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

Although an exclusive record consists primarily of materials submitted by the parties to a proceeding, it may be appropriate or beneficial in certain circumstances for adjudicators to use information obtained through their own and their staffs’ independent research. An “adjudicator,”

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2 5 U.S.C. § 556(e).

3 Admin. Conf. of the U.S., Recommendation 2016-4, Evidentiary Hearings Not Required by the Administrative Procedure Act, ¶ 1, 81 Fed. Reg. 94,314 (Dec. 23, 2016). The Conference’s recent recommendations divided adjudications into three categories: those governed by the APA’s formal-hearing provisions (referred to as Type A in the report accompanying Recommendation 2016-4); those that incorporate a legally required evidentiary hearing not regulated by the APA’s formal-hearing provisions (referred to as Type B); and those not subject to a legally required evidentiary hearing (referred to as Type C). This Recommendation addresses only Type A and Type B adjudications. It does not address Type C adjudications.
as used in this Recommendation, means any agency official or employee, acting either individually or collectively, who presides over a legally required evidentiary hearing or provides administrative review following an evidentiary hearing.

“Independent research,” as used in this Recommendation, refers to an adjudicator’s search for, consideration of, or reliance on documentary materials, for purposes of resolving a proceeding pending before the agency, other than (1) materials submitted by a party or an interested member of the public or adduced with a party’s participation, or(2) legal research materials traditionally consulted by an agency’s adjudicators. Traditional legal research materials may include statutes; agency rules, orders, and notices; and decisions of courts and administrative agencies.

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

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

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6 FED. R. EVID. 201(a) advisory committee’s note.
Congress, courts, agencies, and scholars have long debated the extent to which agency adjudicators may and should conduct independent research. While some forms of independent research are firmly rooted in longstanding agency practices, others have proven more controversial in certain circumstances. The growth of the internet has amplified this debate in recent years as adjudicators now have quicker and easier access to vastly greater amounts of information. Information that is now available to adjudicators includes online versions of print publications and public records, as well as newer forms of information such as openly editable encyclopedias, blogs, social media, and personal and professional websites.

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

Various sources of law may govern independent research by agency adjudicators. Perhaps the most important is constitutional due process. With regard to official notice, in particular, the Supreme Court has held that an agency must offer parties a reasonable opportunity to rebut an officially noticed fact. Constitutional due process also generally requires that an adjudicator be impartial. Whether an act of independent research will affect an adjudicator’s

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3 Ohio Bell Tel. Co., 301 U.S. at 300–06.
impartiality or raise doubts about the integrity of a proceeding may depend on the specific
features of an agency’s adjudicatory program.11

The APA also governs some aspects of independent research in adjudications conducted
according to its formal-hearing provisions. For example, with respect to official notice, the APA
provides that “[w]hen an agency decision rests on official notice of a material fact not appearing
in the evidence of record, a party is entitled, on timely request, to an opportunity to show the
contrary.”12 The APA specifies that a party is entitled to “conduct such cross-examination as
may be required for a full and true disclosure of the facts.”13 The APA generally prohibits an
employee who presides at the reception of evidence from “consult[ing] a person or party on a
fact in issue, unless on notice and opportunity for all parties to participate.”14 Unless an
exception applies, the APA also generally prohibits an employee who participates or advises in
the decision or review of a decision from performing an investigative or prosecutorial function in
the same or a factually related case.15

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

Because adjudications vary widely in their purpose, scope, complexity, and effects, a
categorical approach to independent research across federal adjudications is neither practicable
nor desirable. Some adjudications are adversarial; others are non-adversarial. In some contexts,
the government brings an action against a private party; in others, a private party petitions the
government, or the government resolves a dispute between private or public parties. Some

12 5 U.S.C. § 556(e).
14 Id. § 554(d).
15 Id.
agencies apply the *Federal Rules of Evidence*; others have developed evidentiary rules to suit their specific need. Adjudicators in some contexts have an affirmative duty to develop the record or assist unrepresented parties; adjudicators in other contexts have no such obligation. Some adjudicators play an active role questioning parties and witnesses and calling experts; others do not. Adjudicators vary in the degree to which they are viewed as subject-matter experts and the extent to which they have access to the expertise of agency policymakers.

This Recommendation encourages agencies to develop appropriate policies to address independent research conducted by adjudicators. The policies could take different forms depending on the circumstances. In some circumstances, an agency may consider publishing a legislative rule or a rule of agency organization, procedure, or practice. In other circumstances, an agency guidance document, including an interpretative rule or general statement of policy within the meaning of the APA, may be suitable. An agency may intend for its policy to confer an important procedural right on private parties and bind the agency. Alternatively, it may intend for its policy only to facilitate internal agency processes and not bind the agency except, perhaps, in cases in which noncompliance results in substantial prejudice to a private party. The appropriate form of an agency’s policy on independent research will depend on its substance and intended effect and on the unique circumstances of the agency’s adjudicatory program.

Although the emphasis of this Recommendation is the particular phenomenon of independent internet research, its recommended best practices apply equally to independent research by other means.

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19 See *id.*
RECOMMENDATION

Given the possibility that independent research by adjudicators, especially that conducted on the internet, could result in actual or perceived bias or result in errors or inefficiencies, agencies should consider implementing the following best practices in consultation with adjudicators.

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

2. When agencies designate sources that are appropriate for independent research, they should consider clearly identifying and providing access to the source on their websites. Agencies should ensure that they maintain the most current version of all sources that they host on their websites. 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.

3. If agencies permit adjudicators to independently consult sources that are not specifically designated, they should consider establishing publicly available policies to help adjudicators assess the authenticity and reliability of information. Agencies should consider including indicia of authenticity and reliability, particularly with respect to internet information, that adjudicators may consider if they choose to consult outside sources. Examples of such indicia include:

   a. Whether the information was authored by an identifiable and easily authenticated institutional or individual author who is considered an expert or reputable authority on the subject;

   b. Whether the author published the information for a purely informational or scholarly purpose (i.e., not for a commercial, partisan, or promotional purpose);

   c. Whether the information references other authorities that help to corroborate its accuracy;

   d. Whether the meaning and significance of the information is clear;
e. Whether the information is published in a final format rather than as a draft or in a publicly editable format;

f. Whether the information is current;

g. Whether the owner or administrator of the website on which the information appears is easily authenticated, is a recognized authority or resource, and maintains the website for a purely informational or scholarly purpose (i.e., not for a commercial, partisan, or promotional purpose);

h. Whether information that appears on the website or in the publication undergoes editorial or peer review; and

i. Whether other reliable resources contain the same information or cite to the original information as reliable or authoritative.

If agencies have identified sources or categories of sources that they determine are not appropriate for adjudicators to independently consult, they should publicly designate those sources or categories of sources.

4. Agencies should promulgate rules on official notice that specify the procedures that adjudicators must follow when an agency decision rests on official notice of a material fact. The rules should ensure that parties, 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 and timing of an opportunity for rebuttal may depend on factors such as whether a fact is general or specific to the parties, whether a fact is reasonably disputable or indisputable, whether a fact is central or peripheral to the adjudication, and whether a fact is noticed for the first time before or at a hearing or in an initial or appellate decision.

5. If agencies intend that specific procedures will apply when adjudicators use independently obtained information for purposes other than official notice of a material fact, such as for background purposes, they should 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, use of traditional legal research materials from factual
research; and material facts from facts that are not material, such as background facts.

6. Agency policies should specify when adjudicators must physically or electronically put
independently obtained materials, especially internet materials, in an administrative
record and explain what procedures adjudicators should follow to do so to ensure they
preserve materials in a stable, permanent form. Agencies should ensure that such policies
are consistent with other agency rules of procedure.

7. Agencies should identify those policies which are intended to confer an important
procedural right on private parties, noncompliance with which may give rise to grounds
for administrative or judicial review, and those which do not and are intended only to
facilitate internal agency processes.

8. When adjudicators conduct independent research using sources that are not available to
parties on or through an agency website, they should make those sources available to the
parties by alternative means.

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