Federal administrative adjudications take many forms.¹ Many adjudications include a legally required opportunity for an evidentiary hearing—that is, a proceeding “at which the parties make evidentiary submissions and have an opportunity to rebut testimony and arguments made by the opposition, and to which the exclusive record principle applies.”² The Administrative Conference has used the term “Type A adjudications” to refer to adjudications that include such an opportunity and are regulated by the formal adjudication provisions of the Administrative Procedure Act (APA).³ Adjudications that include such an opportunity but are not regulated by the APA’s procedural provisions are referred to as “Type B adjudications.” The

¹ 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). This definition excludes “policy implementation” actions—such as priority setting, managing public lands and institutions, and conducting environmental assessments—which are sometimes considered “adjudication” for purposes of the Administrative Procedure Act. See id. at 9–10; cf. 5 U.S.C. § 551(7) (defining “adjudication” more broadly to include any agency action that is not a rule).

² Asimow, supra note 1, at 10. The “exclusive record principle” means that the decision maker is “confined to considering evidence and arguments from the parties produced during the hearing process (as well as matters officially noticed) when determining factual issues.” Id.

Conference recommended best practices for Type B adjudications in Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act.*

In many federal administrative adjudications, however, no statute, executive order, or regulation grants parties the right to an evidentiary hearing. Proceedings of this type, referred to in Recommendation 2016-4 as “Type C adjudications,” include many agency decisions regarding applications for grants, actions taken in regulating banks, applications for licenses or permits to build pipelines or dams, certain decisions relating to immigration and naturalization, national security, land use decisions, and a wide variety of other discretionary decisions.

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

There is no uniform set of procedures that applies to all Type C adjudications, nor could there be. Some characteristics are common, however. Most notably, agencies typically employ dispute resolution methodologies that lack procedures typical of evidentiary hearings, including the opportunity to cross examine witnesses, the prohibition of ex parte communications, the separation of adjudicative from investigative and prosecutorial functions, and the exclusive record principle. Instead, Type C adjudication often consists of document exchanges and submission of research studies, oral arguments, public hearings, conferences with staff, interviews, negotiations, examinations, and inspection, but not evidentiary hearings. Frequently, the decision maker in a Type C adjudication is involved in the underlying investigation or other preliminary proceedings. Ex parte communication between the parties and the decisionmakers is

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routine, and decision makers are free to rely on their own knowledge and consider materials not introduced as evidence.\(^5\)

Agencies rarely have unfettered discretion to craft and carry out procedures for Type C adjudications. The Due Process Clause of the Constitution may require certain minimum procedures for Type C adjudications involving constitutionally protected interests in life, liberty, or property.\(^6\) And even when the Due Process Clause is not implicated, agencies typically must observe certain general provisions of the APA, in particular 5 U.S.C. § 555,\(^7\) and may be subject to other generally applicable and agency- or program-specific statutes addressing the conduct of federal employees, rights of representation, ombuds, and other matters. Additionally, judicial review is available for many Type C adjudications.

At the same time, however, these procedural constraints may be minimal. Due process, the APA, and other external sources of law may not prescribe the details of agency procedures with great specificity, and judicial review may be impractical given high caseloads or because the costs of judicial review exceed the value of the interests at stake.\(^8\)

For these reasons, agency-adopted rules and policies offer the best mechanisms for agencies to establish procedural protections for parties and promote participant satisfaction and ensure the efficient and effective functioning of their adjudicative systems. The public availability of such rules and policies also facilitates external oversight.

This Recommendation encourages agencies to adopt regulations describing their procedures for Type C adjudication and identifies a set of best practices for Type C adjudication that agencies can implement through regulations, guidance documents, administrative staff manuals, and other means. These practices are grounded in existing law and procedural

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\(^5\) Michael Asimow, Fair Procedure in Informal Adjudication (Sept. 29, 2023) (draft report to the Admin. Conf. of the U.S.)


\(^7\) PBG Corp. v. LTV Corp. 496 U.S. 633 (1990).

\(^8\) Asimow, supra note 5, at 8-9.
regulations and practices. Many agencies conducting Type C adjudications already meet or exceed these best practices. Agencies considering adopting or modifying Type C adjudication procedures should engage in a situation-specific analysis and tailor these best practices to their individual systems.

RECOMMENDATION

Opportunity to Submit Evidence and Argument

1. Agencies should allow parties in Type C adjudications to furnish decision makers with evidence and arguments. Depending on the stakes involved as well as the agency’s caseload and decisional resources, the process for furnishing evidence and argument may include written or electronic submissions, document exchanges, or informal conferences.

2. When credibility issues are presented, a party should be permitted an opportunity to rebut information provided by adverse witnesses.

Representation

3. Agencies should not restrict participants in their Type C adjudicative systems from being represented by a lawyer or a lay person with expertise in the program administered by the agency.

4. Agencies should not restrict participants in their Type C adjudicative systems from obtaining assistance from a friend, family member, or other individual.

5. Agencies should make their proceedings as accessible as possible to self-represented parties by providing plain language resources, such as FAQs, and other appropriate assistance, such as an agency office dedicated to helping the public navigate agency processes.

Decisionmaker Impartiality
6. Neutrality standards must be appropriately tailored to Type C adjudication systems that are inquisitorial rather than adversarial and may be conducted by decision makers who engage in their own investigations or participate in investigative teams and may have prior involvement in the matter.

7. Agencies should adopt regulations that require the disqualification of employees engaged in the adjudicatory process who have a financial conflict of interest in particular matters they are investigating or deciding. Agencies should tailor their regulations on disqualification to the specific ethics issues they confront.

8. Agencies should adopt regulations requiring disqualification of employees who may be viewed by stakeholders as not impartial. In determining whether disqualification is warranted, the agency should consider factors such as personal interest in a decision, the employee’s relationship with the parties, or indication of prejudgment of facts at issue.

9. Where Type C adjudication is inquisitorial in nature and could involve serious sanctions, agencies should consider adoption of internal separation of functions and limitation on outside ex parte communication.

**Statement of Reasons**

10. Agencies conducting Type C adjudications should provide oral or written statements of the facts and reasons on which its decisions are based that follow federal plain language guidelines. Such statements should explain why the party’s arguments were accepted or rejected and set forth the rationale for the agency’s decision. The detail and formality required of an agency’s statement depends on the context, such as the stakes involved in the decision, the complexity of issues, and the agency’s caseload.

**Administrative Review**

11. When an agency conducts Type C adjudication, it should furnish notice to participants and other stakeholders of the agency’s preliminary decision in sufficient time and detail to enable them to challenge that decision. The notice should provide
access to materials in the agency’s file as needed to allow the participant to mount an
effective challenge, while accounting for the need for security or the application of
any privileges.

12. Agencies should provide for administrative review of initial decisions by a higher-
level staff member or other reviewers, unless it is impracticable because of high
caseload, low stakes, lack of available staff, or time constraints.

Ombuds

13. Agencies should establish a program that empowers an ombuds to receive and
investigate complaints about Type C adjudications.

14. Agency ombuds programs should permit an ombuds, if he or she believes that a
complaint is justified, to:
   i. Mediate between the agency and the private parties;
   ii. Recommend that the matter be reconsidered by a different decisionmaker or a
       new appellate reviewer; or
   iii. Take some other appropriate remedial action.

15. Agency ombuds programs should permit an ombuds, if he or she determines that the
agency should consider improvements or reforms in its Type C adjudication
procedure, to advocate for such changes.

16. The ombuds must:
   i. Have independence and stature within the agency structure;
   ii. Be capable of handling complaints confidentially and impartially; and
   iii. Have a sufficiently large staff to handle the volume of complaints in a timely
       manner.

17. Smaller agencies should share a single ombuds.

Procedural Regulations

18. Agency regulations, guidance documents, staff manuals, and other procedural
instructions governing Type C adjudication systems should explain in detail how
notice and access to material in the agency’s file will be provided. The agency rules or guidance should at a minimum explain, as applicable:

i. The required detail of the notice;

ii. The procedural details by which the agency’s preliminary decision can be challenged and later appealed;

iii. Whether the notice is available in languages other than English;

iv. The means used to publicize the notice to affected stakeholders;

v. Under what circumstances agency materials will be withheld or redacted;

vi. Whether the recipient has a second chance to achieve compliance;

vii. The amount of time the notice must precede further agency action or deadlines; and

viii. How the notice requirements apply to emergency situations.

19. Agencies should adopt regulations that specify the procedural details of each scheme of Type C adjudication that the agency conducts. In addition to procedures contained in this Recommendation, such regulations should provide:

i. The identity and assignment of decisionmakers;

ii. The manner in which an agency’s file is disclosed;

iii. Opportunities for negotiation with the staff before the dispute goes to the agency decision maker;

iv. The location of required forms; and

v. Deadlines.

20. Agencies should use notice-and-comment rulemaking for the adoption of significant procedural regulations in order to give affected stakeholders a chance to weigh in on the tradeoffs necessarily inherent in adopting adjudicatory procedures.

21. Agencies should ensure their user-friendly guidance documents, staff manuals, procedural instructions, and FAQs addressing the Type C adjudication system are written in plain language and easily accessible on the agency’s website.

22. In order to assist participants in understanding their Type C adjudicative decision making process, agencies should make publicly available sample written decisions
(redacted to remove personal information), even if these are not intended to be
precedential.

**Quality Assurance Systems**

23. Agencies with Type C adjudication systems that do not have quality assurance
systems—that is, practices for assessing and improving the quality of decisions—
should develop such systems to promote accuracy, efficiency, fairness, the perception
of fairness, and other goals relevant to their Type C adjudication systems. Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, provides best practices for the design and implementation of such systems. These systems may include formal quality assessments and informal peer review on an individual basis, sampling and targeted case selection on a systemic basis, and case management systems with data analytics and artificial intelligence tools.