

Comment from Special Counsel Matthew Wiener on *Best Practices for Adjudication not Involving an Evidentiary Hearing*
October 11, 2023

In my view, the draft report is excellent, as is Michael Asimow's associated report. My comments follow.

1. Lines 1–4: Should the first sentence note that “legally required” means legally required by statute, regulation, or executive order? That might lay a better foundation for lines 11–12.
2. Lines 45–46: Maybe a quibble: Consider replacing “may not prescribe the details of agency procedure with great specificity” with something like: “often do not prescribe agency procedures with much, if any, specificity.”
3. Section 20 (lines 147–149): As I recall, ACUS recommendations generally include a cost-benefit qualification to the customary recommendation that agencies use notice and comment. (No exception is made for “significant regulations.” This qualification goes back at least to Recommendation 92-1, The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements.¹
4. Recommendations Under “Decision Maker Impartiality” (lines 76–91): Should we reference Recommendation 2018-4, Recusal Rules for Administrative Adjudicators? (Compare § 23 (lines 157–165), which references and basically incorporates Recommendation 2021-10, Quality Assurance Systems in Agency Adjudication.) Accounting for any differences between adjudications that require a hearing (the subject of 2018-4) and adjudications that don't, is this recommendation otherwise consistent with 2018-4? One inconsistency I've spotted so far: 2018-4 uses the word “recusal” rather than disqualification. The terminology, as I recall, was debated extensively, and “recusal” used deliberately.
5. Recommendations Under “Ombuds” (lines 107–123): Should this recommendation reference, and perhaps incorporate by reference applicable parts of, Recommendation 2016-5, The Use of Ombuds in Federal Agencies? Is this recommendation consistent with 2016-5 in all relevant respects? (Any variation risks a reopener of 2016-5.) Can §§ 13–17 (lines 107–123) be shortened by relying on 2016-5? Again, compare § 23 (lines 157–165).
6. On terminology and related matters:

¹ “[T]here can be costs to the agency in using notice-and-comment procedures including the time and effort of agency personnel, the cost of Federal Register publication, and the additional delay in implementation that results from seeking public comments and responding to them. For significant procedural rule changes, the benefits seem likely to outweigh the costs; but this may not be the case for minor procedural amendments. Thus, unless the costs outweigh the benefits, we strongly encourage agencies voluntarily to use notice and comment even where an APA exemption applies.”

- a. I'm not sure that the recommendation is sufficiently clear and consistent in identifying the form of the legal pronouncement in which various matters should be addressed, especially matters that we think should be addressed in what the recommendation calls "regulations." See lines 52–55, 124–137, and 138–146. In several past adjudication-related recommendations, ACUS has specified exactly what matters should be addressed in regulations. See especially 2016-4, Evidentiary Hearings Not Required by the Administrative Procedure Act. (Some recommendations state that certain matters should be addressed in CFR-codified "rules of practice" rather than in regulations. See, e.g., 2020-3, Precedential Decision Making in Agency Adjudication § 17.²)
- b. The recommendation could be more consistent in identifying the relevant legal authorities in which adjudication procedures might be set forth. See especially lines 54-55 (listing regulations, guidance documents, and administrative staff manuals), lines 124-125 (listing regulations, guidance documents, staff manuals, and other procedural instructions), lines 126–127 (referring to agency rules or guidance), and lines 150–151 (listing guidance documents, staff manuals, procedural instructions, and FAQs). See, in addition to the above-cited recommendations, Recommendation 2018-5, Public Availability of Adjudication Rules, on terminology.
- c. In section 21 (lines 150–152), should regulations be among the documents written in plain English? Is the implied carve-out intended? If so, on what basis?
- d. Lines 126–127 refer to agency "rules or guidance." (i) Should "rules" be replaced by "regulation," consistent with the rest of the recommendation? (ii) Consistency aside, we might not want to imply that guidance documents form a category of legal pronouncement separate from rules, given the APA's definition of rules (see § 551; see also § 551). ACUS has generally tried to avoid that. (iii) Is "guidance" as used here meant to subsume "staff manuals," as suggested by the preceding sentence? Consider replacing "The agency rules or guidance" with "Any such documents" or "Any such rules."

² "As part of their rules of practice, published in the Federal Register and codified in the Code of Federal Regulations, agencies should adopt rules regarding precedential decision making."