



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

### **Committee on Adjudication**

#### **Draft Recommendation for Committee | October 11, 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 to which the exclusive record principle applies.”<sup>2</sup> The  
5 Administrative Conference has used the term “Type A adjudications” to refer to adjudications  
6 that include such an opportunity and are regulated by the formal adjudication provisions of the  
7 Administrative Procedure Act (APA).<sup>3</sup> Adjudications that include such an opportunity but are  
8 not regulated by the APA’s procedural provisions are referred to as “Type B adjudications.” The

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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). 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).

<sup>2</sup> 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.*

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



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

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

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

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

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



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34 routine, and decision makers are free to rely on their own knowledge and consider materials not  
35 introduced as evidence.<sup>5</sup>

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

44 At the same time, however, these procedural constraints may be minimal. Due process,  
45 the APA, and other external sources of law may not prescribe the details of agency procedures  
46 with great specificity, and judicial review may be impractical given high caseloads or because  
47 the costs of judicial review exceed the value of the interests at stake.<sup>8</sup>

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

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

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

<sup>6</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>7</sup> *PBG Corp. v. LTV Corp.* 496 U.S. 633 (1990).

<sup>8</sup> Asimow, *supra* note 5, at 8-9.



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56 regulations and practices. Many agencies conducting Type C adjudications already meet or  
57 exceed these best practices. Agencies considering adopting or modifying Type C adjudication  
58 procedures should engage in a situation-specific analysis and tailor these best practices to their  
59 individual systems.

### RECOMMENDATION

#### Opportunity to Submit Evidence and Argument

- 60 1. Agencies should allow parties in Type C adjudications to furnish decision makers  
61 with evidence and arguments. Depending on the stakes involved as well as the  
62 agency's caseload and decisional resources, the process for furnishing evidence and  
63 argument may include written or electronic submissions, document exchanges, or  
64 informal conferences.
- 65 2. When credibility issues are presented, a party should be permitted an opportunity to  
66 rebut information provided by adverse witnesses.

#### Representation

- 67 3. Agencies should not restrict participants in their Type C adjudicative systems from  
68 being represented by a lawyer or a lay person with expertise in the program  
69 administered by the agency.
- 70 4. Agencies should not restrict participants in their Type C adjudicative systems from  
71 obtaining assistance from a friend, family member, or other individual.
- 72 5. Agencies should make their proceedings as accessible as possible to self-represented  
73 parties by providing plain language resources, such as FAQs, and other appropriate  
74 assistance, such as an agency office dedicated to helping the public navigate agency  
75 processes.

#### Decisionmaker Impartiality



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- 76 6. Neutrality standards must be appropriately tailored to Type C adjudication systems  
77 that are inquisitorial rather than adversarial and may be conducted by decision makers  
78 who engage in their own investigations or participate in investigative teams and may  
79 have prior involvement in the matter.
- 80 7. Agencies should adopt regulations that require the disqualification of employees  
81 engaged in the adjudicatory process who have a financial conflict of interest in  
82 particular matters they are investigating or deciding. Agencies should tailor their  
83 regulations on disqualification to the specific ethics issues they confront.
- 84 8. Agencies should adopt regulations requiring disqualification of employees who may  
85 be viewed by stakeholders as not impartial. In determining whether disqualification is  
86 warranted, the agency should consider factors such as personal interest in a decision,  
87 the employee's relationship with the parties, or indication of prejudgment of facts at  
88 issue.
- 89 9. Where Type C adjudication is inquisitorial in nature and could involve serious  
90 sanctions, agencies should consider adoption of internal separation of functions and  
91 limitation on outside ex parte communication.

### **Statement of Reasons**

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

### **Administrative Review**

- 98 11. When an agency conducts Type C adjudication, it should furnish notice to  
99 participants and other stakeholders of the agency's preliminary decision in sufficient  
100 time and detail to enable them to challenge that decision. The notice should provide



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- 101 access to materials in the agency's file as needed to allow the participant to mount an  
102 effective challenge, while accounting for the need for security or the application of  
103 any privileges.
- 104 12. Agencies should provide for administrative review of initial decisions by a higher-  
105 level staff member or other reviewers, unless it is impracticable because of high  
106 caseload, low stakes, lack of available staff, or time constraints.

### **Ombuds**

- 107 13. Agencies should establish a program that empowers an ombuds to receive and  
108 investigate complaints about Type C adjudications.
- 109 14. Agency ombuds programs should permit an ombuds, if he or she believes that a  
110 complaint is justified, to:
- 111 i. Mediate between the agency and the private parties;
  - 112 ii. Recommend that the matter be reconsidered by a different decisionmaker or a  
113 new appellate reviewer; or
  - 114 iii. Take some other appropriate remedial action.
- 115 15. Agency ombuds programs should permit an ombuds, if he or she determines that the  
116 agency should consider improvements or reforms in its Type C adjudication  
117 procedure, to advocate for such changes.
- 118 16. The ombuds must:
- 119 i. Have independence and stature within the agency structure;
  - 120 ii. Be capable of handling complaints confidentially and impartially; and
  - 121 iii. Have a sufficiently large staff to handle the volume of complaints in a timely  
122 manner.
- 123 17. Smaller agencies should share a single ombuds.

### **Procedural Regulations**

- 124 18. Agency regulations, guidance documents, staff manuals, and other procedural  
125 instructions governing Type C adjudication systems should explain in detail how



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- 126 notice and access to material in the agency’s file will be provided. The agency rules  
127 or guidance should at a minimum explain, as applicable:
- 128 i. The required detail of the notice;
  - 129 ii. The procedural details by which the agency’s preliminary decision can be  
130 challenged and later appealed;
  - 131 iii. Whether the notice is available in languages other than English;
  - 132 iv. The means used to publicize the notice to affected stakeholders;
  - 133 v. Under what circumstances agency materials will be withheld or redacted;
  - 134 vi. Whether the recipient has a second chance to achieve compliance;
  - 135 vii. The amount of time the notice must precede further agency action or  
136 deadlines; and
  - 137 viii. How the notice requirements apply to emergency situations.
- 138 19. Agencies should adopt regulations that specify the procedural details of each scheme  
139 of Type C adjudication that the agency conducts. In addition to procedures contained  
140 in this Recommendation, such regulations should provide:
- 141 i. The identity and assignment of decisionmakers;
  - 142 ii. The manner in which an agency’s file is disclosed;
  - 143 iii. Opportunities for negotiation with the staff before the dispute goes to the  
144 agency decision maker;
  - 145 iv. The location of required forms; and
  - 146 v. Deadlines.
- 147 20. Agencies should use notice-and-comment rulemaking for the adoption of significant  
148 procedural regulations in order to give affected stakeholders a chance to weigh in on  
149 the tradeoffs necessarily inherent in adopting adjudicatory procedures.
- 150 21. Agencies should ensure their user-friendly guidance documents, staff manuals,  
151 procedural instructions, and FAQs addressing the Type C adjudication system are  
152 written in plain language and easily accessible on the agency’s website.
- 153 22. In order to assist participants in understanding their Type C adjudicative decision  
154 making process, agencies should make publicly available sample written decisions



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155 (redacted to remove personal information), even if these are not intended to be  
156 precedential.

### Quality Assurance Systems

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