



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## **Best Practices for Adjudication Not Involving an Evidentiary Hearing**

### **Committee on Adjudication**

#### **Proposed Recommendation from Committee | November 1, 2023**

1 Federal administrative adjudications take many forms.<sup>1</sup> Many adjudications include a  
2 legally required opportunity for an evidentiary hearing—that is, a proceeding “at which the  
3 parties make evidentiary submissions and have an opportunity to rebut testimony and arguments  
4 made by the opposition”—and, under the exclusive-record principle, confine the decision maker  
5 to considering “evidence and arguments from the parties produced during the hearing process (as  
6 well as matters officially noticed) when determining factual issues.”<sup>2</sup> The Administrative  
7 Conference has used the term “Type A adjudications” to refer to adjudications that include such  
8 an opportunity and are regulated by the formal adjudication provisions of the Administrative  
9 Procedure Act (APA).<sup>3</sup> Adjudications that include such an opportunity but are not regulated by  
10 the APA’s formal adjudication provisions are referred to as “Type B adjudications.” The  
11 Conference recommended best practices for Type B adjudications in Recommendation 2016-4,  
12 *Evidentiary Hearings Not Required by the Administrative Procedure Act*.<sup>4</sup>

13 In many federal administrative adjudications, however, no constitutional provision,  
14 statute, regulation, or executive order grants parties the right to an evidentiary hearing.

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<sup>1</sup> The term “adjudication” as used in this Recommendation refers to the process for formulating an order that is “a decision by government officials made through an administrative process to resolve a claim or dispute between a private party and the government or between two private parties arising out of a government program.” MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 8 (2019).

<sup>2</sup> ASIMOW, *supra* note 1, at 10.

<sup>3</sup> 5 U.S.C. §§ 554, 556–557.

<sup>4</sup> 81 Fed. Reg. 94,314 (Dec. 23, 2016).



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15 Proceedings of this type, referred to in Recommendation 2016-4 as “Type C adjudications,”  
16 include many agency decisions regarding grants, licenses, or permits; immigration and  
17 naturalization; national security; the regulation of banks and other financial matters; requests for  
18 records under the Freedom of Information Act; land-use requests; and a wide variety of other  
19 matters.<sup>5</sup>

20 There are many policy reasons why adjudications might be conducted without a legally  
21 required opportunity for an evidentiary hearing, though such reasons are beyond the scope of this  
22 Recommendation. The stakes in disputes resolved through Type C adjudications vary widely,  
23 but, whether they are low or high, each decision matters to the parties. For the public, Type C  
24 adjudication by government agencies is often the face of justice. Accordingly, decision making  
25 in such adjudications should be accurate, efficient, and both fair and perceived to be fair,  
26 regardless of the stakes.

27 Type C adjudication differs from Type A and Type B adjudication in fundamental ways.  
28 In adjudications of all types, a decision maker conducts an investigation and issues a front-line  
29 decision, i.e., a proposed or preliminary decision. In Type A and Type B adjudication, if the  
30 private party does not acquiesce in the front-line decision, it is entitled to an evidentiary hearing  
31 before a neutral decision maker who, after considering the evidence and arguments, issues a  
32 decision. Typically, the private party can also seek review of that decision within the agency,  
33 often by the agency head or delegated officials. By contrast, in Type C adjudication, often the  
34 front-line decision maker issues what this Recommendation refers to as the “primary decision,”  
35 normally after considering input from the affected party. Typically, that party is entitled to seek  
36 review of the primary decision by a different decision maker within the agency. These  
37 fundamental differences are reflected in this Recommendation.

38 No uniform set of procedures applies to all Type C adjudications, nor could one be  
39 devised. Some characteristics are common, however. Type C adjudications often allow for

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<sup>5</sup> Michael Asimow, Fair Procedure in Informal Adjudication 16 (Oct. 16, 2023) (draft report to the Admin. Conf. of the U.S.).



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40 document exchanges and submission of research studies, oral arguments, public hearings,  
41 conferences with staff, interviews, negotiations, examinations, and inspections. Frequently, the  
42 decision maker in a Type C adjudication is involved in the underlying investigation or other  
43 preliminary proceedings. Ex parte communication between the parties and the decision maker is  
44 routine, and the decision maker is free to rely on their own knowledge and consider materials not  
45 submitted as evidence.<sup>6</sup> Agencies that engage in Type C adjudication typically employ dispute  
46 resolution methodologies that lack the procedures typical of evidentiary hearings, such as the  
47 opportunity to cross examine witnesses, the prohibition of ex parte communications, the  
48 separation of adjudicative from investigative and prosecutorial functions, and the exclusive  
49 record principle.

50 While not subject to the requirement that a decision be preceded by an evidentiary  
51 hearing, Type C adjudications may be subject to other legal requirements. The Due Process  
52 Clause of the Constitution’s Fifth Amendment may require certain minimum procedures for  
53 Type C adjudications involving constitutionally protected interests in life, liberty, or property.<sup>7</sup>  
54 In addition, agencies conducting Type C adjudication typically must observe certain general  
55 provisions of the APA—in particular 5 U.S.C. §§ 555<sup>8</sup> and 558—and are subject to other  
56 generally applicable statutes and regulations addressing the conduct of federal employees, rights  
57 of representation,<sup>9</sup> ombuds,<sup>10</sup> and other matters.<sup>11</sup> The procedures employed by agencies

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<sup>6</sup> Asimow, *supra* note 5, at 7–10.

<sup>7</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262–63 (1987) (applying *Mathews* principles in a Type C context); *Goss v. Lopez*, 415 U.S. 565 (1975) (minimal procedures required for short-term suspension from public school).

<sup>8</sup> *PBG Corp. v. LTV Corp.* 496 U.S. 633 (1990).

<sup>9</sup> See Asimow, *supra* note 6, at 62, for a discussion of the right to representation before agencies, including the right to lay representation under many agencies’ regulations.

<sup>10</sup> See Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94,316 (Dec. 23, 2016).

<sup>11</sup> Asimow, *supra* note 5, at 56.



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58 conducting Type C adjudications may also be subject to agency-specific statutes and procedural  
59 regulations. Finally, judicial review is available for many Type C adjudications.

60 These legal requirements, however, may provide minimal protection in Type C  
61 adjudication. Due process, the APA, and other sources of law external to the agency often do not  
62 specifically prescribe the details of agency procedures, and judicial review may be unrealistic  
63 because the costs of such review exceed the value of the interests at stake.<sup>12</sup> For these reasons,  
64 agency-adopted policies offer the best mechanism for establishing procedural protections for  
65 parties, promoting fairness and participant satisfaction, and facilitating the efficient and effective  
66 functioning of Type C adjudications. The public availability of such rules also facilitates external  
67 oversight.

68 This Recommendation identifies a set of best practices for Type C adjudication and  
69 encourages agencies to implement them through their regulations and guidance documents.  
70 Many agencies conducting Type C adjudications already follow these best practices. Agencies  
71 adopting or modifying Type C adjudication procedures should tailor these best practices to their  
72 individual systems.

### RECOMMENDATION

#### Notice of Proposed Action

- 73 1. Agencies conducting Type C adjudications should notify parties of the front-line  
74 decision, i.e., the proposed or preliminary decision, including the reasons for that  
75 decision.
- 76 2. Such notice should provide sufficient detail and be given in sufficient time to allow  
77 parties to contest the front-line decision and submit evidence to support their position.
- 78 This notice should provide parties with the following information, when applicable:
- 79 a. Whether the agency provides a second chance to achieve compliance;

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<sup>12</sup> *Id.* at 8–9, 75.



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- 80           b. The manner by which the party can submit additional evidence and argument to  
81           influence the agency’s front-line decision;  
82           c. The amount of time before further agency action will be taken; and  
83           d. How materials in the agency’s case file can be accessed.

### **Opportunity to Submit Evidence and Argument**

- 84           3. Agencies should allow parties in Type C adjudications to furnish decision makers with  
85           evidence and arguments. Depending on the stakes involved, the types of issues involved,  
86           and the agency’s caseload and adjudicatory resources, the process for furnishing evidence  
87           and argument may include written submissions or oral presentations.  
88           4. When credibility issues are presented, a party should be permitted an opportunity to rebut  
89           adverse information.

### **Representation**

- 90           5. Agencies should allow, when feasible, participants in their Type C adjudications to be  
91           represented by a lawyer or a lay person with expertise in the program administered by the  
92           agency.  
93           6. Apart from representation, agencies should allow participants in their Type C  
94           adjudications to obtain assistance or support from friends, family members, or other  
95           individuals in presenting their case.  
96           7. Agencies should make their proceedings as accessible as possible to self-represented  
97           parties by providing plain-language resources, such as frequently asked questions  
98           (FAQs), and other appropriate assistance, such as offices dedicated to helping the public  
99           navigate agency programs.

### **Decision Maker Impartiality**

- 100           8. Agencies should tailor neutrality standards appropriately to Type C adjudications, which  
101           may be conducted by decision makers who engage in their own investigations or  
102           participate in investigative teams and may have prior involvement in the matter.



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- 103 9. Consistent with government ethics requirements, agencies should require the recusal of  
104 employees engaged in Type C adjudications who have financial or other conflicts of  
105 interest in matters they are investigating or deciding.
- 106 10. Agencies should require recusal of employees whom stakeholders may reasonably view  
107 as not impartial.
- 108 11. When Type C adjudications involve serious sanctions, agencies should consider adopting  
109 internal separation of investigative or prosecutorial and adjudicatory functions and  
110 limitations on ex parte communications.

### **Statement of Reasons**

- 111 12. Agencies conducting Type C adjudications should provide oral or written statements of  
112 reasons that follow federal plain language guidelines setting forth the rationale for the  
113 primary decision, i.e., the final decision issued by the front-line decision maker, including  
114 the factual and other bases for it.

### **Administrative Review**

- 115 13. Agencies should provide for administrative review of their primary decisions by higher-  
116 level decision makers or other reviewers unless it is impracticable because of high  
117 caseload, low stakes, lack of available staff, or time constraints.

### **Procedural Regulations**

- 118 14. Agency regulations should specify the procedures for each Type C adjudication the  
119 agency conducts. Consistent with Recommendation 92-1, *The Procedural and Practice*  
120 *Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, agencies  
121 should voluntarily use notice-and-comment rulemaking for the adoption of significant  
122 procedural regulations unless the costs outweigh the benefits of doing so.
- 123 15. Agencies should ensure their regulations, guidance documents, staff manuals, procedural  
124 instructions, and FAQs addressing their Type C adjudications follow federal plain-  
125 language guidelines and are easily accessible on the agency's website.



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126 16. Agencies should ensure that their notices, statements, procedural instructions, FAQs, and  
127 other documents that contain important information about their Type C adjudications are  
128 made available in languages understood by people who frequently appear before the  
129 agency.

### **Ombuds**

130 17. Agencies with an ombuds program should ensure that their ombuds are empowered to  
131 handle complaints about Type C adjudications.

132 18. Agencies without an ombuds program should consider establishing one, particularly if  
133 their Type C adjudications have sufficient caseloads, significant stakes, or significant  
134 numbers of unrepresented parties. The establishment and standards of such programs  
135 should follow the best practices suggested in Recommendation 2016-5, *The Use of*  
136 *Ombuds in Federal Agencies*.

137 19. Agencies with smaller caseloads, lower stakes, or lack of available staff should consider  
138 sharing an ombuds program with other similarly situated agencies to address resource  
139 constraints.

140 20. Agencies that choose not to establish or share an ombuds program should provide  
141 alternative procedures for allowing parties to submit feedback or complaints, such as  
142 through an agency portal or dedicated email address.

### **Quality Assurance**

143 21. Agencies conducting Type C adjudications should establish methods for assessing and  
144 improving the quality of their decisions to promote accuracy, efficiency, fairness, the  
145 perception of fairness, and other goals relevant to their adjudications in accordance with  
146 Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*.  
147 Depending on the caseload, stakes, and available resources, such methods may include  
148 formal quality assessments and informal peer review on an individual basis, sampling and  
149 targeted case selection on a systemic basis, and case management systems with data  
150 analytics and artificial intelligence tools.