2007).

<sup>329</sup> See, e.g., *Lusardi v. McHugh*, Appeal No. 0120133395, 2015 EEOPUB LEXIS 896, at \*16 (Apr. 1, 2015) (Am. Psych. Ass'n); Docket No. 08-27 287, 2013 BVA LEXIS 6581 (Feb. 26, 2013) (Am. Acad. Orthopedic Surgeons); *Ceres Gulf v. Dir.*, OWCP, 46 Ben. Rev. Bd. Serv. 25 n.1 (June 4, 2012) (Am. Speech-Language-Hearing Ass'n); *Palm Garden of Sun City v. CMS*, Docket No. C-10-878, 2011 HHSDAB LEXIS 124, at \*17 (Sep. 19, 2011) (Am. Ass'n for Long Term Care Nursing); *Hall v. Serv. Employees Int'l*, 45 Ben. Rev. Bd. Serv. 337 n.6 (Apr. 14, 2011) (Am. College of Rheumatology); Case No. WAC 07 800 08282, 2008 *Immig. Rptr.* LEXIS 12916 (Apr. 2, 2008) (Am. Dental Ass'n); *Mario Avello, M.D.*, 70 Fed. Reg. 11,695 (DEA Mar. 9, 2005) (Nat'l Ass'n Bd.'s of Pharm.).

<sup>330</sup> See, e.g., Docket No. 05-11 091, 2006 BVA LEXIS 143816 (Sep. 7, 2006) (*Psychology Today*).

<sup>331</sup> See, e.g., *Childs v. Astrue*, 2009 U.S. Dist. LEXIS 28254, at \*19-20 (M.D. Ala. Mar. 31, 2009) (back.com); Case No. 08-18 754, 2018 BVA LEXIS 95517 (July 24, 2018) (Drugs.com, ndrugs.com, Everyday Health); *Rachel v. DOD*, Case No. DA-0752-17-0185-I-1, 2017 MSPB LEXIS 2704, at \*17 n.10 (June 19, 2017) (Practical Pain Management); Docket No. 09-08 480, 2015 BVA LEXIS 51393 (Dec. 9, 2015) (foot-pain-explained.com); *Roberts v. Tri-Star Construction*, BRB No. 14-0291 BLA, 2015 DOLBRB LEXIS 89, at \*26 n.12 (May 29, 2015) (Medscape); *Wilson v. Bell County Coal Corp.*, 2015 DOLBRB LEXIS 86 at \*26 (May 29, 2015) (healthhype.com); *Manhattan Beer Distributors*, 362 NLRB No. 192 (2015) (WebMD); Docket No. 13-26 213, 2014 BVA LEXIS 22428 (May 19, 2014) (spine-health.com); 2013 BVA LEXIS 44344 (Nov. 15, 2013) (UpToDate); *Ex parte Lau*, Appeal No. 2011-002148, 2013 Pat. App. LEXIS 4024, at \*14 (June 20, 2013) (MediLexicon); *Smith v. Potter*, Appeal No. 01A00660, 2003 EEOPUB LEXIS 2222, at \*7 n.2 (Apr. 17, 2013) (podiatrychannel.com); *Henderson v. OPM*, 2012 M.S.P.B. 11 (2012) (healthline.com); *Embassy Health Care Ctr.*, CR No. 2464, 2011 HHSDAB LEXIS 155 (Nov. 8, 2011) (rxlist.com); *Angel v. OPM*, Case No. SF-844E-09-0292-I-1, 2009 MSPB LEXIS 6933, at \*12 n.2 (Oct. 19, 2009) (Family Practice Notebook); *Finley v. Shinseki*, Appeal No. 0120073873, 2009 EEOPUB LEXIS 2787, at \*4 n.2 (Sep. 18, 2009) (Google Health); *Jarrett v. OPM*, Case No. DC-844E-08-0617-I-1, 2008 MSPB LEXIS 4313, at \*16 n.7 (Sep. 26, 2008) (MedicineNet, medindia.com); *Ex parte Stapleton*, 2006 Pat. App. LEXIS 2391 (Apr. 28, 2006) (General Practice Notebook); *Bautista v. Centennial Stevedoring Servs.*, 37 Ben. Rev. Bd. Servs. 798 (2003) (General Practice Notebook); *Cruz v. Matson Terminals*, 37 Ben. Rev. Bd. Serv. 866 (2003) (Family Practice Notebook); *Scace v. Western Dock Enterps.*, 36 Ben. Rev. Bd. Serv. 847 (2002) (rxlist.com).

<sup>332</sup> See, e.g., *Ralph Calabro*, Exchange Act Release No. 75076, 2015 SEC LEXIS 2175, at \*94 (May 29, 2015).

<sup>333</sup> See, e.g., *Phillis W. v. Wilkie*, Appeal No. 0120180863, 2019 EEOPUB LEXIS 1817, at \*12 n.4 (June 5, 2019) (medical practice); *Avalon Place Trinity*, DAB No. A-16-108, 2017 HHSDAB LEXIS 122, at \*33 n.11 (Sep. 15, 2017) (drug manufacturer); *Western Watersheds Project*, 183 IBLA 297 (2013) (software developer); *Cook v. OPM*, Case No. AT-844E-10-0064-I-1, 2010 MSPB LEXIS 774, at \*5 n.3 (Feb. 10, 2010) (medical malpractice expert); *K. D. v. Kwajalein Range Servs.*, 41 Ben. Rev. Bd. Serv. 706 (2007) (drug manufacturer).

- many other online resources.<sup>334</sup>

If an agency expects adjudicators may need to obtain information from non-designated internet sources, it should develop guidance to help adjudicators determine their authenticity and reliability. This guidance should describe indicia of reliability and authenticity such as:

- ***The information’s authorship.*** Adjudicators should consider the author of the information, including whether the author is anonymous or identifiable. If the author is identifiable, the adjudicator should consider whether the author is an expert or reputable authority and whether that person’s authorship can be easily authenticated.<sup>335</sup> Certain information may be self-authenticating, such as the websites of United States or some foreign government entities.<sup>336</sup> Authorship may be more difficult to establish in other circumstances, such as social media accounts.<sup>337</sup>
- ***The information’s purpose.*** Adjudicators should consider the purpose for which the information was created. Is there an identifiable bias, or was the information produced for a commercial, advocacy, or promotional purpose?<sup>338</sup> For example, the Executive Office for Immigration Review (EOIR) explained in a 2002 rule that “reports by NGOs are simply not as reliable as those of the Department of State because the mission of those organizations is to advocate specific ideas and views.”<sup>339</sup> Another example: social media users routinely engage in “impression management,” by which they unintentionally or intentionally “present[] an exaggerated or even entirely false persona on the internet and social media, in an attempt to influence the perceptions of other people, about a person, object or event.”<sup>340</sup>
- ***The information’s methodology.*** Adjudicators should consider the methodology by which the information was compiled. For example, EOIR explained in a 2002 final rule that “reports by [nongovernmental organizations] are simply not as reliable as those of the Department of State because . . . their positions are often based on anecdotal experiences of identified and unidentified persons, and their opinions tend to lack the discernment and expertise of those provided by the Department of State.”<sup>341</sup> Adjudicators should also consider whether the information contains

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<sup>334</sup> See, e.g., *Shunfu Li v. Mukasey*, 529 F.3d 141, 145 (2d Cir. 2008) (Ontario Consultants on Religious Tolerance); *Emelda F. v. Spencer*, Appeal No. 0120121347, 2018 EEOPUB LEXIS 4065, at \*8 n.7 (June 19, 2018) (personal blog); *Wilson v. Bell County Coal Corp.*, 2015 DOLBRB LEXIS 86, at \*26 (May 29, 2015) (medical school lecture notes); Case No. 09-46 659A, 2012 BVA LEXIS 1581 (Feb. 10, 2012) (private medical practice); *Bruss v. OPM*, Case No. CH-831E-11-0358-I-1, 2011 MSPB LEXIS 3605 (June 10, 2011) (personal website).

<sup>335</sup> *Barger*, *supra* note 2; *Bellin & Ferguson*, *supra* note 4, at 1168-69.

<sup>336</sup> See *Chen v. Holder*, 715 F.3d 207, 212 (7th Cir. 2013).

<sup>337</sup> See *The Social Security Administration: Is It Meeting Its Responsibilities to Save Taxpayer Dollars and Serve the Public?: Hearing Before the Sen. Comm. on Finance*, 112th Cong. 19-20 (2012).

<sup>338</sup> *Bellin & Ferguson*, *supra* note 4, at 1169-70.

<sup>339</sup> BIA: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,892 (Aug. 26, 2002).

<sup>340</sup> NAT’L ORG. OF SOC. SEC. CLAIMANTS’ REPRESENTATIVES, SOCIAL SECURITY PRACTICE GUIDE § 14.03 (2019) [hereinafter SOC. SEC. PRACTICE GUIDE].

<sup>341</sup> Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,892 (Aug. 26, 2002).

references to other authorities, which may help to corroborate its accuracy.

- ***The information's clarity.*** Adjudicators should consider whether the information is presented in a way that is easy to understand. For example, Social Security Administration sub-regulatory guidance directs readers to use web-based inmate locators that “have the information displayed in a clear and readable format that is unlikely to result in misinterpretation of any of its content or an incorrect conclusion about a claimant’s identity or inmate status.”<sup>342</sup> Similar concerns have also been raised about the ease of interpreting licensure status information on state medical board websites<sup>343</sup> and social media content.<sup>344</sup>
- ***The information's publication.*** Adjudicators should consider whether information is presented in “a final, edited form,” such as a newspaper article, or an “editable” form, such as a blog, chatroom post, or wiki.<sup>345</sup> Scholars, courts, and agency decision makers have tended to criticize the use of Wikipedia in particular as an authority in judicial and administrative decision making.<sup>346</sup> Permanent sources “may be more reliable due to the fact that they are posted and viewed by an audience for such a long enough period of time that falsities would tend to be exposed through public review.”<sup>347</sup> Even for permanent sources, adjudicators should consider when the information was published to the website (to determine whether it is current), whether it has been revised, and for how long it has been made available. Adjudicators may also wish to consider whether a print version of the internet publication exists.<sup>348</sup>

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<sup>342</sup> HALLEX §§ I-2-5-69 C, I-3-2-40 C.

<sup>343</sup> Mulrooney & Legel, *supra* note 96, at 432-33.

<sup>344</sup> See *The Social Security Administration: Is It Meeting Its Responsibilities to Save Taxpayer Dollars and Serve the Public?: Hearing Before the Sen. Comm. on Finance*, 112th Cong. 19-20 (2012); SOC. SEC. PRACTICE GUIDE, *supra* note 340, § 14.03; Pear, *supra* note 323; Letter from Sen. Sherrod Brown & Sen. Robert P. Casey, to Mick Mulvaney, Dir., Office of Mgmt. & Budget, and Nancy A. Berryhill, Acting Comm’r, Soc. Sec. Admin. (Mar. 13, 2019), available at <https://www.brown.senate.gov/newsroom/press/release/brown-casey-press-trump-administration-for-answers-on-reported-proposal-to-monitor-americans-social-media-accounts->.

<sup>345</sup> Kelly S. Horn, Note, *Ending the Game of Evidentiary Roulette: Why a Rule Should Exclude Hearsay from Asylum Proceedings Absent a Corroborating Indication of Reliability*, 30 GEO. IMMIGR. L.J. 339, 352-53 (2016); see also Barger, *supra* note 2, at 46.

<sup>346</sup> See *Sibanda v. Holder*, 778 F.3d 676, 680 (7th Cir. 2015); *Singh v. Holder*, 720 F.3d 635, 643-44 (7th Cir. 2013); *Abdurakhmanov v. Holder*, 666 F.3d 978, 981 n.1 (6th Cir. 2012); *Bing Shun Li v. Holder*, 400 Fed. Appx. 854, 857-58 (5th Cir. 2010); *Badasa v. Mukasey*, 540 F.3d 909, 910-11 (8th Cir. 2008); *Ex parte Ionescu*, 2018 Pat. App. LEXIS 10449, at \*8 (PTAB Dec. 6, 2018); *Matter of L—A—C—*, 26 I. & N. Dec. 516, 526-27 (2015); POSNER, *supra* note 8, at 134-35; Cohen, *supra* note 55; Joseph L. Gerken, *How Courts Use Wikipedia*, 11 J. APP. PRAC. & PROCESS 191 (2010); Godwin, *supra* note 51, at 242-44; Grodin, *supra* note 62, at 3-4; Ellie Margolis, *It’s Time to Embrace the New—Untangling the Uses of Electronic Sources in Legal Writing*, 23 ALB. L.J. SCI. & TECH. 191, 203-04 (2013); Jason C. Miller & Hannah B. Murray, *Wikipedia in Court: When and How Citing Wikipedia and Other Consensus Websites Is Appropriate*, 84 ST. JOHN’S L. REV. 633 (2010); Peoples, *supra* note 5; Amber Lynn Wagner, Comment, *Wikipedia Made Law?: The Federal Judicial Citation of Wikipedia*, 26 J. MARSHALL J. COMPUTER & INFO. L. 229 (2008); Michael Whiteman, *The Death of Twentieth-Century Authority*, 58 UCLA L. REV. DISC. 27, 47-53 (2010); Jodi L. Wilson, *Proceed with Extreme Caution: Citation to Wikipedia in Light of Contributor Demographics and Content Policies*, 16 VAND. J. ENT. & TECH. L. 857 (2014).

<sup>347</sup> Horn, *supra* note 345, at 352-53.

<sup>348</sup> See *supra* note 290.

- ***The website’s ownership, registration, and administration.*** Adjudicators should consider the ownership, registration, and administration of the website on which the information is posted.<sup>349</sup> Some websites may be self-authenticating, such as the websites of United States or foreign government entities,<sup>350</sup> or presumptively reliable, such as the websites of reputable news media outlets<sup>351</sup> or well-known corporations.<sup>352</sup> In other cases, adjudicators can often determine the website’s ownership, registration, or administration through the WHOIS service available on the website of the Internet Corporation for Assigned Names and Numbers (ICANN).<sup>353</sup> The uniform resource locator (URL) may also provide context, such as the domain (e.g., “.gov” versus “.net”) or transfer protocol (“http” for unencrypted sites versus “https” for encrypted sites).<sup>354</sup> Both the identity of the website’s owner and the purpose of its owner in making the site publicly available are relevant considerations in assessing the reliability of information posted to the site. Adjudicators should consider whether the website is a reputable authority on the subject of the information and assess the publisher’s “motivation to ensure the accuracy of the posted information.”<sup>355</sup>
- ***The website’s business process.*** Adjudicators should consider whether information posted on the website has undergone editorial or peer review.<sup>356</sup> Adjudicators should also consider whether the information is “of a type ordinarily posted on that website or websites of similar entities.”<sup>357</sup>
- ***Corroboration from other sources.*** Adjudicators should consider “whether others have published the same data, in whole or in part” and “whether the data has been republished by others who identify the source of the data as the website in question.”<sup>358</sup> In other words, adjudicators should ask whether others familiar with the information consider it to be reliable and authoritative. Other sources referenced in the information may also help corroborate the accuracy of the information in question or be useful resources in their own right.<sup>359</sup>

While none of these indicia individually or even cumulatively provides definitive proof of the reliability of internet information, the likelihood of the reliability of information increases as

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<sup>349</sup> Keele, *supra* note 5, at 165-66.

<sup>350</sup> See *Chen v. Holder*, 715 F.3d 207, 212 (7th Cir. 2013); Joseph, *supra* note 52, at 51.

<sup>351</sup> See *Chhetry v. United States DOJ*, 490 F.3d 196, 199-200 (2d Cir. 2007).

<sup>352</sup> Joseph, *supra* note 52, at 51.

<sup>353</sup> *Domain Name Registration Data Lookup*, ICANN, <https://lookup.icann.org/> (last visited Aug. 14, 2019).

<sup>354</sup> Keele, *supra* note 5, at 165-66.

<sup>355</sup> Bellin & Ferguson, *supra* note 4, at 1170-71.

<sup>356</sup> *Id.* at 167; Barger, *supra* note 2, at 446.

<sup>357</sup> *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 555-56 (D. Md. 2007) (quoting Gregory P. Joseph, *Internet and Email Evidence*, 13 PRAC. LITIGATOR (Mar. 2002)).

<sup>358</sup> *Id.*; see also Keele, *supra* note 5, at 166

<sup>359</sup> Keele, *supra* note 5, at 166-67 (“For example, while one might choose not to cite Wikipedia for a particular point, the references in Wikipedia might be useful for locating that same point on another website that is sufficiently authentic and reliable”).

more indicia of reliability are present.<sup>360</sup> The same guidance will apply to internet information submitted by parties.

#### **D. Meeting Informational Needs Through Substantive Rules and Policies**

Of course, widespread reliance on extra-record materials for a specific category of information may simply indicate a need for substantive regulation. For example, in the early days of the Social Security disability insurance program, Social Security Administration (SSA) adjudicators routinely relied on government and industrial studies to determine the occupational effect of individuals' age, education, prior work experience, and physical and mental limitations.<sup>361</sup> After two decades of congressional, regulatory, and judicial developments, the agency published Medical-Vocational Guidelines as part of its regulations to impose a greater degree of consistency on agency decision making.<sup>362</sup> Because an agency will likely need to undertake notice-and-comment rulemaking to revise the resulting regulation, substantive rulemaking may be less appropriate for situations in which adjudicators need to consider dynamic data or other information subject to frequent changes or updates.

#### **V. ACHIEVING ADMINISTRATIVE EFFICIENCY**

When used appropriately, adjudicators' reliance on extra-record information can result in real efficiencies within the hearing room as well. As in judicial practice, "[l]aborious proof of what is obvious and notorious is wasteful."<sup>363</sup> In other cases, even in circumstances when independent research would not raise issues of fairness or accuracy, there may be good reasons to discourage independent research where it is inefficient. The following sections address the potential efficiencies and inefficiencies associated with independent research.

The efficiency of independent internet research within a particular adjudicative scheme will depend on factors such as the agency's priorities, the volume of its caseload, the ease of locating relevant information, the agency's ability to designate specific extra-record resources, adjudicators' training and level of expertise, the availability and expertise of adjudicative staff, the degree to which different cases are factually similar, and parties' legal sophistication and access to representation. Agencies that adopt more permissive policies on independent research should consider the value of uniform practice in the adjudicative scheme, the need for quality assurance mechanisms, and the availability of sufficient resources to monitor or achieve uniformity.<sup>364</sup>

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<sup>360</sup> *Id.* at 166.

<sup>361</sup> *See, e.g.*, *McLamore v. Weinberger*, 538 F.2d 572, 574-75 (4th Cir. 1976); *Haley v. Celebrezze*, 531 F.2d 516, 519 (10th Cir. 1965); *McDaniel v. Celebrezze*, 331 F.2d 426, 428 (4th Cir. 1964); *Stancavage v. Celebrezze*, 323 F.2d 373, 377-78 (3d Cir. 1963); *Rinaldi v. Ribicoff*, 305 F.2d 548, 549-50 (2d Cir. 1962); *Graham v. Ribicoff*, 295 F.2d 391, 395 (9th Cir. 1961); *Kerner v. Flemming*, 283 F.2d 96, 922 (2d Cir. 1960).

<sup>362</sup> *See Heckler v. Campbell*, 461 U.S. 458, 470 (1983); JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 114-23 (1983); JERRY L. MASHAW ET AL., *Social Security Hearings and Appeals* 79-82 (1978).

<sup>363</sup> *Id.* at 72.

<sup>364</sup> *Cf. Rowe*, 798 F.3d at 642-43 (Hamilton, J., dissenting) ("From the larger perspective of our judicial system, the independent factual research the majority endorses and even requires here is not something that federal courts can carry out reliably on a large scale.").

## A. The Efficiencies of Independent Research

Just as judicial notice was developed to simplify court proceedings and render them more efficient, the use of reliable extra-record information that reflects agency expertise has significant potential to increase the efficiency of administrative adjudication.<sup>365</sup> By specifically referring to “official notice” at a time when there was significant judicial and scholarly interest in contrasting official and judicial notice, that was arguably one purpose of the Administrative Procedure Act’s adjudication provisions.<sup>366</sup>

In some instances, adjudicators may obtain appreciable efficiency from relying on the “considerable expertise” they develop from considering the “salient historical events and conditions of countries that are the subject of an appreciable proportion of asylum claims.”<sup>367</sup> An adjudicator’s limited time may be better spent considering evidence and testimony specific to the facts of a particular case rather than reviewing a recitation of general facts that arise frequently across an adjudicative scheme.<sup>368</sup> In the immigration context, in particular, observers have noted that “[u]sed properly, administrative notice allows the [agency] to focus on the differences of each case.”<sup>369</sup>

Of course, the sheer efficiency of official notice has the potential to overwhelm a party’s right to an individualized decision. The courts have held that adjudicators must take care that the “use of official notice does not substitute for an analysis of the facts of each applicant’s individual circumstances,” such as by assuming that general principles apply in all situations.<sup>370</sup>

## B. The Inefficiencies of Independent Research

While the internet makes research more efficient, independent internet research also carries the potential to shift an adjudicator’s attention away from tasks central to her role, such as holding hearings and drafting decisions. Simply put, independent research may not be the best use of the limited time of an adjudicator or her staff, especially in mass adjudication systems or agencies that face significant case backlogs. Some experts consulted for this report noted that adjudicators are often too busy to conduct independent research except from limited resources such as maps or general or technical dictionaries. When a congressional committee questioned then-Commissioner of Social Security Michael Astrue in 2012 about a new Social Security Administration (SSA) policy prohibiting adjudicators from independently researching disability

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<sup>365</sup> Muir, *supra* note 1, at 334-36.

<sup>366</sup> See Sigmon, *supra* note 124, at 271; Muir, *supra* note 1, at 342.

<sup>367</sup> Hoxhallari v. Gonzales, 468 F.3d 179, 186 (2d Cir. 2006).

<sup>368</sup> Castillo-Villagra v. INS, 972 F.2d 1017, 1027 (9th Cir. 1992).

<sup>369</sup> James C. Frasher & Xuan T. Tran, Note, *Administrative Notice in Political Asylum Appeals: Does the Motion to Reopen Preserve the Alien’s Due Process Rights*, 69 NOTRE DAME L. REV. 311, 311 (1993).

<sup>370</sup> Kaczmarczyk v. INS, 933 F.2d 588, 594-95 (7th Cir. 1991); see also de la Llana-Castellon v. INS, 16 F.3d 1093, 1098 (10th Cir. 1994); Rhoa-Zamora v. INS, 971 F.2d 26, 34 (7th Cir. 1992); Civil v. INS, 140 F.3d 52, 57 (1st Cir. 1998). In *In re Manco Watch Strap*, the Federal Trade Commission explained: “[W]e are not barred from taking official notice of a general fact merely because it is not a universal fact. By recognizing, as we do, that there will be exceptions to the general fact, we do not impair the essential validity or propriety of utilizing the doctrine of official notice.” 60 F.T.C. 495, 513-15 (1962).



applicants' social media accounts, he testified that providing "increasingly stretched thin" adjudicators and staff access to social media sites on government time had the potential to become "an enormous suck on productivity."<sup>371</sup> He guessed that if SSA were to permit adjudicators to independently research parties' social media accounts, "it would be a very short period of time before [he] would be before a committee trying to answer the question, 'How come your employees are spending all their time on Facebook and other social medial sites?'"<sup>372</sup>

Independent research may also impact parties' costs and behavior in potentially inefficient ways. In an adversarial proceeding, a party may expend substantial time and money responding to the evidence and arguments offered by an opposing party. Significant independent research raises the concern that parties will also "need to anticipate the evidence the judge might turn up on her own" and expend additional time and money to meet it.<sup>373</sup> The back and forth of notice and the opportunity to show the contrary has time costs of its own and may serve primarily as "an open invitation" for parties to further supplement well-developed records with additional materials.<sup>374</sup> Conversely, parties may be less incentivized to expend the time and money to develop the record if they expect adjudicators to take an active role in researching the general or specific facts of a case.

An additional concern is that where adjudicators engage in some independent research, parties will object to an adjudicator's failure to conduct independent research. Courts have long held, for example, that although an immigration judge (IJ) may consult a State Department country report on her own initiative, there is generally no obligation to do so.<sup>375</sup> However, in a case where the record indicated an IJ already had access to extra-record information from Wikipedia, the Seventh Circuit found that the IJ had "unreasonably demanded that [a party] furnish reports of country conditions" because "[a]sylum regulations and case law invite IJs to consider reports produced by the State Department and other credible sources in evaluating country conditions."<sup>376</sup> If it is within an adjudicator's discretion to conduct or not conduct independent research, the possibility exists that some courts will find abuse of discretion where an adjudicator fails to do so.<sup>377</sup>

Alternatively, if parties perceive that independent research is more likely to result in an unfavorable outcome, they may ask why adjudicators conduct independent research in some cases and not in others. If patterns of independent research correlate with personal characteristics unrelated to the subject of adjudication, parties may perceive bias or prejudice.

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<sup>371</sup> See *The Social Security Administration: Is It Meeting Its Responsibilities to Save Taxpayer Dollars and Serve the Public?: Hearing Before the Sen. Comm. on Finance*, 112th Cong. 19-20 (2012).

<sup>372</sup> *Id.*

<sup>373</sup> *Rowe v. Gibson*, 798 F.3d 622, 642 (7th Cir. 2015).

<sup>374</sup> See *id.* at 642 (7th Cir. 2015).

<sup>375</sup> *Shi v. AG United States*, 559 Fed. Appx. 143, 145 n.6 (3d Cir. 2014); *Yang Zhao-Cheng v. Holder*, 721 F.3d 25, 28 (1st Cir. 2013); *Jisheng Xiao v. Holder*, 459 Fed. Appx. 485, 488 (5th Cir. 2012); *Zhu v. Holder*, 383 Fed. Appx. 59, 60 (2d Cir. 2010); *Meghani v. INS*, 236 F.3d 843, 848 (7th Cir. 2001).

<sup>376</sup> See *Sibanda v. Holder*, 778 F.3d 676, 680-81 (7th Cir. 2015).

<sup>377</sup> See *Thornburg*, *supra* note 6, at 199. *But see Cheng*, *supra* note 9, at 1307-16 (arguing that non-uniform independent research practices would be acceptable in the judiciary).

## VI. INDEPENDENT RESEARCH BY APPELLATE ADJUDICATORS

An important consideration in designing an adjudication scheme is the division of labor among operations staff, hearing officers, and appellate reviewers. For reasons of fairness or efficiency, many agencies impose a limited standard for review or restrict adjudicators' capacity to engage in fact finding or consider additional evidence. Independent research may alter this balance when it results in additional fact finding or the consideration of additional evidence. Some observers and adjudicators have questioned the extent to which independent research by hearing-level or appellate adjudicators with limited jurisdiction supplants the role of a lower-level decision maker;<sup>378</sup> serves "as a way to evade procedural restrictions on appellate review;"<sup>379</sup> or reopens a closed record to new evidence.<sup>380</sup>

However, independent research can also play an important role in correcting errors made by lower-level agency decision makers, especially if a party is legally unsophisticated or unrepresented by counsel. A decision of the Board of Alien Labor Certification Appeals (BALCA) specifically acknowledges that adjudicators have taken official notice of "substantive adjudicative facts in reversals or remands, such as in situations that could be characterized as clear government error or a violation of procedural due process."<sup>381</sup> In one case, BALCA determined the agency had received a timely response from the employer by verifying in the agency's Employee Locator system that the individual who signed a certified mail receipt was indeed employed by the agency in a specific office.<sup>382</sup> In another case, BALCA determined from an agency webpage that an agency field office was still processing claims on a specific date.<sup>383</sup>

Several decisions of the Board of Veterans' Appeals (BVA) exhibit a similar trend. For example, a decision reviewing a denial of a veteran's claim for service connection for posttraumatic stress disorder (PTSD) found service connection based on significant internet research into the history of the veteran's unit during the Gulf War.<sup>384</sup> In a case where a veteran alleged PTSD as a result of witnessing a fatal lightning strike at an air force base in 1968, the BVA "acknowledge[d] that it is prohibited from obtaining" evidence but noted that "a cursory internet search" turned up information corroborating the veteran's account.<sup>385</sup> Reviewing an agency opinion that concluded there was "no scientific evidence that an anxiety disorder could cause heart disease," the BVA noted that a "quick internet search" uncovered several articles linking the two.<sup>386</sup> Several other BVA decisions reflect corrective action by BVA adjudicators based on "brief" or "cursory" internet research or a "simple" or "quick" internet search.<sup>387</sup>

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<sup>378</sup> Mulrooney & Legel, *supra* note 96, at 441.

<sup>379</sup> Albert Einstein Medical Ctr., 2011 BALCA LEXIS 1577 (Nov. 21, 2011); *see also* Infosys Technologies, 2012 BALCA LEXIS 1880 (Nov. 16, 2012).

<sup>380</sup> *Cf.* Rowe, 798 F.3d at 642 (7th Cir. 2015) (Hamilton, J., dissenting).

<sup>381</sup> Albert Einstein Medical Ctr., 2011 BALCA LEXIS 1577 (Nov. 21, 2011).

<sup>382</sup> Int'l Systems Technologies, 2005-INA-175 (DOL Sep. 8, 2005).

<sup>383</sup> Brooklyn Amity School, 2007-PER-64 (DOL Sep. 19, 2007).

<sup>384</sup> Docket No. 05-24 899, 2010 BVA LEXIS 36721 (Aug. 19, 2010).

<sup>385</sup> Docket No. 04-41 521, 2012 BVA LEXIS 11863 (Apr. 30, 2012).

<sup>386</sup> Docket No. 05-11 091, 2006 BVA LEXIS 143816 (Sep. 7, 2006); *see also* Docket No. 04-40 225, 2007 BVA LEXIS 33448 (May 21, 2007).

<sup>387</sup> *See, e.g.*, Docket No. 16-23 029, 2019 BVA LEXIS 33910 (Apr. 25, 2019); Docket No. 14-11 381, 2017 BVA LEXIS 71596 (Dec. 20, 2017); Docket No. 10-07 533, 2017 BVA LEXIS 18917 (Mar. 24, 2017); Docket No. 06-37

Other agency rules explicitly permit appellate adjudicators to take official notice of extra-record facts. For example, while the Board of Immigration Appeals may “not engage in factfinding in the course of deciding appeals,” it is permitted to “tak[e] administrative notice of commonly known facts such as current events or the contents of official documents.”<sup>388</sup> A procedural rule of the National Oceanic and Atmospheric Administration proceedings similarly permits appellate officers to “take official notice of Federal or State public records and of any matter of which courts may take judicial notice.”<sup>389</sup>

Agencies should consider their own institutional priorities—especially the division of labor among operations staff, hearing officers, and appellate reviewers—when developing policies regarding independent research by appellate adjudicators.

## RECOMMENDED BEST PRACTICES

The following recommendations offer best practices for agencies to consider when they identify regular instances 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

1. If agencies find that adjudicators regularly conduct independent research on a specific subject, they should consider whether they can develop rules to resolve or reduce adjudicators’ need for independently obtained information. In some cases, this may take the form of a legislative rule, for example one that defines a term or resolves uncertainty.
2. Agencies should identify those circumstances in which independent research is likely to result in actual or perceived bias or partiality, including personal animus against a party or group to which that party belongs or prejudgment of the adjudicative facts at issue in the proceeding, or otherwise result in unfairness. In determining whether particular exercises of independent research would be appropriate or inappropriate, agencies should consider the specific features of their adjudicative proceedings and institutional needs. For example, an adjudicator’s recognized duty to develop the record may permit independent research in

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234, 2017 BVA LEXIS 3122 (Feb. 23, 2017); Docket No. 11-13 730, 2017 BVA LEXIS 252 (Jan. 5, 2017); Docket No. 04-08 675, 2016 BVA LEXIS 31169 (June 20, 2016); Docket No. 13-00 408A, 2015 BVA LEXIS 45021 (Sep. 25, 2015); Docket No. 10-39 216, 2015 BVA LEXIS 44976 (Sep. 25, 2015); Docket No. 12-04 423, 2014 BVA LEXIS 52415 (Nov. 28, 2014); Docket No. 09-35 406, 2014 BVA LEXIS 26637 (June 12, 2014); Docket No. 10-31 418, 2014 BVA LEXIS 8908 (Mar. 4, 2014); Docket No. 08-29 676, 2013 BVA LEXIS 36972 (Sep. 18, 2013); Docket No. 12-28 700, 2013 BVA LEXIS 23448 (May 20, 2013); Docket No. 09-26 146, 2013 BVA LEXIS 19699 (Apr. 17, 2013); Docket No. 08-01 712, 2013 BVA LEXIS 19420 (Apr. 15, 2013); Docket No. 08-24 139, 2012 BVA LEXIS 24166 (Aug. 9, 2012); Docket No. 01-07 771A, 2011 BVA LEXIS 19297 (May 18, 2011); Docket No. 05-10 555, 2010 BVA LEXIS 45074 (Oct. 22, 2010); Docket No. 07-05 164, 2009 BVA LEXIS 22709 (Sep. 2, 2009); Docket No. 04-05 404, 2007 BVA LEXIS 20818 (July 30, 2007); Docket No. 05-21 957, 2007 BVA LEXIS 8415 (Mar. 21, 2007); Docket No. 01-03 473, 2006 BVA LEXIS 75758 (June 5, 2006); Docket No. 99-17 716, 2005 BVA LEXIS 86965 (Mar. 17, 2005).

<sup>388</sup> 8 C.F.R. § 1003.1 (2019); *see also* 8 C.F.R. § 1208.11(b) (permitting the Department of State to provide “[d]etailed country conditions information” “with respect to any asylum application”).

<sup>389</sup> 15 C.F.R. § 906.10 (2019).

some instances in which independent research would otherwise place an undue or unfair burden on the subject of an agency enforcement action. Hearsay evidence may be more acceptable in some circumstances than in others.

3. Agencies should identify those circumstances in which independent research is likely to be inefficient or result in inaccurate outcomes making or inconsistencies across different cases. In determining whether particular exercises of independent research are likely to have those effects, agencies should consider the specific features of their adjudicative proceedings and institutional needs, including:
  - a. Whether sufficient resources are available for adjudicators or adjudicative staff to conduct independent research given an agency's adjudicative caseload volume and capacity and other administrative priorities;
  - b. Whether it will be difficult or excessively time-consuming for adjudicators or adjudicative staff to locate certain information;
  - c. Whether it will be difficult or excessively time-consuming for adjudicators or adjudicative staff to establish the authenticity and reliability of information for which independent research is being conducted;
  - d. Whether an adjudicator can more accurately obtain the desired information from the parties or from an expert witness;
  - e. Whether independent research will reopen a closed administrative record or require a supplemental hearing.

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

4. If agencies identify reliable sources or categories of sources that it determines would be appropriate for adjudicators to independently consult, they should publish rules that identify the sources or categories of sources and state that adjudicators may independently consult them for purposes of an adjudication. These rules should clarify whether adjudicators may consult other, unenumerated resources related to the subject.
5. Agencies should promulgate rules on official notice. They should specify the procedures that an adjudicator 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 specific to the parties or general, whether a fact is reasonably disputable or undisputable, whether a fact is central or peripheral to the adjudication, and whether a decision represents an initial or a final action of

an agency.

6. 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.
7. Agency rules on independent research should specify when and how 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.
8. If agencies' rules permit adjudicators to independently consult sources that are not specifically designated in an agency rule, they should consider publishing rules to help adjudicators assess the authenticity and reliability of internet information. Agencies should consider including at least the following indicia of authenticity and reliability in such rules:
  - 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 purpose other than commerce, advocacy, or promotion;
  - c. Whether the author developed the information according to a sound methodology;
  - d. Whether the information references other authorities which help to corroborate its accuracy;
  - e. Whether the meaning and significance of the information is clear and not susceptible to misinterpretation;
  - f. Whether the information is published in a final format rather than a continuously or openly editable format;
  - g. Whether the information remains current;
  - h. Whether the information has been available for a long enough period to allow members of the public to identify errors or contextualize facts contained in the information;
  - i. 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 purpose other than commerce, advocacy, or promotion;

- j. Whether information that appears on the website undergoes editorial or peer review;
- k. Whether the information is of a type that ordinarily appears on the website or other, similar websites; and
- l. Whether other resources characterized by sufficient indicia of reliability contain the same information or cite to the original information as reliable or authoritative.

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

- 9. When agency rules designate sources that are appropriate for independent research, agencies should consider clearly identifying and providing access to the source on their websites. 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.
- 10. 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.
- 11. If an adjudicator intends to rely on an independently obtained source that is not available to the parties on or through an agency website, the adjudicator should ensure that the parties have reasonable access to the source or to a relevant excerpt from the source.