



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Internet Evidence in Agency Adjudication

Committee on Adjudication

Proposed Recommendation | December 12, 2019

**Commented [A1]:** The Committee on Adjudication voted to change the title of this Recommendation to “Independent Research by Agency Adjudicators in the Internet Age.”

1 A fundamental characteristic of agency adjudications that incorporate a legally required  
2 evidentiary hearing is the existence of an exclusive record for decision making.<sup>1</sup> The exclusive  
3 record in adjudications regulated by the formal-hearing provisions of the Administrative  
4 Procedure Act (APA) consists of the “transcript of testimony and exhibits, together with all  
5 papers and requests filed in the proceeding.”<sup>2</sup> Many other adjudications in which an evidentiary  
6 hearing is required by statute, regulation, or executive order, though not governed by those  
7 provisions of the APA, also rely on an exclusive record similarly constituted.<sup>3</sup> The exclusive  
8 record principle seeks to ensure that parties know and can meet the evidence against them;  
9 promotes accurate, evidence-based decision making; and facilitates administrative and judicial  
10 review.

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

<sup>1</sup> Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act 20–21* (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), available at <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.

<sup>2</sup> 5 U.S.C. § 556(e).

<sup>3</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). 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.



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14 as used in this Recommendation, means any agency official or employee, acting either  
15 individually or collectively, who presides over a legally required evidentiary hearing or provides  
16 administrative review following an evidentiary hearing.

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

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

30 In addition, independent research is sometimes used, for example, to learn background  
31 information in preparation for a hearing, define terms, assess a party’s or witness’s credibility,  
32 determine an expert’s qualifications, assess the reliability of an expert’s opinion, or interpret or  
33 evaluate existing evidence. The facts identified through independent research may be  
34 adjudicative (i.e., “the facts of the particular case”) or legislative (i.e., “those which have  
35 relevance to legal reasoning and the lawmaking process”).<sup>6</sup>

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

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

<sup>6</sup> FED. R. EVID. 201(a) advisory committee’s note.



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36 Congress, courts, agencies, and scholars have long debated the extent to which agency  
37 adjudicators may and should conduct independent research.<sup>7</sup> While some forms of independent  
38 research are firmly rooted in longstanding agency practices, others have proven more  
39 controversial in certain circumstances. The growth of the internet has amplified this debate in  
40 recent years as adjudicators now have quicker and easier access to vastly greater amounts of  
41 information.<sup>8</sup> Information that is now available to adjudicators includes online versions of print  
42 publications and public records, as well as newer forms of information such as openly editable  
43 encyclopedias, blogs, social media, and personal and professional websites.

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

49 Various sources of law may govern independent research by agency adjudicators.  
50 Perhaps the most important is constitutional due process. With regard to official notice, in  
51 particular, the Supreme Court has held that an agency must offer parties a reasonable opportunity  
52 to rebut an officially noticed fact.<sup>9</sup> Constitutional due process also generally requires that an  
53 adjudicator be impartial.<sup>10</sup> Whether an act of independent research will affect an adjudicator's

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<sup>7</sup> See FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 71–73 (1941); Kenneth Culp Davis, *Official Notice*, 62 HARV. L. REV. 537 (1949).

<sup>8</sup> See generally Jeremy Graboyes, *Internet Evidence in Agency Adjudication* 8–11 (Oct. 31, 2019) (report to the Admin. Conf. of the U.S.), available at <https://www.acus.gov/report/final-report-independent-research-agency-adjudicators-internet-age>.

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

<sup>10</sup> Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019); Louis J. Virelli III, *Recusal Rules for Administrative Adjudicators* 7-8 (Nov. 30, 2018) (report to the Admin. Conf. of the U.S.), available at <https://www.acus.gov/report/final-report-recusal-rules-administrative-adjudicators>.



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54 impartiality or raise doubts about the integrity of a proceeding may depend on the specific  
55 features of an agency's adjudicatory program.<sup>11</sup>

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

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

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

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<sup>11</sup> See Recommendation 2018-4, *supra* note 10, ¶ 3.

<sup>12</sup> 5 U.S.C. § 556(e).

<sup>13</sup> 5 U.S.C. § 556(d).

<sup>14</sup> *Id.* § 554(d).

<sup>15</sup> *Id.*



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77 agencies apply the *Federal Rules of Evidence*; others have developed evidentiary rules to suit  
78 their specific need. Adjudicators in some contexts have an affirmative duty to develop the record  
79 or assist unrepresented parties; adjudicators in other contexts have no such obligation. Some  
80 adjudicators play an active role questioning parties and witnesses and calling experts; others do  
81 not. Adjudicators vary in the degree to which they are viewed as subject-matter experts and the  
82 extent to which they have access to the expertise of agency policymakers.

83 This Recommendation encourages agencies to develop appropriate policies to address  
84 independent research conducted by adjudicators. The policies could take different forms  
85 depending on the circumstances. In some circumstances, an agency may consider publishing a  
86 legislative rule or a rule of agency organization, procedure, or practice.<sup>16</sup> In other circumstances,  
87 an agency guidance document, including an interpretative rule or general statement of policy  
88 within the meaning of the APA, may be suitable.<sup>17</sup> An agency may intend for its policy to confer  
89 an important procedural right on private parties and bind the agency.<sup>18</sup> Alternatively, it may  
90 intend for its policy only to facilitate internal agency processes and not bind the agency except,  
91 perhaps, in cases in which noncompliance results in substantial prejudice to a private party.<sup>19</sup> The  
92 appropriate form of an agency's policy on independent research will depend on its substance and  
93 intended effect and on the unique circumstances of the agency's adjudicatory program.

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

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<sup>16</sup> See generally Admin. Conf. of the U.S., Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30,102 (July 8, 1992).

<sup>17</sup> 5 U.S.C. § 553(a); 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., Recommendation 2018-5, *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>18</sup> See *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970).

<sup>19</sup> See *id.*



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### RECOMMENDATION

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

- 100 1. If agencies identify reliable sources or categories of sources that they determine would be  
101 generally appropriate for adjudicators to independently consult, they should publicly  
102 designate those sources or categories of sources.
- 103 2. When agencies designate sources that are appropriate for independent research, they  
104 should consider clearly identifying and providing access to the source on their websites.  
105 Agencies should ensure that they maintain the most current version of all sources that  
106 they host on their websites. If agencies provide hyperlinks to sources that are hosted on  
107 websites not maintained by the agency, they should ensure that both the hyperlinks on  
108 their own websites and the materials on third-party sites remain current and accurate.
- 109 3. If agencies permit adjudicators to independently consult sources that are not specifically  
110 designated, they should consider establishing publicly available policies to help  
111 adjudicators assess the authenticity and reliability of information. Agencies should  
112 consider including indicia of authenticity and reliability, particularly with respect to  
113 internet information, that adjudicators may consider if they choose to consult outside  
114 sources. Examples of such indicia include:
  - 115 a. Whether the information was authored by an identifiable and easily authenticated  
116 institutional or individual author who is considered an expert or reputable  
117 authority on the subject;
  - 118 b. Whether the author published the information for a purely informational or  
119 scholarly purpose (i.e., not for a commercial, partisan, or promotional purpose);
  - 120 c. Whether the information references other authorities that help to corroborate its  
121 accuracy;
  - 122 d. Whether the meaning and significance of the information is clear;



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- 123 e. Whether the information is published in a final format rather than as a draft or in a  
124 publicly editable format;
- 125 f. Whether the information is current;
- 126 g. Whether the owner or administrator of the website on which the information  
127 appears is easily authenticated, is a recognized authority or resource, and  
128 maintains the website for a purely informational or scholarly purpose (i.e., not for  
129 a commercial, partisan, or promotional purpose);
- 130 h. Whether information that appears on the website or in the publication undergoes  
131 editorial or peer review; and
- 132 i. Whether other reliable resources contain the same information or cite to the  
133 original information as reliable or authoritative.

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

- 137 4. Agencies should promulgate rules on official notice that specify the procedures that  
138 adjudicators must follow when an agency decision rests on official notice of a material  
139 fact. The rules should ensure that parties, upon timely request, are provided a reasonable  
140 opportunity to rebut the fact; rebut an inference drawn from the fact; and supplement,  
141 explain, or give different perspective to the fact. The precise nature and timing of an  
142 opportunity for rebuttal may depend on factors such as whether a fact is general or  
143 specific to the parties, whether a fact is reasonably disputable or indisputable, whether a  
144 fact is central or peripheral to the adjudication, and whether a fact is noticed for the first  
145 time before or at a hearing or in an initial or appellate decision.
- 146 5. If agencies intend that specific procedures will apply when adjudicators use  
147 independently obtained information for purposes other than official notice of a material  
148 fact, such as for background purposes, they should clarify the distinction between official  
149 notice and other uses of information independently obtained by an adjudicator and  
150 describe the applicable procedures, if any. In particular, agencies should consider



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- 151 distinguishing, as appropriate, use of traditional legal research materials from factual  
152 research; and material facts from facts that are not material, such as background facts.
- 153 6. Agency policies should specify when adjudicators must physically or electronically put  
154 independently obtained materials, especially internet materials, in an administrative  
155 record and explain what procedures adjudicators should follow to do so to ensure they  
156 preserve materials in a stable, permanent form. Agencies should ensure that such policies  
157 are consistent with other agency rules of procedure.
- 158 7. Agencies should identify those policies which are intended to confer an important  
159 procedural right on private parties, noncompliance with which may give rise to grounds  
160 for administrative or judicial review, and those which do not and are intended only to  
161 facilitate internal agency processes.
- 162 8. When adjudicators conduct independent research using sources that are not available to  
163 parties on or through an agency website, they should make those sources available to the  
164 parties by alternative means.
- 165 9. Agencies or agency adjudicators, as appropriate, should take steps to ensure that  
166 adjudicative staff are aware of agency policies on independent research, particularly with  
167 respect to independent internet research.