



Administrative Conference Recommendation 2019-6

Independent Research by Agency Adjudicators in the Internet Age

Adopted December 12, 2019

A fundamental characteristic of agency adjudications that incorporate a legally required evidentiary hearing is the existence of an exclusive record for decision making.¹ 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.”² 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.³ 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,” as used in this Recommendation, means any agency official or employee, acting either

¹ See 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>.

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, 94,315 (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 the first two categories.



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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 factual materials, on his or her own initiative, for purposes of resolving a proceeding pending before the agency.⁴

This definition 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.⁵ In appropriate circumstances, an adjudicator may do so on his or her own motion based on information identified through independent research.⁶

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”).⁷

Congress, courts, agencies, and scholars have long debated the extent to which agency adjudicators may and should conduct independent research.⁸ While some forms of independent

⁴ This definition does not include an adjudicator’s search for, consideration of, or reliance on materials submitted by a party or an interested member of the public or adduced with a party’s participation. Nor does it include the use of legal research materials traditionally consulted by an agency’s adjudicators, such as statutes; agency rules, orders, and notices; and decisions of courts and administrative agencies.

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

⁶ See *Ohio Bell Tel. Co. v. Pub. Utilities Comm’n*, 301 U.S. 292, 300–06 (1937).

⁷ FED. R. EVID. 201(a) advisory committee’s note.

⁸ 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).



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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.⁹ 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.¹⁰ Constitutional due process also generally requires that an adjudicator be impartial.¹¹ Whether an act of independent research will affect an adjudicator's impartiality or raise doubts about the integrity of a proceeding may depend on the specific features of an agency's adjudicatory program.¹²

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

⁹ See generally Jeremy Graboyes, *Independent Research by Agency Adjudicators in the Internet Age* 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>.

¹⁰ *Ohio Bell Tel. Co.*, 301 U.S. at 300–06.

¹¹ 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>.

¹² See Recommendation 2018-4, *supra* note 11, ¶ 3.



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in the evidence of record, a party is entitled, on timely request, to an opportunity to show the contrary.”¹³ 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.”¹⁴ 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.”¹⁵ 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.¹⁶

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—such as the need for accuracy, consistency, and administrative efficiency in agency decision making—may counsel in favor of or against its exercise.

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. A few agencies apply the *Federal Rules of Evidence*, others use it as a guide, and others have developed evidentiary rules to suit their specific need.¹⁷ 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

¹³ 5 U.S.C. § 556(e).

¹⁴ *Id.* § 556(d).

¹⁵ *Id.* § 554(d).

¹⁶ *Id.*

¹⁷ Admin. Conf. of the U.S., Recommendation 86-2, *Use of Federal Rules of Evidence in Federal Agency Adjudications*, 51 Fed. Reg. 25,642 (July 16, 1986). The APA provides only that “the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.” 5 U.S.C. § 556(d).



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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.¹⁸ In other circumstances, an agency guidance document, including an interpretive rule or general statement of policy within the meaning of the APA, may be suitable.¹⁹ 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.²⁰ 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.

RECOMMENDATION

Independent research by adjudicators, especially that conducted on the internet, could have

¹⁸ Legislative rules dealing with agency organization, procedure, or practice are exempt from notice-and-comment requirements. 5 U.S.C. § 553(b)(A). *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).

¹⁹ 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).

²⁰ *See* *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970).



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unintended results, such as actual or perceived bias, factual errors or misunderstandings, or inefficiencies. Therefore, agencies, to the extent permitted by law, 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, when possible, providing access to the source on their websites.²¹ 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 the hyperlinks remain current and accurate.
3. If agencies permit adjudicators to independently consult sources that are not specifically designated, they should establish publicly available policies to help adjudicators assess the authenticity and reliability of information. Agencies should include 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 information references other authorities that help to corroborate its accuracy;
 - c. Whether the meaning and significance of the information is clear;

²¹ Agencies should be mindful of copyright protections when they provide access to sources on their websites. *See, e.g., Am. Soc’y for Testing & Materials v. Public.Resource.Org*, 896 F.3d 437 (D.C. Cir. 2018). There may be steps agencies can take to ensure copyrighted materials will be reasonably available to interested members of the public. *Cf. Admin. Conf. of the U.S., Recommendation 2011-5, Incorporation by Reference*, ¶ 3, 77 Fed. Reg. 2257, 2258 (Jan. 17, 2012).



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- d. Whether the information is published in a final format rather than as a draft or in a publicly editable format;
- e. Whether the information is current or bears a date as of which the information was accurate;
- f. Whether the owner or administrator of the website on which the information appears is easily authenticated and is a recognized authority or resource;
- g. Whether information that appears on the website undergoes editorial or peer review;
- h. Whether other reliable resources contain the same information or cite the original information as reliable or authoritative; and
- i. Whether the information is thorough, materially supported, internally consistent, and analytically persuasive.

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 factual finding or an inference drawn from a fact is subject to reasonable dispute, 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



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describe the applicable procedures, if any. In particular, agencies should consider distinguishing 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 that 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 that 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.