



## Best Practices for Adjudication Not Involving an Evidentiary Hearing

### Committee on Adjudication

#### Proposed Recommendation for Plenary | December 14, 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”—~~Such proceedings also follow and, under the exclusive-record~~  
 5 ~~principle, confine in which the decision maker is confined~~ to considering “evidence and  
 6 arguments from the parties produced during the hearing process (as well as matters officially  
 7 noticed) when determining factual issues.”<sup>2</sup>~~The Administrative Conference has used the term~~  
 8 ~~“Type A adjudications” to refer to adjudications that include such an opportunity and are~~  
 9 ~~regulated by the formal adjudication provisions of the Administrative Procedure Act (APA).<sup>3</sup>~~  
 10 ~~Adjudications that include such an opportunity but are not regulated by the APA’s formal~~  
 11 ~~adjudication provisions are referred to as “Type B adjudications.” The Conference recommended~~

<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. ~~The Administrative Conference has used the term “Type A adjudications” to refer to adjudications that include an opportunity for a legally required evidentiary hearing that is regulated by the formal adjudication provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 554, 556–557. The Conference has used the term “Type B adjudications” to refer to adjudications that include an opportunity for a legally required evidentiary hearing that is not regulated by the APA’s formal adjudication provisions. See Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).~~

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

**Commented [CMA1]:** Comment from Special Counsel Jeffrey Lubbers #1.

I would not say “regulated” and would substitute “also covered” [The reason is that the APA doesn’t “regulate” in the same way we usually use that word.] (see parallel amendment on Line 10)

**Commented [CMA2]:** Comment from Special Counsel Jeffrey Lubbers #1.

I would also use “covered” instead of “regulated” (see parallel amendment on line 9)



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

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14 In many federal administrative adjudications, however, no constitutional provision,  
15 statute, regulation, or executive order grants parties the right to an evidentiary hearing.<sup>5</sup>  
16 Proceedings of this type, referred to in Recommendation 2016-4 as “Type C adjudications,”  
17 include many agency decisions regarding grants, licenses, or permits; immigration and  
18 naturalization; national security; the regulation of banks and other financial matters; requests for  
19 records under the Freedom of Information Act; land-use requests; and a wide variety of other  
20 matters.<sup>6</sup>

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

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29 Type C adjudication without an evidentiary hearing differs from Type A and Type B  
30 adjudication in fundamental ways from adjudication that includes a legally required opportunity  
31 for an evidentiary hearing. In adjudications of all types, a decision maker conducts an  
32 investigation and issues a front-line decision, i.e., a proposed or preliminary decision. In Type A  
33 and Type B adjudication that includes a legally required opportunity for an evidentiary hearing,  
34 if the private party does not acquiesce in the front-line decision, it is entitled to an evidentiary

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

<sup>5</sup> The Conference has used the term “Type C” adjudication to refer to adjudications that are not subject to a legally required evidentiary hearing. *See id.*

<sup>6</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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35 hearing before a neutral decision maker who, after considering the evidence and arguments,  
36 issues a decision. Typically, the private party can also seek review of that decision within the  
37 agency, often by the agency head or delegated officials. By contrast, in ~~Type-C adjudication~~  
38 ~~without an evidentiary hearing~~, often the ~~front-line~~ same decision maker who issued the proposed  
39 ~~or preliminary decision~~ issues ~~what this Recommendation refers to as the “primary decision,”~~  
40 normally after considering input from the affected party. Typically, that party is entitled to seek  
41 review of the ~~primary~~ decision by a different decision maker within the agency. These  
42 fundamental differences are reflected in this Recommendation.

43 No uniform set of procedures applies to all ~~Type-C adjudications without evidentiary~~  
44 ~~hearings~~, nor could one be devised. Some characteristics are common, however. ~~Type-C~~ Such  
45 adjudications often allow for document exchanges and submission of research studies, oral  
46 arguments, public hearings, conferences with staff, interviews, negotiations, examinations, and  
47 inspections. ~~Frequently, the decision maker in a Type-C adjudication is involved in the~~  
48 ~~underlying investigation or other preliminary proceedings. Ex parte communication between the~~  
49 ~~parties and the decision maker is routine, and the decision maker is free to rely on their own~~  
50 ~~knowledge and consider materials not submitted as evidence.~~<sup>2</sup> Agencies that engage in ~~Type-C~~  
51 ~~such~~ adjudication typically employ dispute resolution methodologies ~~that lack~~ without the  
52 procedures typical of evidentiary hearings, such as the opportunity to cross examine witnesses,  
53 the prohibition of ex parte communications, the separation of adjudicative from investigative and  
54 prosecutorial functions, and the exclusive record principle.

55 While not subject to the requirement that a decision be preceded by an evidentiary  
56 hearing, ~~Type-C adjudications without evidentiary hearings~~ may be subject to other legal  
57 requirements. The Due Process Clause of the Constitution’s Fifth Amendment may require  
58 certain minimum procedures for ~~Type-C~~ such adjudications ~~that involving involve~~

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<sup>2</sup> Asimow, *supra* note 5, at 7–10.



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59 constitutionally protected interests in life, liberty, or property.<sup>8</sup> In addition, agencies conducting  
60 ~~Type C~~ such adjudication typically must observe certain general provisions of the APA—in  
61 particular 5 U.S.C. §§ 555<sup>9</sup> and 558—and are subject to other generally applicable statutes and  
62 regulations addressing the conduct of federal employees, rights of representation,<sup>10</sup> ombuds,<sup>11</sup>  
63 and other matters.<sup>12</sup> The procedures employed by agencies conducting ~~Type C~~ these adjudications  
64 may also be subject to agency-specific statutes and procedural regulations. Finally, judicial  
65 review is available for many ~~Type C~~ such adjudications.

66 ~~These legal requirements, however, may provide minimal protection~~ Statutorily required  
67 procedures and judicial review, however, may be insufficient to ensure fairness, accuracy, and  
68 efficiency in ~~Type C~~ adjudication without an evidentiary hearing. Due process, the APA, and  
69 other sources of law external to the agency often do not specifically prescribe the details of  
70 agency procedures, and judicial review may be unrealistic because the costs of such review  
71 exceed the value of the interests at stake.<sup>13</sup> For these reasons, agency-adopted policies offer the  
72 best mechanism for establishing procedural protections for parties, promoting fairness and  
73 participant satisfaction, and facilitating the efficient and effective functioning of ~~Type C~~ these  
74 adjudications. The public availability of such rules also facilitates external oversight.

75 This Recommendation identifies a set of best practices for ~~Type C~~ adjudication without  
76 an evidentiary hearing and encourages agencies to implement them through their regulations and  
77 guidance documents. Many agencies conducting ~~Type C~~ such adjudications already follow these  
78 best practices. ~~This Recommendation recognizes that agencies adjudicate a wide range of~~

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<sup>8</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>9</sup> *PBG Corp. v. LTV Corp.*, 496 U.S. 633 (1990).

<sup>10</sup> See Asimow, *supra* note 66, at 62, for a discussion of the right to representation before agencies, including the right to lay representation under many agencies' regulations.

<sup>11</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>12</sup> Asimow, *supra* note 6, at 56.

<sup>13</sup> *Id.* at 8–9, 75.



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79 matters, have different adjudication needs and available resources, and are subject to different  
80 legal requirements. What works best for one agency may not work for another. Agencies must  
81 take into account their own unique circumstances when implementing the best practices that  
82 follow. Accordingly, Agencies-agencies adopting or modifying Type-C adjudication procedures  
83 for adjudication without an evidentiary hearing should tailor these best practices to their  
84 individual systems.

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RECOMMENDATION

Notice of Proposed Action

- 85 1. Agencies conducting Type-C adjudications without evidentiary hearings should notify  
86 parties of the front-line decision, i.e., the proposed or preliminary decision, including the  
87 reasons for that decision.
- 88 2. Such notice should provide sufficient detail and be given in sufficient time to allow  
89 parties to contest the front-line proposed or preliminary decision and submit evidence to  
90 support their position. This notice should provide parties with the following information,  
91 when applicable:
- 92 a. Whether the agency provides a second chance to achieve compliance;
  - 93 b. The manner by which the party can submit additional evidence and argument to  
94 influence the agency’s front-line proposed or preliminary decision;
  - 95 c. The amount of time before further agency action will be taken; and
  - 96 d. Whether and, if so, How how parties may access materials in the agency’s case  
97 file can be accessed.

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Opportunity to Submit Evidence and Argument

- 98 3. Agencies should allow parties in Type-C adjudications without evidentiary hearings to  
99 furnish decision makers with evidence and arguments. Depending on the stakes involved,  
100 the types of issues involved, and the agency’s caseload and adjudicatory resources, the

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101 process for furnishing evidence and argument may include written submissions or oral  
102 presentations.

- 103 4. When credibility issues are presented, such as when the decision maker intends to rely on  
104 evidence obtained from a source other than the party, a the party should be permitted an  
105 opportunity to rebut adverse information. Agencies should make such opportunities  
106 available in a manner that permits people with disabilities and people with limited  
107 English proficiency to take advantage of them.

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### Representation

- 108 5. When feasible, Agencies-agencies should allow, when feasible, participants in their Type  
109 C adjudications without evidentiary hearings to be represented by a lawyer or a lay  
110 person with expertise in the program administered by the agency.

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- 111 6. Apart from representation Particularly for self-represented parties, agencies should allow  
112 not prevent participants in their Type C adjudications without evidentiary hearings to  
113 from obtaining assistance or support from friends, family members, or other individuals  
114 in presenting their case.

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- 115 7. Agencies should make their proceedings as accessible as possible to self-represented  
116 parties by providing plain-language resources, such as frequently asked questions  
117 (FAQs), and other appropriate assistance, such as offices dedicated to helping the public  
118 navigate agency programs.

### Decision Maker Impartiality

- 119 8. Agencies should tailor neutrality standards appropriately to Type C adjudications without  
120 evidentiary hearings, which may be conducted by decision makers who engage in their  
121 own investigations or participate in investigative teams and may have prior involvement  
122 in the matter.

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- 123 9. Consistent with government ethics requirements, agencies should require the recusal of  
124 employees engaged in Type C adjudications without evidentiary hearings who have  
125 financial or other conflicts of interest in matters they are investigating or deciding.

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126 10. Agencies should require recusal of employees **whom stakeholders** may reasonably **be**  
127 **viewed** as not impartial.

128 11. When **Type-C adjudications without evidentiary hearings** involve serious  
129 **sanctions consequences**, agencies should consider adopting internal separation of  
130 investigative or prosecutorial and adjudicatory functions **and limitations on ex parte**  
131 **communications**.

#### Statement of Reasons

132 12. Agencies conducting **Type-C adjudications without evidentiary hearings** should provide  
133 oral or written statements of reasons that follow federal plain language guidelines setting  
134 forth the rationale for the **primary decision, i.e., the final decision issued by the front-line**  
135 **decision-maker**, including the factual and other bases for it. **The level of detail in the**  
136 **statement should be consistent with the stakes involved in the adjudication**.

#### Administrative Review

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

#### Procedural Regulations

140 14. Agency regulations should specify the procedures for each **Type-C adjudication without**  
141 **an evidentiary hearing** the agency conducts. Consistent with Recommendation 92-1, *The*  
142 *Procedural and Practice Rule Exemption from the APA Notice-and-Comment*  
143 *Rulemaking Requirements*, agencies should voluntarily use notice-and-comment  
144 rulemaking for the adoption of significant procedural regulations unless the costs  
145 outweigh the benefits of doing so.  
146 15. Agencies should ensure their regulations, guidance documents, staff manuals, procedural  
147 instructions, and FAQs addressing their **Type-C adjudications without evidentiary**

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Commented [CMA44]: Proposed amendment by Senior Fellow Alan Morrison #1.

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148 hearings follow federal plain-language guidelines and are easily accessible on the  
149 agency's website.

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150 16. Agencies should ensure that their notices, statements, procedural instructions, FAQs, and  
151 other documents that contain important information about their Type C adjudications  
152 without evidentiary hearings are made available in languages understood by people who  
153 frequently appear before the agency.

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### Ombuds

154 17. Agencies with an ombuds program should ensure that their ombuds are empowered to  
155 handle complaints about Type C adjudications without evidentiary hearings.

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

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

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

### Quality Assurance

167 21. Agencies conducting Type C adjudications without evidentiary hearings should establish  
168 methods for assessing and improving the quality of their decisions to promote accuracy,  
169 efficiency, fairness, the perception of fairness, and other goals relevant to their-those  
170 adjudications in accordance with Recommendation 2021-10, *Quality Assurance Systems*  
171 *in Agency Adjudication*. Depending on the caseload, stakes, and available resources, such  
172 methods may include formal quality assessments and informal peer review on an

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individual basis, sampling and targeted case selection on a systemic basis, and case

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management systems with data analytics and artificial intelligence tools.