

Comment from Special Counsel Matthew Wiener on *Best Practices for Adjudication not Involving an Evidentiary Hearing*  
October 23, 2023

1. Page 1: I'd move the definition of "exclusive record principle" to the main text. It's too important in drawing the line between Type A/B adjudications (especially Type B adjudications in which the hearing may be written submission (see M. Asimow's report) and C adjudications to relegate it to a footnote.

2. Line 11: Consider whether to include "constitutional provision." My only concern is consistency across recommendations: As I recall, ACUS has never identified the Constitution as a source of the legal requirement (which isn't to say, of course, that it can't be the source). See, e.g., Rec. 2016-4, which defines "legally required" as required by statute, regulation, or EO (p. 1, par. [b]), although it does refer elsewhere to "other sources of law." I think the definition in 2016-4 has been consistently used.

3. Lines 36-37: This sentence should be more specific.

4. Lines 45-56:

- a. Line 45: This might read better, given the preceding paragraph, by adding "other" before "fundamental ways."
- b. Line 50: Change "This decision" to "The decision of the neutral decisionmaker." "This" has no referent.
- c. Line 51: Replace "reconsideration" with "review" (or "administrative review"). "Reconsideration" connotes something else. The distinction is drawn in, among recommendations, 2016-6 (§ 26).
- d. Line 52: Consider deleting "agency heads" or, if it's retained, adding "or their delegates" (consistent with other recommendations).