Comment from Senior Fellow Jack M. Beermann on *Best Practices for Adjudication not Involving an Evidentiary Hearing*
October 10, 2023

In the paragraph starting on line 24, I suggest switching the order so that the text leads with the positive, i.e. what agencies do and then concludes with the negative, what agencies do not do. The paragraph would read as follows.

There is no uniform set of procedures that applies to all Type C adjudications, nor could 24 there be. Some characteristics are common, however. Type C adjudication often consists of document exchanges and 29 submission of research studies, oral arguments, public hearings, conferences with staff, 30 interviews, negotiations, examinations, and inspection, but not evidentiary hearings. Frequently, 31 the decision maker in a Type C adjudication is involved in the underlying investigation or other 32 preliminary proceedings. Ex parte communication between the parties and the decisionmakers is routine, and decision makers are free to rely on their own knowledge and consider materials not 34 introduced as evidence. Agencies typically employ 25 dispute resolution methodologies that lack procedures typical of evidentiary hearings, including 26 the opportunity to cross examine witnesses, the prohibition of ex parte communications, the 27 separation of adjudicative from investigative and prosecutorial functions, and the exclusive 28 record principle.

On line 46, I suggest changing the word "impractical" to "unrealistic" and I would delete the words "given high caseloads or" Agencies with the highest caseloads, e.g. social security and immigration, have judicial review and a high caseload is not, in my experience, a reason not to have judicial review. Maybe internal administrative review, but not judicial review.
In the sentence starting on line 48, I suggest a bit of word smithing:
For these reasons, agency-adopted rules and policies offer the best mechanisms for 48 agencies to establish procedural protections for parties,promote fairness and participant satisfaction and 49 ensure the efficient and effective functioning of their adjudicative systems. The public 50 availability of such rules and policies also facilitates external oversight. 51

In recommendation 8, n line 84 I would add the word "reasonably" at the end of the line because I wouldn't want to require agencies to require disqualification every time someone claims that the decisionmaker is not impartial.
In recommendation number 10, I think we could convey the thought in simpler language as follows, in the first sentence: I also feel a bit queasy about the second sentence, it might be too much to expect and perhaps we should consider deleting it. The third sentence leaves the detail and formality to the agency based on the context, which I think is more appropriate than turning it into something like the concise general statement of basis and purpose.

Agencies conducting Type C adjudications should provide oral or written statements that follow federal plain language guidelines setting forth the rationale for the decision including the facts and other reasons upon which the decision is based.

Recommendation17. Instead of saying that they should share a single ombuds, I would provide the idea as an option: “Smaller agencies should consider sharing a single ombuds.”

Recommendation 21, given the earlier reference to federal plain language guidelines, with a little word smithing, I suggest changing the language as follows:

Agencies should ensure their guidance documents, staff manuals, 150 procedural instructions, and FAQs addressing the Type C adjudication system are 151 user-friendly, follow federal plain language guidelines and are easily accessible on the agency’s website.