

REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**PARTICIPATION OF SENATE-CONFIRMED OFFICIALS
IN ADMINISTRATIVE ADJUDICATION**

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Acronyms

ACUS	Administrative Conference of the United States
ALJ	Administrative Law Judge
APA	Administrative Procedure Act
APJ	Administrative Patent Judge
ARB	Administrative Review Board (Department of Labor)
ATJ	Administrative Trademark Judge
BRB	Benefits Review Board (Department of Labor)
BVA	Board of Veterans Appeals
CAVC	Court of Appeals for Veterans Claims
CBCA	Civilian Board of Contract Appeals (General Services Administration)
CFTC	Commodity Futures Trading Commission
CGCCA	Coast Guard Court of Criminal Appeals
DEA	Drug Enforcement Administration
DHS	Department of Homeland Security
DOC	Department of Commerce
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOS	Department of State
DOT	Department of Transportation
EEOC	Equal Employment Opportunity Commission
EOIR	Executive Office for Immigration Review
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FCC	Federal Communications Commission
FMSHRC	Federal Mine Safety and Health Review Commission
FTC	Federal Trade Commission
GSA	General Services Administration
HHS	Department of Health and Human Services
IBIA	Interior Board of Indian Appeals
IRS	Internal Revenue Service
ITC	International Trade Commission
MSPB	Merit Systems Protection Board
NLRB	National Labor Relations Board
NRC	Nuclear Regulatory Commission
OGE	Office of Government Ethics
OSHA	Occupational Safety and Health Administration
OSHRC	Occupational Safety and Health Review Commission
PTAB	Patent Trial and Appeal Board
PAS	Presidentially Appointed, Senate-Confirmed
SEC	Securities and Exchange Commission
SSA	Social Security Administration
USDA	Department of Agriculture

USPS
USPTO
VA
VBA

U.S. Postal Service
U.S. Patent and Trademark Office
Department of Veterans Affairs
Veterans Benefits Administration

Introduction

Tens of thousands of federal agency officials participate in administrative adjudication. Most are members of the career civil service hired and supervised under the civil service laws. Several thousand, like administrative law judges (ALJs) and many other administrative judges (AJs), are appointed by a department head.¹ Some, like many agency heads, are appointed by the President with the advice and consent of the Senate. It is to such “PAS” officials that federal laws typically assign authority to adjudicate matters, and it is PAS officials who—by rule, delegation of authority, and the development of norms, practices, and organizational cultures—structure systems of administrative adjudication and oversee their operation, ensuring some measure of political accountability.

There is wide variation in the structural attributes of PAS positions and officials, but certain attributes distinguish all or many PAS positions and officials from other agency officials, especially civil servants. First, as the Administrative Conference of the United States (ACUS) has previously noted, there are often numerous vacancies in PAS positions. These pervasive vacancies exist for several reasons, including delays related to the presidential-nomination and Senate-confirmation process.² Relatedly, there is relatively high turnover in PAS positions, and PAS officials often serve in their positions for a shorter time than career civil servants. Third, unlike career civil servants who are hired without regard to political affiliation, activity, or beliefs,³ PAS officials are often nominated by the President *because* of their political affiliation, activities, or beliefs. PAS officials are also subject to removal by the President, although a statute may impose for-cause limitations on removal. Unlike officials appointed by the President alone, however, PAS officials are confirmed by the Senate, which may make them more responsive to Congress than other agency officials. Fourth, unlike career civil servants, PAS officials may lack preexisting knowledge of agency processes or relationships with agency employees, and they often lack prior adjudicative experience. Fifth, organizationally, PAS officials often sit atop agency hierarchies. And finally, statutes often assign PAS officials, especially the heads of cabinet departments, a broad range of responsibilities, potentially including the administration of multiple programs and, under any given program, multiple functions (e.g., rulemaking, investigation, prosecution) in addition to adjudication.

PAS officials participate directly and indirectly in administrative adjudication. Indirectly, they establish agency subunits and positions responsible for adjudicating cases, and they appoint and supervise, or oversee the appointment and supervision of, adjudicative personnel.⁴ PAS

¹ See *Lucia v. United States*, 585 U.S. 237 (2018). Under the Constitution’s Appointments Clause, “Officers of the United States” must be appointed through presidential nomination and Senate confirmation, except that “Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. CONST. art. II, § 2, cl. 2.

² See Admin. Conf. of the U.S., Recommendation 2019-7, *Acting Agency Officials and Delegations of Authority*, 84 Fed. Reg. 71,352 (Dec. 27, 2019).

³ 5 U.S.C. § 2301.

⁴ See Admin. Conf. of the U.S., Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021).

officials may coordinate with the President and Congress to ensure that adjudicative subunits have the resources they need to adjudicate cases in a fair, accurate, consistent, efficient, and timely manner.⁵ PAS officials also establish rules of procedure and practice to structure adjudication,⁶ and they develop substantive rules that supply the law in adjudications.

PAS officials may also participate directly in administrative adjudication, serving as the final, executive-branch decision maker in cases arising under the statutes they administer.⁷ Direct participation by PAS officials can serve a number of objectives. First, it can provide a means for coordinating policymaking and ensuring that agencies' policies are politically accountable. Second, PAS officials may have better access to subject-matter expertise than other agency decision makers, which may improve the quality of policies developed through case-by-case adjudication. Third, by participating directly in the adjudication of cases, PAS officials can gain better awareness of the adjudicative and regulatory systems for which they are statutorily responsible. Relatedly, given their relationships with the President, other political appointees, and Congress, PAS officials may also be well equipped to address systemic problems requiring intra- or interbranch coordination. Fourth, direct participation by PAS officials may promote consistent decision-making by agency adjudicators. Finally, PAS officials may be especially well equipped to address politically sensitive matters that arise in the course of adjudicating individual cases.

At the same time, there may be concerns associated with the direct participation of PAS officials in the adjudication of cases. First, as a practical matter, PAS officials—who often have many statutory responsibilities and may oversee large programs—may lack the capacity to decide cases in a fair, accurate, consistent, efficient, and timely manner. Second, the combination of certain functions (e.g., investigation, prosecution, rulemaking) in a single decision maker may raise concerns about the integrity of agency proceedings or the effectiveness of agency policymaking. Third, PAS officials may lack the specialized expertise that adjudicators who are not political appointees develop over the course of their careers. And finally, many PAS positions are characterized by high turnover and frequent vacancies, which can also affect fairness, accuracy, inter-decisional consistency, efficiency, and timeliness. (At some agencies, vacancies or the lack of a quorum have resulted in long delays.)

Congress has, for some programs, determined by statute whether, when, and how PAS officials participate directly in the adjudication of cases. Such determinations gained new salience after *United States v. Arthrex*,⁸ in which the Supreme Court held that one apparent

⁵ See Admin. Conf. of the U.S., Recommendation 2023-7, *Improving Timeliness in Agency Adjudication*, 89 Fed. Reg. 1513 (Jan. 10, 2024); Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022).

⁶ See, e.g., Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); see also Admin. Conf. of the U.S., Recommendation 2023-5, *Best Practices for Adjudication Not Involving an Evidentiary Hearing*, 89 Fed. Reg. 1509 (Jan. 10, 2024); 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).

⁷ See Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021).

⁸ 141 S. Ct. 1970 (2021).

congressional choice—divesting any PAS official of explicit authority to review decisions of the Patent Trial and Appeal Board (PTAB)—violated the Appointments Clause of the Constitution.⁹ Opinions in previously decided cases also shape how Congress structures administrative adjudication.¹⁰

For other programs, executive-branch officials must determine whether, when, and how PAS officials participate directly in the adjudication of cases. They must consider constitutional and statutory requirements, the potential advantages and disadvantages of direct participation by PAS officials, and the performance of mechanisms for indirect participation. When an agency determines that one or more PAS officials should participate directly in the adjudication of individual cases, it must determine the procedures and organizational structure that will permit the PAS official(s) to adjudicate cases in a fair, accurate, consistent, efficient, and timely manner.

ACUS has addressed some of these issues in previous recommendations, most notably in Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*;¹¹ Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*;¹² Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*;¹³ Recommendation 2020-3, *Agency Appellate Systems*;¹⁴ and Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*.¹⁵

Unlike these earlier recommendations, this report focuses exclusively on direct participation by PAS officials(s) in the adjudication of individual cases. Part I describes the objectives and scope of this project, defines certain key terms, and explains the methodology we used to answer our research questions. Part II provides necessary background for considering whether, when, how, and how often PAS officials participate in the adjudication of cases, including prior ACUS recommendations and research, constitutional principles, statutory requirements, and policy considerations. Part III examines who—Congress or agencies—should determine how PAS officials participate in administrative adjudication. Part IV considers a wide range of options for structuring direct participation by PAS officials, drawing heavily on current and historical agency practices. Part V addresses how agencies develop and communicate policies regarding direct participation by PAS officials in their adjudicative systems. Part VI examines transparency, including the public availability of proceedings, decisions, and supporting materials. We conclude our report with a set of recommended best practices for consideration by ACUS.

⁹ U.S. CONST. art. II, § 2.

¹⁰ See, e.g., *Lucia v. United States*, 585 U.S. 237 (2018); *Edmond v. United States*, 520 U.S. 651 (1997); *Wiener v. United States*, 357 U.S. 349 (1958).

¹¹ Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19,783 (July 23, 1973).

¹² Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983).

¹³ Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019).

¹⁴ Recommendation 2020-3, *supra* note 7.

¹⁵ Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023).

I. Objectives, Scope, Definitions, and Methodology

A. Objectives and Scope

This report examines, as a legal and practical matter, whether, when, how, and how often Senate-confirmed officials participate in the adjudication of cases across a range of federal administrative programs. For agencies that have decided to provide or are considering providing for participation by Senate-confirmed officials in the adjudication of individual cases, the project will identify principles and practicalities that agencies should consider in structuring such participation and recommend best practices for developing and communicating relevant policies regarding such participation.

Although this report provides background on constitutional and policy principles underlying whether other Senate-confirmed officials participate in the adjudication of individual cases, the principles and practicalities identified by this project will not address whether agencies should, for constitutional or other reasons, provide for participation by Senate-confirmed officials in specific programs.

B. Definitions

This report examines the participation of Senate-confirmed officials in administrative adjudication. This section begins by defining “Senate-confirmed officials,” “administrative adjudication,” and “participation.”

1. Senate-Confirmed Officials

The Supreme Court in *Edmond v. United States*¹⁶ and *United States v. Arthrex*¹⁷ emphasized the constitutional imperative that exercise of executive power through adjudication by inferior officers be subject to the direction and supervision of a “principal officer in the Executive Branch.”¹⁸ Because principal officers must as a constitutional matter be appointed by the President by and with the advice and consent of the Senate,¹⁹ we focus our inquiry on executive-branch positions filled through that process. By focusing on how an individual is appointed to a position rather than the functions the officeholder performs, we avoid having to determine which functions, as a constitutional matter, must be performed by a principal officer.

PAS officials exist in all three branches of government. Although it is clear in many cases whether a PAS position is part of the executive branch, in other cases the executive-branch status of a position may be less clear.²⁰ For purposes of this report, we consider a PAS position to be part of the executive branch if an officeholder is subject to removal by the President (at will or

¹⁶ *Edmond v. United States*, 520 U.S. 651 (1997).

¹⁷ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

¹⁸ *Edmond*, 520 U.S. at 663; *Arthrex*, 141 S. Ct. 1970.

¹⁹ U.S. CONST. art. II, § 2, cl. 2; *Edmond*, 520 U.S. at 659; *Arthrex*, 141 S. Ct. 1970.

²⁰ *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714 (1986).

for cause). This definition includes members of many independent boards and commissions as well as the judges of certain Article I courts, including the Court of Appeals for Veterans Claims (CAVC) and the Tax Court. This is consistent with the approach of the Court in *Arthrex*, which characterized CAVC as “an Executive Branch entity.”²¹

A note on usage: Unless otherwise noted, the term “PAS officials” as used in this report refers only to PAS officials *in the executive branch*.

2. *Administrative Adjudication*

The Administrative Procedure Act (APA) defines administrative “adjudication” broadly as “any agency process for the formulation of an order” and an “order” as any agency action that is not a “rule.”²² Like most researchers, we address a narrower set of processes, namely those that result in “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.”²³

This definition includes licensing²⁴ but excludes “policy implementation” decisions²⁵ and agency processes for receiving and reviewing complaints of legal wrongdoing from members of the public.²⁶ It also excludes particularized proceedings that the APA classifies as rulemaking, i.e., “the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances thereof or of valuations costs, or accounting, or practices bearing on any of the foregoing.”²⁷

Administrative adjudication, as we define it, exhibits enormous diversity. Substantively, some adjudications are conducted to determine whether an applicant is eligible for a benefit, license, permit, grant, loan, patent, visa, certification, or other entitlement. Some adjudications are conducted to determine whether a regulated entity has violated the law and, if so, what consequences attach. Some adjudications involve conflicting claims by multiple private parties.

²¹ *Arthrex*, 141 S. Ct. 1970.

²² 5 U.S.C. § 551(6)–(7).

²³ MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 8–9 (2019).

²⁴ 5 U.S.C. § 551(6).

²⁵ Examples of policy implementation decisions include:

priority setting, maintaining databases, allocating funds between programs, closing a post office, approving state Medicaid rate adjustments, administering grant-in-aid programs managed by states, managing public institutions such as hospitals or prisons, conducting environmental impact assessments, making decisions involving multiple uses of public lands, designating . . . public lands as national monuments or prohibiting mineral extraction, siting airports or power plants, and protecting habitats of endangered species.

ASIMOW, *supra* note 23, at 8–9.

²⁶ Complaints may lead, of course, to the initiation of administrative enforcement actions, which is adjudication for our purposes.

²⁷ 5 U.S.C. § 551(4).

The consequences for the private parties, the government, and the general public vary widely. Some adjudications involve relatively low stakes, while others implicate important liberty or property interests or may have significant consequences for nonparties.

Procedurally, administrative adjudications follow processes situated anywhere on a spectrum between adversarial and inquisitorial. They may resemble judicial proceedings, be distinctly bureaucratic in nature, or exist somewhere between those two poles. The processes used at different stages or levels of an overall adjudication process often vary considerably from one another.²⁸ All processes—formal and informal—and all stages of those processes are encompassed in the definition of “adjudication” used in this report.

Institutionally, in some programs, adjudication is the sole or predominant function of an agency. In other programs, adjudication is only one aspect of an agency’s broader workload. Programs also vary enormously in terms of volume. Some adjudication systems process millions of cases each year; others may decide only a handful of cases.

3. Participation

In this report, we distinguish “direct” from “indirect” participation by PAS officials. “Direct participation” refers to a role in deciding individual cases. When the National Labor Relations Board (NLRB) reviews a case decided by an ALJ, for example, Board members participate directly in the adjudication of that case. So too does the Attorney General when he or she directs the Board of Immigration Appeals to refer a case to him or her for review.

“Indirect participation” refers to other mechanisms by which PAS officials direct and supervise administrative adjudication, including the establishment of binding procedural rules, the use of substantive rulemaking to resolve questions that might otherwise be decided through case-by-case adjudication,²⁹ the appointment and removal of adjudicators and other managerial controls (e.g., performance evaluation, case assignment),³⁰ the delegation of review authority to other officials,³¹ and the establishment of quality assurance systems.³²

Of course, these two forms of participation are interrelated. When agencies construct their adjudicative processes, they integrate both direct and indirect PAS participation to create a cohesive whole that helps satisfy constitutional and statutory requirements, responds to the

²⁸ Compare Recommendation 2016-4, *supra* note 6, with Recommendation 2023-5, *supra* note 6.

²⁹ See, e.g., Jerry L. Mashaw, *Organizing Adjudication: Reflections on the Prospect for Artisans in the Age of Robots*, 39 U.C.L.A. L. REV. 1055, 1059–61 (1992); Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 1010–11 (1991).

³⁰ See Recommendation 2020-5, *supra* note 4; see also Jeffrey S. Lubbers, *Selection, Supervision, and Oversight of Adjudicators*, in A GUIDE TO FEDERAL AGENCY ADJUDICATION 101–09 (Jeremy S. Graboyes ed., 3d ed. 2023).

³¹ See Recommendation 83-3, *supra* note 12; see also Christopher J. Walker & Matthew L. Wiener, *Agency Appellate Review*, in A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 30, at 312–315.

³² See Recommendation 2021-10, *supra* note 5; Admin. Conf. of the U.S., Recommendation 73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 38 Fed. Reg. 16,840 (June 27, 1973); see also Austin Peters, Gerald K. Ray, David Marcus & Daniel E. Ho, *Quality Assurance*, in A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 30, at 383–399.

agencies' unique policy environments and resources, and helps facilitate core adjudicative values such as full and adequate participation by interested parties, transparency of procedure, and efficiency. Put another way, agencies must strike a balance between administrative management and individualized justice determining whether, when and how often PAS officials directly or indirectly participate in adjudication.

C. Methodology

In preparing this report, we relied on primary and secondary sources that document whether, when, how, and how often PAS officials in the executive branch participate in the adjudication of individual cases and otherwise direct and supervise administrative adjudication. We conducted a detailed review of records from all branches of the federal government and publications in a variety of disciplines, including law, public administration, public policy, and political science. Our review of the literature was designed to provide context for our analysis of the role that PAS officials play in administrative adjudication. While wide-ranging, our examination is not intended to be a comprehensive literature on the subject.

In addition to a literature review of the relevant literature, we conducted detailed case studies of the following 23 programs. The case studies are available as appendixes to this report.

Program	Agency(ies)	App.
Air and water pollution enforcement	EPA	A
Federal Aviation Act enforcement	DOT (FAA)	B
Animal health protection enforcement	USDA	C
Civilian contract disputes	GSA (CBCA)	D
Consumer protection enforcement	FTC	E
Controlled substances regulation	DOJ (DEA)	F
Federal employee adverse actions	MSPB	G
Federal employment discrimination	EEOC	H
Immigrant and nonimmigrant visas	DOS	I
Immigration-related employment discrimination	DOJ (EOIR)	J
Immigration removal	DHS, DOJ (EOIR)	K
Indian affairs appeals	DOI	L
Longshore and harbor workers' compensation	DOL	M
Occupational safety and health enforcement	DOL (OSHA), OSHRC	N
Old-age, survivors, and disability insurance	SSA	O
Patentability	DOC (USPTO)	P
Payment of prevailing wage rates by federal contractors	DOL	Q
Securities fraud enforcement	SEC	R
Tax deficiency cases	IRS, Tax Court	S
Trademark registration	DOC (USPTO)	T
Unfair labor practices	NLRB	U
Unfair practices in import trade	ITC	V
Veterans disability compensation	VA, CAVC	W

In selecting cases, we followed contemporary best practices in qualitative analysis and sought a representative sample of adjudicative systems that contained useful variation on a variety of important dimensions. When considering programs for inclusion in our study, we aimed to include a mix of programs that, among other characteristics: (1) are administered by executive departments and independent agencies,³³ (2) are administered by single-headed and multimember agencies,³⁴ (3) decide high and low volumes of cases, (4) use formal and informal procedures,³⁵ and (5) rely or do not rely on adjudication as an important vehicle for policymaking.³⁶

Additionally, we aimed to include several programs in which PAS officials regularly participate in the adjudication of individual cases and other programs in which PAS officials rarely or never participate in the adjudication of cases.³⁷ We also aimed to include several programs that have recently amended their rules governing PAS-official participation, as well as programs that continue to rely on longstanding policies. In sum, our case-selection strategy had the primary objective of exploring variance across multiple dimensions.

As with our review of the literature, we stress that our case studies are not comprehensive treatises. Instead, they are simple narrative accounts of the historical development of the role that PAS officials play in adjudicating cases under different programs. These accounts provide qualitative context for considering whether, when, how, and how often PAS officials across the executive branch participate in the adjudication of individual cases.

To provide additional qualitative background, we also considered, in a more limited fashion, the experience of a variety of programs administered by other agencies, including the Federal Communications Commission (FCC), Federal Mine Safety and Health Review Commission (FMSHRC), U.S. Postal Service (USPS), Nuclear Regulatory Commission (NRC), and Department of Health and Human Services (HHS).

II. Background

This Part provides background for considering whether, when, how, and how often PAS officials participate in the adjudication of individual cases. The first section examines prior ACUS recommendations and research. The second section examines constitutional and statutory questions, including structural requirements and potential due process concerns. The third section

³³ See JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 34–51 (2018) (distinguishing executive departments from independent agencies); *see also* 5 U.S.C. § 501 (defining the “Executive departments”).

³⁴ See SELIN & LEWIS, *supra* note 33, at 34–56 (describing single-headed executive departments, single-headed “administrations,” and multimember bodies).

³⁵ Compare Recommendation 2016-4, *supra* note 6, with Recommendation 2023-5, *supra* note 6.

³⁶ See Christopher J. Walker, Melissa Wasserman & Matthew Lee Wiener, Precedential Decision Making in Agency Adjudication 19–20 (Dec. 6, 2022) (report to the Admin. Conf. of the U.S.).

³⁷ See Christopher J. Walker & Matthew Lee Wiener, Agency Appellate Systems 7–9 (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.).

addresses the statutory requirements related to direct and indirect PAS participation, including the APA, agency- and program-specific statutes, and transparency statutes.

A. Prior ACUS Recommendations and Research

Although this project is the first ACUS inquiry focused exclusively on the role that PAS officials play in administrative adjudication, it is far from the first project to consider the subject. ACUS has adopted six general recommendations on agency appellate review, all of which consider, to varying degrees, the participation of PAS officials in the adjudication of individual cases. They are:

- (1) Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*³⁸
- (2) Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*³⁹
- (3) Recommendation 86-4, *The Split-Enforcement Model for Agency Adjudication*⁴⁰
- (4) Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*⁴¹
- (5) Recommendation 2020-3, *Agency Appellate Systems*⁴²
- (6) Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*⁴³

Other research reports for ACUS bearing generally on the subject includes:

- (a) Russell Weaver, *Organization of Adjudicative Offices in Executive Departments and Agencies* (1993)⁴⁴
- (b) Michael Sant' Ambrogio & Adam Zimmerman, *Aggregate Agency Adjudication* (2016)⁴⁵
- (c) Kent Barnett et al., *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight and Removal* (2018)⁴⁶

³⁸ Recommendation 68-6, *supra* note 11.

³⁹ Recommendation 83-3, *supra* note 12.

⁴⁰ Admin. Conf. of the U.S., Recommendation 86-4, *The Split-Enforcement Model for Agency Adjudication*, 51 Fed. Reg. 46,986 (Dec. 30, 1986).

⁴¹ Recommendation 2018-4, *supra* note 13.

⁴² Recommendation 2020-3, *supra* note 7.

⁴³ Recommendation 2022-4, *supra* note 15.

⁴⁴ Russell L. Weaver, *Organization of Adjudicative Offices in Executive Departments and Agencies*, 1993 ACUS 547 (1993) [hereinafter Weaver, *Organization of Adjudicative Offices*]. The report was subsequently published as Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251 (1996) [hereinafter Weaver, *Appellate Review*]. The report did not result in the adoption of a recommendation by ACUS.

⁴⁵ The report was subsequently published as Michael Sant' Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634 (2017). The report informed an ACUS recommendation, which does not address participation by PAS officials in administrative adjudication. See Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016).

⁴⁶ The report was subsequently published as Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1 (2018). The report did not result in the adoption of a recommendation by ACUS.

- (d) Michael Asimow, *Federal Administrative Adjudication Outside the Administrative Procedure Act* (2019)⁴⁷
- (e) Michael Asimow, *Greenlighting Administrative Prosecution: Checks and Balances on Charging Decisions* (2022)⁴⁸

ACUS has also issued many recommendations that address, explicitly or implicitly, the role of PAS officials in adjudicating cases at particular agencies or in particular programs.⁴⁹

Finally, ACUS has commissioned studies and adopted several recommendations that address strategies other than personal participation in the adjudication of individual cases—including the adoption of substantive and procedural rules, the issuance of administrative manuals and staff instructions, managerial controls, and quality assurance systems—that PAS officials use to direct and supervise administrative adjudication.

1. Recommendation 68-6, Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency

In one of its first statements, ACUS encouraged “every agency having a substantial caseload of formal adjudications” to consider establishing intermediate appellate boards or adopting procedures “for according administrative finality to presiding officers’ decisions, with discretionary authority in the agency to affirm summarily or to review, in whole or in part, the decisions of such boards or officers.” ACUS offered three justifications for these structures. First, they would “make more efficient use of the time and energies of agency members and their staffs.” Second, these structures would “improve the quality of decision without sacrificing procedural fairness.” Third, they would “help eliminate delay in the administrative process.”⁵⁰

2. Recommendation 83-3, Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act

Fifteen years later, ACUS issued its most comprehensive evaluation of “agency head review.” (Of note, that recommendation was limited to programs in which adjudication is subject to the APA’s formal adjudication provisions.) Informed by a report by Ronald Cass,⁵¹ the recommendation explained that, in selecting among possible review structures, agencies should keep four basic precepts in mind:

First, efficiency is generally served by spreading the review load over a number of reviewers adequate to keep review time low relative to initial decision time. Application of this precept requires attention to three variables: the total relevant adjudicatory caseload, the difficulty of the cases, and the number of reviewers.

⁴⁷ This book-length study built on Recommendation 2016-4, *supra* note 6.

⁴⁸ The report was subsequently published as Michael Asimow, *Greenlighting Administrative Prosecution*, 75 ADMIN. L. REV. 227 (2023). The report did not result in the adoption of a recommendation by ACUS.

⁴⁹ See *infra* Part II.A.11.

⁵⁰ Recommendation 68-6, *supra* note 11.

⁵¹ The report was subsequently published as Ronald A. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 BOSTON U. L. REV. 1 (1986).

Second, efficiency also is served by minimizing repetition; the same matter seldom should be put in issue more than once. This cautions against *de novo* review, instead favoring more limited review of issues properly committed to a subordinate.

Third, accuracy depends on matching the skills of the reviewer to the issues presented. Officials integrated into the agency's policymaking apparatus should review decisions that significantly involve policy issues while officials trained in factfinding should review decisions presenting fact issues. Furthermore, the level of the reviewer should match the magnitude of the issue. Agency heads with numerous other responsibilities should be insulated from routine cases, but attempts to force resolution of major policy issues at lower levels seems misguided except when those issues can readily be addressed by rulemaking. Similarly, individual reviewers easily can address relatively simple issues, whether of fact or policy, while more complex questions may call for collegial consideration.

Fourth, acceptability generally requires that *some* review by a higher agency authority be available at the instance of the aggrieved party, at least in cases of great impact on individual parties. Inspection of a substantial penalty and removal of a valuable government benefit are obvious candidates for review as of right.⁵²

Efficiency (including timeliness), accuracy (including decisional accuracy and interdecisional consistency), and acceptability continue to represent consensus values throughout ACUS's body of adjudication-related recommendations,⁵³ and these principles described in Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, continue to present a useful framework for consideration. Other consensus values might be added as well, including procedural fairness, impartiality, political accountability, and transparency.

The recommendation urged Congress not to "prescribe detailed review structures" and to instead grant agency heads (i.e., the authorities to whom the law assigns responsibility for administering a program) sufficient flexibility to allocate review functions appropriately. It further recommended that Congress authorize agency heads to: (1) review initial decisions of presiding officers on a discretionary basis, and (2) delegate review authority "on an *ad hoc* basis or with respect to any or all classes of decisions to a subordinate official or board of officials either with possibility for further review by the agency head in his [or her] discretion or without further administrative review."

"Only in the rarest circumstances," ACUS recommended, "should Congress require agency heads to review decisions personally." Instead, ACUS suggested that most formal adjudication be delegated to presiding officers and that "any authority [the agency head] retains

⁵² Recommendation 83-3, *supra* note 12.

⁵³ See, e.g., Recommendation 2016-4, *supra* note 6.

to grant further review should normally be exercisable only in his [or her] discretion on a showing that important policy issues are presented or that the delegate erroneously interpreted agency policy.” ACUS cautioned that “[m]ultilevel review of purely factual issues should be avoided.”

ACUS offered a nonexclusive list of alternatives to agency-head review for “routine cases,” including delegation to individual delegates, the establishment of appellate review boards, and, for multimember agencies, delegation to a panel of members.

3. Recommendation 86-4, The Split-Enforcement Model for Agency Adjudication

When Congress creates a program, it often assigns responsibility for overseeing all aspects of the program’s administration to a single PAS official or a board or commission made up of PAS officials. This model combines rulemaking, adjudication, investigation, and prosecution in a single agency. Separation of functions in such programs is usually achieved “through internal barriers within the agency which separate and insulate those employees who judge from those who investigate and prosecute.” But as ACUS recognized: “The chains of command . . . come together at the top in the person of the head or heads of the agency who, through subordinates, are responsible for all . . . functions.”⁵⁴

Some have criticized such combinations of functions on the grounds that “it is impossible to achieve evenhanded justice when enforcement and adjudicative functions are lodged in the same agency.”⁵⁵ For a few programs, Congress has created separate agencies—one responsible for rulemaking, investigation, and prosecution and another responsible only for adjudication. Examples include occupational safety and health, mine safety and health, and airmen certification programs. This is called the “split-enforcement model.”

Unable to conclude based on its study “whether this model achieves greater fairness in adjudication,” ACUS ultimately took “no position on whether the split-enforcement model is preferable to a structure in which responsibilities for rulemaking, enforcement and adjudication are combined within a single agency.”⁵⁶

4. Organization of Adjudicative Offices in Executive Departments and Agencies (1993)

In 1993, ACUS published a report by Russell Weaver that analyzed the adjudicative systems at 12 agencies, seven using ALJs and five with non-ALJ systems. Although the bulk of the study focused on the procedures and management of hearing-level components, it also examined agency appeal procedures.⁵⁷

Weaver classified appeal procedures into four types: (1) judicial officer systems, (2) review board systems (with final review authority), (3) review board systems (subject to further

⁵⁴ Recommendation 86-4, *supra* note 40.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Weaver, *Organization of Adjudicative Offices*, *supra* note 44; Weaver, *Appellate Review*, *supra* note 44.

discretionary review by the agency head), and (4) direct agency-head review. He compared these structures and evaluated their benefits and costs.

Weaver also examined in depth the question: “is political review really needed?” As described below,⁵⁸ he identified four potential advantages of review by a PAS official or other political appointee, namely that it would enable the official to (1) coordinate agency policymaking, (2) gain and act on systemic awareness, (3) make difficult (especially politically sensitive) decisions, and (4) promote interdecisional consistency. He also identified five potential risks of direct participation by political appointees, namely that (1) parties may lack a meaningful opportunity to participate in proceedings before political appointees; (2) challenges may arise during periods of transitions and vacancies in positions subject to political appointment; (3) interested persons may perceive direct participation by a political appointee as adversely affecting the integrity of the proceedings; (4) direct participation by a political appointee may result in political manipulation of the review process, and (5) access to adjudication as a vehicle for policymaking may disincentivize political appointees from setting policy through notice-and-comment rulemaking.⁵⁹

Although the report did not lead to a formal recommendation adopted by the ACUS Assembly, it is worth considering the recommendations Weaver made in his report to ACUS. It reads, in relevant part:

It is difficult to formulate a single review system and to apply that system to all agencies. Agencies have differing programs with differing needs. Nevertheless, certain broad conclusions can be made about the desirability of various systems.

In general, agencies should limit the extent to which high-level political appointees are involved in the review process. As previously noted, significant problems result from political review, and such review is generally impractical. Agencies decide too many cases for the agency head to be actively involved in the review process. Moreover, such review has defined drawbacks. By virtue of how the review is conducted, such review can undermine public confidence in the fairness and impartiality of agency decisions.

Political review of adjudicative decisions is appropriate when an agency’s adjudications involve major policy questions and the agency wishes to have high-level political appointees “bite” on those questions. But such political review should be accomplished on a discretionary basis. In other words, a review board should initially review the case, and the agency head should get involved only after such review is complete. The initial review sharpens the issues, and lets the political appointee focus on policy issues.⁶⁰

⁵⁸ See *infra* Part IV.A.

⁵⁹ Weaver, *Appellate Review*, *supra* note 44.

⁶⁰ Weaver, *Organization of Adjudication Offices*, *supra* note 44, at 676.

5. Aggregate Agency Adjudication (2016)

In Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, ACUS “recognize[d] aggregation as a useful tool to be employed in appropriate circumstances” to resolve large groups of cases raising common issues of fact or law and “provide[d] guidance and best practices to agencies as they consider whether or how to use or improve their use of aggregation.”⁶¹ The recommendation did not specifically address the participation of PAS officials in aggregate adjudication. However, it recognized that aggregation procedures are one of a variety of techniques to resolve claims with common issues, alongside other techniques such as precedential decision making, and recognized the close connection between aggregation and policymaking.⁶²

The report by Michael Sant’Ambrogio and Adam Zimmerman underlying the recommendation did address the potential for agency heads to participate in the adjudication of individual cases. Recognizing the need for transparency and legitimacy in aggregate adjudication, Sant’Ambrogio and Zimmerman recommended that agencies “develop provisions permitting interested parties to file amicus briefs, or their equivalent, in aggregate proceedings.” They noted that “[a]ppeals to the agency head of initial decisions in such cases should also allow for the possibility of such briefs and oral arguments.”⁶³

And recognizing the close connection between aggregate adjudication and policymaking, Sant’Ambrogio and Zimmerman recommended that agencies “that utilize aggregation in cases with implications for policymaking should develop lines of communication between their adjudicators and agency personnel . . . involved in related rulemaking.” One option for fostering communication was for policymakers to “review the outcomes in aggregated cases.” Another was adoption of a procedure by which “participants could appeal a final judgment made during the course of coordinate proceeding, class action or class settlement to the final Article I tribunal, often the head of the agency.”⁶⁴

Sant’Ambrogio and Zimmerman noted possible efficiency and political-oversight benefits of agency head review. In terms of efficiency, “the agency head will be able to influence not only the aggregated case on direct review, but future administrative proceedings as well, all with a single decision.” In terms of political oversight, aggregate adjudication may have the effect of “increasing the power of agency heads over significant issues that affect large groups of people.” And because aggregate adjudication is “more transparent to the political branches, which are rarely concerned with the outcomes of individual adjudications beyond the provision of constituent services by individual representatives,” aggregate adjudication “may even increase the ability of the political branches to ensure agency accountability.”⁶⁵

⁶¹ Recommendation 2016-2, *supra* note 45.

⁶² *Id.*

⁶³ Michael Sant’Ambrogio & Adam Zimmerman, *Aggregate Agency Adjudication* 80 (June 9, 2016) (report to the Admin. Conf. of the U.S.).

⁶⁴ *Id.*

⁶⁵ *Id.*

6. Recommendation 2018-4, Recusal Rules for Administrative Adjudicators

In this recommendation, ACUS encouraged agencies to adopt rules for recusal applicable to adjudicators who preside over legally required evidentiary hearings and who conduct internal agency appellate review of hearing decisions. The recommendation stated explicitly, however, that such rules should not apply to agency heads. (It noted that agencies might nonetheless take the recommendation into account when determining rules for the recusal of agency heads.) As discussed later in this report,⁶⁶ the underlying report by Louis Virelli, and a subsequent report he produced for ACUS, address the complexity inherent in crafting recusal rules for agency heads.⁶⁷

7. Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal (2018)

In analyzing practices by which agencies supervise non-ALJ adjudicators, Barnett et al. were “initially surprised at the relatively large number of proceedings that the heads of agencies reviewed.” They found, however, that most such proceedings “either appeared to be relatively rare” or took place at “agencies that mainly or solely use adjudication.” They explained:

For instance, appeals from the Administrative Office of the U.S. Courts’ fair-employment-practices hearings, the [Energy Department’s] proceedings concerning improper actions surrounding student financial aid, and the NRC’s various nuclear-power hearings are likely not substantial in number. And several of the agencies—such as the Federal Maritime Commission, the [Merit Systems Protection Board], the NLRB, and the Railroad [Retirement] Board—that permit or mandate appeals to the head(s) of the agency act largely or solely through adjudication, rather than rulemaking.⁶⁸

8. Recommendation 2020-3, Agency Appellate Systems

ACUS revisited best practices for appellate review of hearing-level decisions in a 2020 recommendation. Informed by a report by Christopher Walker and Matthew Wiener,⁶⁹ Recommendation 2020-3, *Agency Appellate Systems*, identified general best practices for agency appellate systems, regardless of whether, when, or how PAS officials (or other political appointees) participate in such systems. This project builds on that recommendation by focusing on that question.

Most importantly, that recommendation emphasized that the optimal design for a program’s appellate system necessarily depends on the objective the system is meant to accomplish. The recommendation identified several possible objectives of an appellate system, including “policymaking, political accountability, management of the hearing-level adjudicative

⁶⁶ See *infra* Part IV.F.

⁶⁷ Recommendation 2018-4, *supra* note 13.

⁶⁸ Kent Barnett, Logan Cornett, Malia Reddick & Russell Wheeler, Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 36 (Sep. 24, 2018) (report to the Admin. Conf. of the U.S.).

⁶⁹ Walker & Wiener, *supra* note 37.

system, organizational effectiveness and systemic awareness, and the reduction of litigation in federal courts.” Along with other practical aspects of the adjudicative system—size, resources, etc.—identification (and public disclosure) of the objective of appellate review is a necessary first step toward designing and implementing an effective review system.⁷⁰ These factors clearly influence the role, if any, that PAS officials play in different programs.

9. Greenlighting Administrative Prosecution: Checks and Balances on Charging Decisions (2022)

As described above, adjudication and enforcement functions are often combined in a single agency. Although there is often an internal separation of functions between adjudicative staff and enforcement staff, functions are often combined as a statutory matter at the level of the agency head. At several independent regulatory agencies, PAS officials who make up the agency may participate both in the initiation of formal proceedings (i.e., by issuing a charging decision or complaint) and in the review of decisions rendered by presiding officers. Michael Asimow examined the charging practices of independent regulatory agencies that engage both in law enforcement and administrative adjudication.⁷¹

Responding to concerns about combining functions in this way (e.g., the possibility of confirmation bias or inefficiency), Asimow assessed mechanisms to address such concerns, including delegation of the charging decision to enforcement staff in routine cases, disqualification of agency members who participated in charging decisions, and delegation of the internal agency appeal function to an appellate review board or judicial officer. Asimow noted that delegation of the appeal function could “cover certain classes of cases that are likely to present only factual issues or it could cover all enforcement cases.” He noted further that “agency heads could retain discretionary review power over decisions of the intermediate review board or judicial officer in cases presenting important policy issues.” Asimow noted that delegations of final decision authority “are quite common in the administrative state” and might benefit certain agencies, particularly those “with substantial caseloads or serious backlogs at the agency head level.” Asimow ultimately concluded, however, that the benefits of PAS-official participation in “greenlighting” charging decisions and reviewing appeals outweigh the costs.⁷²

10. Recommendation 2022-4, Precedential Decision Making in Agency Adjudication

ACUS considered the use of precedential decision making as a mechanism to ensure consistency, predictability, and uniformity when adjudicating cases in a 2022 Recommendation.⁷³ The Recommendation notes that precedential decisions can come from agency heads,⁷⁴ as well as from adjudicators exercising delegated authority to review hearing-level decisions, adjudicators

⁷⁰ Recommendation 2020-3, *supra* note 7.

⁷¹ Michael Asimow, *Greenlighting Administrative Prosecution: Checks and Balances on Charging Decisions* (Jan. 21, 2022) (report to the Admin. Conf. of the U.S.).

⁷² *Id.*

⁷³ Recommendation 2022-4, *supra* note 15.

⁷⁴ This Recommendation and its underlying report refer not to PAS officials but only to agency head or heads. The resulting discussion, however, would apply to all PAS officials.

who review hearing-level decisions but whose decisions are subject to (usually discretionary) agency-head review, or adjudicators other than the agency head who have statutory authority to issue final decisions.

The report underlying the recommendation—by Christopher Walker, Melissa Wasserman, and Matthew Wiener—discussed these variations in more detail, but noted that when precedential decisions are issued by the agency head following direct review of hearing-level adjudicators’ decisions, that review is usually either as of right at the request of a party or at the discretion of the agency head, and that when review is discretionary there often is a statute or more commonly a procedural rule that sets forth a standard or criteria to guide or circumscribe the discretion.⁷⁵ The report also details a scenario by which a decision could be designated precedential by an appellate body but still be subject to (usually discretionary) review by the agency head.⁷⁶ In these instances, the agency head will usually exercise review authority in only a few cases, and agency rules may say little or nothing about the procedures by which a party may seek agency-head review. The report notes that there is a long history of agency heads—as well as intermediate review bodies—using precedential decisions to establish or further develop policy for the agency as a whole.⁷⁷

11. Agency- and Program-Specific Recommendations

ACUS has issued many recommendations that address the role of PAS officials in adjudicating cases in particular programs. Some recommendations explicitly discuss the role that PAS officials should play in adjudication under these programs. Others are conspicuous in the absence of any such discussion, which may, at least in some cases, suggest a lack of concern with the status quo either as a legal or policy matter.

Program	Year	Recommendation
Social Security disability	2013 1990 1987 1978	These recommendations accept the Appeals Council—an appellate body of career adjudicators—as the final decision maker within the executive branch. They address the appropriate role of the Appeals Council in ensuring decisional quality and developing policy but prescribe no role in the adjudication of individual cases for any PAS official (either the Commissioner of Social Security or, before 1994, the Secretary of HHS). ⁷⁸

⁷⁵ Walker et al., *supra* note 36, at 12.

⁷⁶ *Id.* at 13–14.

⁷⁷ *Id.* at 19.

⁷⁸ See, e.g., Admin. Conf. of the U.S., Recommendation 2013-1, *Improving Consistency in Social Security Disability Adjudication*, 78 Fed. Reg. 41,352 (July 10, 2013); Admin. Conf. of the U.S., Recommendation 90-4, *Social Security Disability Appeals Process: Supplementary Recommendation*, 55 Fed. Reg. 34,213 (Aug. 22, 1990); Admin. Conf. of the U.S., Recommendation 87-7, *A New Role for the Social Security Appeals Council*, 52 Fed. Reg. 49,143 (Dec. 30, 1987); Admin. Conf. of the U.S., Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*, 43 Fed. Reg. 27,508 (June 26, 1978).

Asylum and removal	2012 1989 1985	In 1985, ACUS recommended that the Attorney General “should retain the power to review individual [Board of Immigration Appeals] decisions,” but “[i]n accordance with current practice, this power should be exercised only in extraordinary circumstances.” A 1989 recommendation, which encouraged the Attorney General to establish an Asylum Board within EOIR, recommended that the “Attorney General should retain the authority to review decisions of the Asylum Board, upon formal certification or sua sponte.” A 2012 recommendation on immigration removal adjudication made no mention of review by the Attorney General. ⁷⁹
Immigrant and nonimmigrant visas	1989	Federal law is interpreted to bar the Secretary of State from reviewing consular officers’ decisions. ACUS recognized the need for “the creation of a level of centralized administrative review” of visa denials and recommended that the State Department develop and submit to Congress a proposed process for administrative review. ⁸⁰
Debarment and suspension	1995	Given the “substantial economic effect” of debarment and suspension of federal contractors, ACUS recommended (1) that proceedings be heard and decided by ALJs, military judges, board of contract appeals judges, or “other hearing officers who are guaranteed similar levels of independence” and (2) that such decisions be reviewed by debarring officials who are “guaranteed sufficient independence to provide due process.” ⁸¹
Fair housing	1992	ACUS noted in a footnote to this recommendation that, under HUD regulations, the Secretary “will review [lower-level decisions] only in extraordinary cases.” ⁸²
Export control proceedings	1991	ACUS recommended: “Review by the Secretary [of Commerce] or the Secretary’s delegate of staff decisions on classification request or license applications should be available on request of the applicant. To the extent

⁷⁹ Admin. Conf. of the U.S., Recommendation 2012-3, *Immigration Removal Adjudication*, 77 Fed. Reg. 47,804 (Aug. 10, 2012); Admin. Conf. of the U.S., Recommendation 89-4, *Asylum Adjudication Procedures*, 54 Fed. Reg. 28,970 (July 10, 1989); Admin. Conf. of the U.S., Recommendation 85-4, *Administrative Review in Immigration Proceedings*, 50 Fed. Reg. 52,894 (Dec. 27, 1985); see also Admin. Conf. of the U.S., Recommendation 71-5, *Procedures of the Immigration and Naturalization Service in Respect to Change-of-Status Applications*, 2 ACUS 32 (1971).

⁸⁰ Admin. Conf. of the U.S., Recommendation 89-9, *Processing and Review of Visa Denials*, 54 Fed. Reg. 53,496 (Dec. 29, 1989).

⁸¹ Admin. Conf. of the U.S., Recommendation 95-2, *Debarment and Suspension from Federal Programs*, 60 Fed. Reg. 13,695 (Mar. 14, 1995).

⁸² Admin. Conf. of the U.S., Recommendation 92-3, *Enforcement Procedures Under the Fair Housing Act*, 57 Fed. Reg. 30,104 (July 8, 1992).

		possible, the decision on review at the secretarial level should be in detail sufficient to permit others to evaluate its precedential value. The Commerce Department should publish and index these decisions in an appropriate matter, together with other decisions on requests for classification and individual license applications that have possible precedential value and any general written guidance on classification issues.” ⁸³
Aviation civil penalties	1991	ACUS noted the possible benefits of the split-enforcement model for adjudicating civil money penalties against pilots and flight engineers. ⁸⁴
Antidumping and countervailing duty	1991 1973	In 1973, ACUS recommended best practices for proceedings before the Treasury Department’s Assistant Secretary for Enforcement, Tariff and Trade Affairs, and Operations (a PAS official). In 1991, ACUS recommended best practices for consideration by the International Trade Commission (which consists of six PAS officials). ⁸⁵
Medicare appeals	1986	ACUS also noted that the Secretary of HHS may review on his or her own motion decisions of the Provider Reimbursement Review Board, which decides disputes concerning reimbursement under Medicare Part A. ACUS apparently accepted that the Appeals Council, an appellate body of career adjudicators, provided the last level of administrative review of beneficiary appeals involving coverage determinations under Part A. ⁸⁶
Federal grant programs	1982	ACUS recommended that, where appropriate, appeal procedure should afford grantees and vested applicants an “impartial decisionmaker,” such as “a grant appeals board member, a high level agency official, a person from outside the agency, an [ALJ], or certain other agency personnel from outside the program office.” ACUS recommended that agencies accord finality to the appeal decision “unless further review is conducted promptly according to narrowly drawn exceptions and in accordance with preestablished procedures, criteria, and standards of review.” It also recommended that “[i]f the decisionmaker

⁸³ Admin. Conf. of the U.S., Recommendation 91-2, *Fair Administrative Procedure and Judicial Review in Commerce Department Export Control Proceedings*, 56 Fed. Reg. 33,844 (July 24, 1991).

⁸⁴ Admin. Conf. of the U.S., Recommendation 91-8, *Adjudication of Civil Penalties Under the Federal Aviation Act*, 56 Fed. Reg. 67,141 (Dec. 30, 1991); *see also* Admin. Conf. of the U.S., Recommendation 90-1, *Civil Money Penalties for Federal Aviation Violations*, 55 Fed. Reg. 34,209 (Aug. 22, 1990).

⁸⁵ Admin. Conf. of the U.S., Recommendation 91-10, *Administrative Procedures Used in Antidumping and Countervailing Duty Cases*, 56 Fed. Reg. 67,144 (Dec. 30, 1991); Admin. Conf. of the U.S., Recommendation 73-4, *Administration of the Antidumping Law by the Department of the Treasury*, 39 Fed. Reg. 4846 (Feb. 7, 1974).

⁸⁶ Admin. Conf. of the U.S., Recommendation 86-5, *Medicare Appeals*, 51 Fed. Reg. 46,987 (Dec. 30, 1986).

		is delegated, or asserts, authority to review the validity of agency regulations, the agency head should retain an option for prompt final review of the decision in accordance with applicable procedures.” ⁸⁷
Taxation	1975	ACUS recommended that, with regard to civil penalties for failure to file a tax return or to pay tax, taxpayers should be given the right to Tax Court review. ⁸⁸
Mining claims on public lands	1974	ACUS stated: “Effectively conferring final decision-making authority on the Board of Land Appeals [an appellate body made up of non-PAS adjudicators] risks a bifurcation of the Department’s policymaking function. The Department should adopt measures that will reconcile the appropriate adjudicative role of the Board with the Secretary’s policymaking responsibility.” ⁸⁹
Labor certification of immigrants	1973	ACUS apparently accepted that the only opportunity for appellate review of decisions by certifying officers of the Manpower Administration (today the Employment and Training Administration) lay with reviewing officers located in agency regional offices. ⁹⁰

To the extent that any general principles can be drawn from these recommendations, it may be said that ACUS has indicated a preference for participation by a PAS official with policymaking authority in cases involving important questions of law or policy or matters that may have significant consequences beyond the parties to a specific case.

12. Other Research and Recommendations

One cannot consider the question of whether, when, and how PAS officials participate in the adjudication of individual cases without also considering other mechanisms by which PAS officials direct and supervise systems of administrative adjudication. ACUS has commissioned studies and adopted many recommendations that address internal administrative law⁹¹ strategies, including the adoption of substantive and procedural rules, issuance of administrative manuals and staff instructions, use of managerial controls, and implementation of quality assurance systems.

⁸⁷ Admin. Conf. of the U.S., Recommendation 82-2, *Resolving Disputes Under Federal Grant Programs*, 47 Fed. Reg. 30,704 (July 15, 1982).

⁸⁸ See, e.g., Admin. Conf. of the U.S., Recommendation 75-7, *Internal Revenue Service Procedures: Civil Penalties*, 41 Fed. Reg. 3984 (Jan. 27, 1976).

⁸⁹ Admin. Conf. of the U.S., Recommendation 74-3, *Procedures of the Department of the Interior with Respect to Mining Claims on Public Lands*, 39 Fed. Reg. 23,043 (June 26, 1974); see also Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department’s Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1256–59 (1974).

⁹⁰ Admin. Conf. of the U.S., Recommendation 73-2, *Labor Certification of Immigrant Aliens*, 38 Fed. Reg. 16840 (June 27, 1973).

⁹¹ See generally Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

Administrative adjudication typically takes place according to substantive and procedural regulations adopted by agencies. Administrative manuals, staff instructions, and other guidance supplement statutes and regulations. The designation of adjudicative orders and opinions as precedential often has a similar effect. ACUS has addressed the role of such materials in dozens of recommendations.⁹²

Alongside appellate review, PAS officials use managerial controls to direct and supervise adjudication.⁹³ Many such controls were identified in Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*. They include: “[p]rocedures for assessing selecting, and appointing candidates for adjudicator positions”; “[p]lacement of adjudicators within agencies’ organizational hierarchies”; “[c]ompensation structure and performance incentives, such as bonuses, nonmonetary awards, and promotions”; “[p]rocedures for assigning cases”; “[a]ssignment, if any, of nonadjudicative duties to adjudicators”; “[s]upervision of adjudicators by higher-level officials”; “[e]valuation of adjudicators, including quantitative and qualitative methods for appraising adjudicators’ performances, such as case-processing goals”; and “[d]iscipline and removal of adjudicators.”⁹⁴

Recognizing the limitations of agency appellate systems for ensuring decisional quality, especially in high-volume programs, many agencies have adopted quality assurance systems. In such systems, agency personnel review all or, more often, a sample of cases to determine the extent to which adjudicators are complying with relevant policies and deciding cases accurately and consistently. Agencies use data and findings gleaned from such review to, among other things, provide feedback to adjudicators and staff involved in adjudication, target training, identify policies requiring clarification or modification, and identify questions that might be resolved more effectively through rulemaking. ACUS has addressed quality assurance mechanisms twice, first in 1973⁹⁵ and most recently in 2021.⁹⁶

As discussed throughout this report, policymaking, precedential decision making, agency appellate systems, managerial controls, quality assurance systems, and other mechanisms can intersect in important ways.

B. Constitutional Principles

Both structural and due process requirements shape how PAS officials participate in administrative adjudication. As discussed in this section, these requirements can be distilled into two high-level principles. First, administrative adjudication must be supervised and directed by one or more PAS officials. Second, matters must be adjudicated according to an impartial application of the relevant law to the relevant facts, following established procedures, without consideration given to other factors.

⁹² See, e.g., Recommendation 2022-4, *supra* note 15; Recommendation 2018-5, *supra* note 6.

⁹³ See, e.g., Recommendation 92-7, *The Federal Administrative Judiciary*, 57 Fed. Reg. 61,760 (Dec. 29, 1992).

⁹⁴ Recommendation 2020-5, *supra* note 4; see also Barnett et al., *supra* note 68.

⁹⁵ Recommendation 73-3, *supra* note 32.

⁹⁶ Recommendation 2021-10, *supra* note 5.

1. Structural Requirements

The Constitution identifies three powers of the federal government—the legislative, executive, and judicial powers—and assigns them to Congress, the President, and the Article III courts, respectively. Although the Constitution never addresses agencies explicitly, it sets forth certain principles that are understood to constrain the structural choices that Congress and executive branch actors make in designing executive-branch instrumentalities.

Most importantly for this study, the Constitution vests the executive power in the President and directs him or her to “take Care that the Laws be faithfully executed.” Recognizing that it would be impossible for the President to personally perform all functions of the federal government, the Constitution permits others to assist him or her but regulates, to a certain extent, the manner of their appointment and supervision.⁹⁷

The Appointments Clause establishes as a default rule that all “Officers of the United States” must be appointed by the President by and with the advice and consent of the Senate.⁹⁸ The “Officers of the United States,” as interpreted by the Supreme Court, encompass all federal officials who “occupy a ‘continuing’ position established by law” and “exercise[] significant authority pursuant to the laws of the United States.”⁹⁹ (The Constitution does not explicitly

⁹⁷ In rare circumstances, the President may have explicit legal authority to adjudicate a particular class of cases. *See, e.g.*, 19 U.S.C. § 1337(j). More often, adjudicative authority is assigned to an executive-branch officer other than the President. In such instances, there may be constitutional limits on the President’s authority to countermand a decision rendered by the officer. As Chief Justice Taft wrote in *Myers v. United States*:

Finding [executive-branch] officers to be negligent and inefficient, the President should have the power to remove them. Of course, there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer’s interpretation of his statutory duty in a particular instance. Then there may be duties of a *quasi*-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case, he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been, on the whole, intelligently or wisely exercised. Otherwise, he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

272 U.S. 52, 135 (1926). There may also be constitutional or statutory limits on the authority of the President or White House staff to communicate with the officer in the course of an adjudication. *See Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2362–63 (2001); *see also* Memorandum for All White House Staff from Dana Remus, Counsel to the President 4–6 (July 21, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/White-House-Policy-for-Contacts-with-Agencies-and-Departments.pdf>. As Emily Bremer has written, “[t]o date, adjudication generally has been viewed as an area of administration that is properly insulated from presidential control.” Emily Bremer, *Presidential Adjudication*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4726519.

⁹⁸ U.S. CONST. art. II, § 2.

⁹⁹ *Lucia v. United States*, 585 U.S. 237, 244 (2018) (quoting *United States v. Germaine*, 99 U.S. 508, 511–12 (1879), and *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

regulate the appointment or supervision of non-officers, called “employees,”¹⁰⁰ most of whom are hired and supervised today according to merit system principles.)

This default process for appointing high-level officials is meant to promote accountable governance, on the theory that the President can be held accountable for nominating a bad candidate, and the Senate can be held accountable for confirming a bad candidate or rejecting the nomination of a good one.¹⁰¹ Its chief drawback is that it is time-consuming, requiring the personal attention of both the President and the Senate.¹⁰² Recognizing that the appointment of all officers might be “inconvenient” when offices “became numerous, and sudden removals necessary,”¹⁰³ the Framers permitted Congress by law to vest the appointment of “inferior” officers in the President alone, or in a court of law or a department head, without Senate confirmation.¹⁰⁴ This streamlines the process for appointing lower-level, executive-branch officers while preserving a “chain of dependence” between them and the President.¹⁰⁵

The line the Court has drawn between “principal” officers, who must be nominated by the President and confirmed by the Senate, and “inferior” officers, who may be appointed through the streamlined process, is “one that is far from clear.”¹⁰⁶ In general, however, an “inferior” officer is one who is “directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”¹⁰⁷

Courts in many contexts have found the power to take a final action binding on the federal government to constitute “significant authority pursuant to the laws of the United States.” Because an adjudication typically results in a binding order, courts have classified many thousands of executive-branch officials with legal authority to issue orders to be “Officers of the United States.” This includes ALJs,¹⁰⁸ administrative patent judges (APJs),¹⁰⁹ administrative

¹⁰⁰ *Id.*

¹⁰¹ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021) (citing *Edmond v. United States*, 520 U.S. 651, 660 (1997)).

¹⁰² *See* Admin. Conf. of the U.S., Forum: Advice and Consent: Problems and Reform in the Senate Confirmation of Executive-Branch Appointees (Mar. 29, 2022), <https://www.acus.gov/meetings-and-events/event/advice-and-consent-problems-and-reform-senate-confirmation-executive>.

¹⁰³ *Germaine*, 99 U.S. at 509–510.

¹⁰⁴ U.S. CONST. art. II, § 2. Courts have held that a department head may have legal authority to appoint individuals to an inferior-officer position that was not specifically created by statute so long as the department head has legal authority to create the position. *See, e.g.*, *Duenas v. Garland*, 78 F.4th 1069 (9th Cir. 2023); *Varnadore v. Sec’y of Labor*, 141 F.3d 625 (6th Cir. 1998).

¹⁰⁵ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1989–90 (2021) (Gorsuch, J., concurring in part and dissenting in part) (quoting 1 ANNALS OF CONG. 499 (1789) (Joseph Gales ed., 1834) (statement of James Madison)). *See generally* Jed H. Shugerman & Jodi L. Short, *Major Questions About Presidentialism: Untangling the “Chain of Dependence” Across Administrative Law*, 65 B.C. L. REV. 511 (2024).

¹⁰⁶ *Morrison v. Olson*, 487 U.S. 654, 671 (1988).

¹⁰⁷ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021) (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)).

¹⁰⁸ *Lucia v. United States*, 585 U.S. 237, 249 (2018); *see also* *Brooks v. Kijakazi*, 60 F.4th 735, 740 (4th Cir. 2023); *Calcutt v. FDIC*, 37 F.4th 293, 320 (6th Cir. 2022); *Fleming v. USDA*, 987 F.3d 1093, 1103 (D.C. Cir. 2021).

¹⁰⁹ *Arthrex*, 141 S. Ct. at 1979–80.

trademark judges,¹¹⁰ immigration judges and members of the Board of Immigration Appeals,¹¹¹ Copyright Royalty Board judges,¹¹² judges of the Coast Guard Court of Criminal Appeals,¹¹³ veterans law judges,¹¹⁴ and special trial judges of the Tax Court.¹¹⁵ Many other officials who participate in the administrative adjudication of cases likely also qualify as “Officers of the United States” under current caselaw,¹¹⁶ in particular officials who “preside over adversarial hearings” and “take testimony, conduct trials, rule on the admissibility of evidence, and have power to enforce compliance with discovery orders.”¹¹⁷

Adjudicators who are “Officers of the United States” must be appointed in a manner consistent with the Appointments Clause. As suggested above, there are two possible options. First, Congress can require that more adjudicator positions be filled through presidential nomination and Senate confirmation.¹¹⁸ As a practical matter, however, filling several thousand additional positions in this way would require a significant amount of the President’s and Senate’s limited time, almost certainly resulting in high turnover and frequent vacancies without clear benefits in terms of accountability.¹¹⁹

Secondly, policymakers could ensure that non-PAS adjudicators are “directed and supervised” by PAS officials. As a policy matter, there are many ways in which a PAS official might direct and supervise the work of non-PAS adjudicators. A PAS official might review all decisions rendered by lower-level adjudicators or at least reserve discretion to review any decision. Alternatively, a PAS official might rely on managerial controls to direct and supervise adjudicators’ work.¹²⁰ Such controls might include the development and adoption of substantive and procedural rules binding on adjudicators, designation of decisions as binding precedent,¹²¹ appointment and performance management of adjudicators,¹²² assignment of cases to

¹¹⁰ *Piano Factory Grp., Inc. v. Schiedmayer Celesta GmbH*, 11 F.4th 1363, 1372 (Fed. Cir. 2021).

¹¹¹ *Duenas v. Garland*, 78 F.4th 1069, 1072–73 (9th Cir. 2023).

¹¹² *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012).

¹¹³ *Edmond v. United States*, 520 U.S. 651, 666 (1997).

¹¹⁴ *See Prewitt v. McDonough*, 36 Vet. App. 1, 11 (2022) (Falvey, J., concurring).

¹¹⁵ *Freytag v. Commissioner*, 501 U.S. 868, 881 (1991).

¹¹⁶ *See generally* Jennifer L. Mascott, *Who Are ‘Officers of the United States’?*, 70 STAN. L. REV. 443 (2018);

Jennifer Mascott & John F. Duffy, *Executive Decisions After Arthrex*, 2021 S. CT. REV. 225 (2022).

¹¹⁷ Memorandum from the Solicitor General, U.S. Dep’t of Justice, to Agency Gen. Counsels, Guidance on Administrative Law Judges after *Lucia v. SEC* (S. Ct.) (July 2018) (quoting *Lucia v. United States*, 585 U.S. 237, 238 (2018)).

¹¹⁸ *See The Patent Trial and Appeal Board and the Appointments Clause: Implications of Recent Court Decisions: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 116th Cong. (2019) (testimony of John F. Duffy).

¹¹⁹ *See infra* Part II.C.

¹²⁰ *See* Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 59–61 (2023).

¹²¹ *See* Recommendation 2022-4, *supra* note 15.

¹²² *See* Recommendation 2020-5, *supra* note 4.

adjudicators,¹²³ use of quality assurance techniques,¹²⁴ and control of resources available to adjudicators.¹²⁵

The Supreme Court has sought to define a constitutional baseline for the direction and supervision of administrative adjudication by PAS officials. In *Edmond v. United States*,¹²⁶ the Court held that judges of the Coast Guard Court of Criminal Appeals (CGCCA),¹²⁷ then appointed by the Secretary of Transportation, were constitutionally appointed inferior officers. In reaching its holding, the Court emphasized (1) that CGCCA judges were bound by procedural rules established by a PAS official (the Judge Advocate General), (2) that CGCCA judges were subject to removal from their judicial assignments without cause by a PAS official (the Judge Advocate General), and (3) that CGCCA judges' decisions were subject to review and reversal by PAS officials (judges of the Court of Appeals for the Armed Forces¹²⁸).

In *United States v. Arthrex*,¹²⁹ on the other hand, the Court held that APJs, appointed by the Secretary of Commerce were not subject to adequate direction and supervision by a PAS official. Like CGCCA judges, APJs are bound by procedural rules established by a PAS official (the Director of the U.S. Patent and Trademark Office). APJs are also subject to several managerial controls. The Director sets their pay, for example, and has statutory authority to decide which cases the PTAB panels will decide, assign cases to panels, issue binding guidance, and designate PTAB decisions as binding precedent.¹³⁰

Unlike CGCCA judges, however, APJs are not subject to at-will removal by a PAS official,¹³¹ nor are their decisions subject to review and reversal by a PAS official in the executive branch.¹³² Given the absence of two of the three structural features identified in *Edmond*, both the Federal Circuit and the Supreme Court found that APJs exercised significant authority without adequate direction and supervision by a PAS official. To remedy the constitutional defect, the Federal Circuit severed APJs' removal protections.¹³³ The Supreme Court reversed, holding instead that APJs' decisions were subject to plenary review by the Director.¹³⁴

¹²³ *Id.*

¹²⁴ See Recommendation 2021-10, *supra* note 5.

¹²⁵ See, e.g., Nicholas Bednar, *The Public Administration of Justice*, 44 CARDOZO L. REV. 2139 (2023); David K. Hausman, Daniel E. Ho, Mark S. Krass & Anne McDonough, *Executive Control of Agency Adjudication: Capacity, Selection, and Precedential Rulemaking*, 39 J. L. ECON. & ORG. 682 (2022).

¹²⁶ *Edmond v. United States*, 520 U.S. 651 (1997).

¹²⁷ The CGCCA hears appeals from decisions of courts-martial.

¹²⁸ The Court of Appeals for the Armed Forces is an Article I tribunal within the executive branch.

¹²⁹ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

¹³⁰ *Id.* at 1980.

¹³¹ The agency may take an adverse action against an APJ "only for such cause as will promote the efficiency of the [civil] service." 5 U.S.C. § 7513.

¹³² By statute, PTAB decisions are reviewable only in the Court of Appeals for the Federal Circuit, an Article III court. 35 U.S.C. § 319.

¹³³ *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1337 (Fed. Cir. 2019).

¹³⁴ *United States v. Arthrex, Inc.*, 141 S. Ct. at 1987.

Read in combination, *Edmond* and *Arthrex* raise at least five important questions. First, must one or more PAS officials have statutory authority to render a final order binding on the executive branch in an adjudication, or can Congress divest PAS officials of adjudicative authority so long as a PAS official directs and supervises non-PAS adjudicators' work through other means?¹³⁵ The Court's opinion in *Arthrex* suggests that while the power to countermand decisions rendered by non-PAS adjudications is an important means of directing and supervising their work, it may not necessarily be a constitutionally required one. The Court in *Arthrex* seemingly reaffirmed the rule from *Edmond* that there is no "exclusive criterion for distinguishing between principal and inferior officers."¹³⁶ And it noted further that judges of the Labor Department's Benefits Review Board (BRB), whose decisions are not subject to review by a PAS official in the executive branch under the statute establishing it, are "potentially distinguishable" from APJs because, unlike APJs, BRB judges "appear to serve at the pleasure of the appointing department head."¹³⁷

Second, can Congress limit a PAS official's authority to review the decisions of non-PAS officials? For example, in reviewing decisions of the Board of Veterans Appeals (BVA) (of which all members but one are non-PAS officials), judges of the Court of Appeals for Veterans Claims may only hold unlawful and set aside or reverse a factual finding if it is a "material fact adverse to the claimant" and "clearly erroneous."¹³⁸ Is such a restriction on the standard or scope of review permissible, or must a statute provide a PAS official with plenary authority to review decisions rendered by non-PAS adjudicators?

Third, assuming a statute gives a PAS official plenary power to issue the final decision of the executive branch and review decisions made by non-PAS adjudicators, can the PAS official limit the issues it will review? For example, may a PAS official restrict his or her review to questions of law or, in a particular case, to arguments raised before a lower-level adjudicator? The APA provides that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision *except as it may limit the issues on notice or by rule.*"¹³⁹ Many agencies that conduct formal adjudications adopted such rules long ago, and ACUS repeatedly has recommended the adoption of such rules as a best practice.¹⁴⁰ It is highly unlikely that *Arthrex* broadly restricts PAS officials' authority to adopt rules limiting the circumstances in which they will review the decisions of non-PAS officials exercising delegated authority.

Fourth, assuming a PAS official has statutory authority to render the final decision of the executive branch, may he or she delegate all authority to issue and review decisions to lower-

¹³⁵ See Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 Yale L.J. 1769, 1783 (2023).

¹³⁶ *Arthrex*, 141 S. Ct. at 1985 (quoting *Edmond v. United States*, 520 U.S. 651, 661 (1997)).

¹³⁷ *Id.* at 1984. The BRB is a statutorily created subunit of the Labor Department that decides appeals under several worker's compensation programs. BRB judges are appointed by the Secretary of Labor. BRB decisions are subject to judicial review in the courts of appeals.

¹³⁸ 38 U.S.C. § 7261(4).

¹³⁹ 5 U.S.C. § 557(b) (emphasis added).

¹⁴⁰ See Recommendation 68-6, *supra* note 11; Recommendation 83-3, *supra* note 12; see also Admin. Conf. of the U.S., Model Adjudication Rules § 410 (2018).

level adjudicators? The Commissioner of Social Security, Secretary of HHS, and Secretary of Agriculture, for example, have expressly delegated all review authority over certain programs to non-PAS officials. Although some commentators have questioned whether the wholesale delegation of review authority is constitutional,¹⁴¹ the Court’s reasoning in *Arthrex* suggests that such arrangements are acceptable because a PAS official can be held responsible for an inadvisable delegation of final decision-making authority.¹⁴²

The few courts that have addressed the constitutionality of such arrangements since *Arthrex* have upheld them, at least where a PAS official can revoke a delegation of review authority,¹⁴³ remove or reassign adjudicators at will,¹⁴⁴ or exercise discretion to not enforce an adjudicator’s decision.¹⁴⁵ Most notably, the Federal Circuit held on remand from the Supreme Court in *Arthrex*: “That the Appointments Clause requires that a [PAS official] have review authority does not mean that a principal officer, once bestowed with such authority, cannot delegate it to other agency officers.”¹⁴⁶ And in *In re Palo Alto Networks*, considering the U.S. Patent and Trademark Office (USPTO) Director’s choice to delegate institution decisions to non-PAS officials, the Federal Circuit held:

The unambiguous identification of the Director as the politically accountable executive officer responsible for institution decisions maintains the clear “lines of accountability demanded by the Appointments Clause,” from the President to the Director, and allows the President to “attribute [any] failings to those whom he can oversee.”¹⁴⁷

Finally, does the temporary absence of a PAS official in a position—or a quorum of PAS officials, in the case of a multimember board or commission—affect whether non-PAS adjudicators are adequately directed and supervised? Courts that have considered the question so far have held that the temporary absence of a PAS official does not render decision-making by non-PAS adjudication unlawful.¹⁴⁸ Courts have also held that final adjudicative authority is generally delegable and may be performed by an acting official or another official performing the duties of a PAS position.¹⁴⁹

¹⁴¹ See, e.g., Richard J. Pierce, Jr., *Agency Adjudication: It Is Time to Hit the Reset Button*, 28 GEO. MASON. L. REV. 643, 649–50, 652 (2021).

¹⁴² *Arthrex*, 141 S. Ct. at 1978–79.

¹⁴³ *In re Palo Alto Networks, Inc.*, 44 F.4th 1369 (Fed. Cir. 2022); *McConnell v. U.S. Dep’t of Agric.*, 2023 U.S. Dist. LEXIS 162382, at *7–14 (E.D. Tenn. Sep. 13, 2023); see also *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328 (Fed. Cir. 2022) (finding that the USPTO Director’s duty to decide rehearing requests is delegable).

¹⁴⁴ *Id.*; *McConnell*, 2023 U.S. Dist. LEXIS 162382 at *7–14.

¹⁴⁵ *Sanofi-Aventis U.S. v. U.S. Dep’t of Health & Hum. Sers.*, 570 F. Supp. 3d 129, 175–83 (D.N.J. 2021), *rev’d on other grounds*, 58 F.4th 696 (3d Cir. 2023).

¹⁴⁶ *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1339 (Fed. Cir. 2022) (Moore, C.J.).

¹⁴⁷ *In re Palo Alto Networks, Inc.*, 44 F.4th at 1375 (Dyk, J.) (quoting *Arthrex*, 141 S. Ct. at 1981–82).

¹⁴⁸ See, e.g., *McIntosh v. Dep’t of Def.*, 53 F.4th 630 (Fed. Cir. 2022); *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th at 1332–40.

¹⁴⁹ See, e.g., Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. MICH. J. L. REFORM 103 (2018).

2. Due Process Requirements

The Fifth Amendment provides that no person shall be deprived of liberty or property “without due process of law.” Many administrative adjudications involve private interests in liberty or property, and, in such proceedings, agencies must comply with the requirements of constitutional due process.

Constitutional due process says nothing about the participation of PAS officials, as a class, in administrative adjudication. But several due process arguments have been made regarding how PAS officials administer programs involving adjudication and interact with non-PAS adjudicators. For example:

Combination of Functions. When Congress establishes a program, it often assigns to a single PAS official or collegial body of PAS officials responsibility for administering all aspects of the program, including policymaking, investigation, prosecution, and adjudication. Although there is often an internal separation of the adjudicative function from the investigative and prosecutorial functions, separate chains of command often converge at the level of the agency head. Agency heads might even serve concurrently as adjudicators, investigators, and prosecutors. As Michael Asimow examined in a recent report to ACUS, PAS officials at several independent regulatory agencies both “greenlight” the initiation of a formal proceeding before an ALJ and review ALJ decisions on appeal.¹⁵⁰ Some commentators have raised due process concerns about the combination of certain functions.¹⁵¹ The Supreme Court and lower courts have held as a general matter that Congress does not violate due process when it combines in a single position adjudication with policymaking¹⁵² or investigation and prosecution.¹⁵³

Supervision of Adjudicators. As noted earlier, PAS officials use managerial controls to direct and supervise adjudication by non-PAS officials. Indeed, Supreme Court opinions suggest that some degree of managerial control by PAS officials (or the President) may be constitutionally mandated.¹⁵⁴ At the same time, concerns have been raised that the use or

¹⁵⁰ Asimow, *supra* note 71; *see also* Asimow, *supra* note 48.

¹⁵¹ *See* Vollmer, *supra* note 149.

¹⁵² *Kisor v. Wilkie*, 139 S. Ct. 2400, 2421–22 (2019); *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013).

¹⁵³ *See Withrow v. Larkin*, 421 U.S. 35 (1975); *see also* *AFGE v. Gates*, 486 F.3d 1316, 1329 (D.C. Cir. 2007); *Pathak v. Dep’t of Vet. Affs.*, 274 F.3d 28, 33 (1st Cir. 2001); *Seidman v. Off. of Thrift Supervision*, 37 F.3d 911, 924–26 (3d Cir. 1994); *Kessel Food Mkts., Inc. v. NLRB*, 868 F.2d 881, 888 (6th Cir. 1989); *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1105 (D.C. Cir. 1988); *Utica Packing Co. v. Block*, 781 F.2d 71, 77–78 (6th Cir. 1986); *Gibson v. FTC*, 682 F.2d 554, 560 (5th Cir. 1982); *Air Prods. & Chems., Inc. v. FERC*, 650 F.2d 687, 709 (5th Cir. 1981); *Porter Cnty. Chapter of Izaak Walton League, Inc. v. NRC*, 606 F.2d 1363, 1371 (D.C. Cir. 1979); *Eisenberg v. Holland Rantos Co.*, 583 F.2d 100, 104 n.8 (3d Cir. 1978); *O’Brien v. DiGrazia*, 544 F.2d 543, 546–47 (1st Cir. 1976); *United States v. Litton Indus., Inc.*, 462 F.2d 14, 16–17 (9th Cir. 1972); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 79 (10th Cir. 1972); *FTC v. Cinderella Career & Finishing Schs., Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968).

¹⁵⁴ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021) (citing *Edmond v. United States*, 520 U.S. 651, 660 (1997)).

application of certain managerial controls violates parties' right to due process.¹⁵⁵ A judicial opinion in at least one recent case suggests that courts are unlikely to find that general supervisory structures violate due process, at least in the absence of strong showing of actual prejudice in a particular case.¹⁵⁶

* * *

Attributes common among PAS officials—the political nature of their appointment and position, and their often short tenure in public service—have sometimes also prompted due process challenges in specific cases. In some ways, the activity and visibility of PAS officials may render them more susceptible to due process challenges than other administrative adjudicators. In other ways, however, the due-process calculus may be rather different.¹⁵⁷

Supervision by the President. One critique of non-ALJ AJs is that they are not as insulated from political control as ALJs. Some have argued that this lack of insulation raises due process concerns.¹⁵⁸ Like many AJs, PAS officials are generally subject to supervision by a political actor—the President—at least if they are subject to at-will removal by the President. Some may argue that presidential supervision of adjudication by PAS officials raises due process concerns. Kent Barnett has argued that “the due process problem can be justifiably confined to AJs based on differences in agency heads’ function, their method of appointment, salience of removal, and necessity.” He explains:

First, agency heads are much more likely to be deciding policy matters finally for the agency, and that policy discretion will be limited by the hearing record. Although AJs and ALJs can make policy in the first instance, their policy decisions are subject to reversal by the agency heads and deputies. The President probably is entitled to oversee the policies via at-will removal authority for matters that are related to core executive power, such as foreign affairs and defense. Second, the President’s nomination of agency heads may be less troubling than AJs because the Senate must confirm the nomination, and the agency head may balance the views of the President with those of the confirming Senate that may differ. Similarly, agency heads’ at-will removal may be less troubling than AJs because their removal has a much stronger salience than low-level agency employees like AJs. Agency heads likely have their own political capital and relationships on Capitol Hill and in the press, which permit them to create political backlash for the President for questionable removals. The third

¹⁵⁵ See, e.g., Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023 (2016); Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 49 (2020).

¹⁵⁶ See, e.g., *Mobility Workx, LLC v. Unified Pats., LLC*, 15 F.4th 1146, 1156 (Fed. Cir. 2021); see also *Marcello v. Bonds*, 349 U.S. 302 (1955). For a general discussion of the Court’s interpretation of the interaction between the Take Care Clause and the Due Process Clause, see Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1701–19 (2020).

¹⁵⁷ Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1679–80 (2016); see also Barnett et al., *supra* note 68, at 14.

¹⁵⁸ See generally Bremer, *supra* note 97.

distinction may be the most important: agency heads' appointment and removal (and any accompanying downsides) are required by the Appointment and the Take Care Clauses. If executive agencies' ability to adjudicate is beyond peradventure despite these constraints, then agencies [sic] heads' appointment and removal cannot alone create a constitutional defect. The same kind of necessity or compulsion does not apply to AJs, who can be appointed in other ways (such AJs are or, as I have suggested elsewhere, should be) and removed only for cause (as ALJs are).¹⁵⁹

Public Statements on Disputed Matters. As discussed in the next section, the President often nominates individuals for PAS positions whose policy preferences align with his or her own preferences. One signal of likely policy alignment is prior political activity, such as public statements and advocacy. The substance of prior political activity may relate, in some instances, to disputed matters that come before an agency for adjudication. While a PAS official is in office, he or she as part of his or her policymaking or supervisory role may also make public statements or advocate for particular policies or actions. There have been several high-profile instances in which a party has alleged that, as a result of or as evidenced by prior political activity, a PAS official has prejudged disputed facts or is biased against a party and therefore cannot fairly and impartially adjudicate its case. A PAS official's public statement on a disputed matter can, in some instances, amount to prejudgment, in which case participation by that official may violate a party's right to due process.¹⁶⁰

Tenure in Public Service. As discussed in the next part, PAS officials often serve only a limited time in their positions. They often come to government from the private sector and expect to return to the private sector after public service. A PAS official's private sector activity is often related to the program he or she directs and supervises. Participation by a PAS official in a case involving a previous or future employer, client, or associate—or perhaps a competitor to a previous or future employer, client, or associate—may raise questions about possible conflicts of interest. Whether participation amounts to a violation of due process will depend on the facts of the case.

C. Statutory Requirements

This section examines statutory requirements related to direct and indirect participation by PAS officials in administrative adjudication. It addresses: (1) the APA, (2) agency- and program-specific statutes, and (3) transparency statutes.

1. Administrative Procedure Act

The APA establishes minimum default requirements for agency action. One provision specifies that “[s]o far as the orderly conduct of public business permits, an interested person

¹⁵⁹ Barnett, *supra* note 157, at 1679–80.

¹⁶⁰ See, e.g., *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970); see also Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481 (1990).

may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding.”¹⁶¹ The *Attorney General’s Manual on the Administrative Act* interpreted this provision to mean that “any person should be given an opportunity to confer or discuss with responsible officers or employees of the agency matters in which he is properly interested.”¹⁶² Although this provision “would seem to confer a rather broad right on members of the public whose interests would be affected by an agency action to compel relatively high-level agency employees to meet with them,” it has never been interpreted that way.¹⁶³ As the *Attorney General’s Manual* states:

[The APA] does not require that every interested person be permitted to follow the chain of command to the head of the agency. It was not intended to require the directors of the Reconstruction Finance Corporation, for example, to confer personally with every applicant for a loan.¹⁶⁴

More importantly, the APA established the standard¹⁶⁵ (or not-so-standard¹⁶⁶) model for administrative adjudication. Under that model, the agency, one or more members of the body which comprises the agency, or one or more ALJs may preside at the taking of evidence.¹⁶⁷ ALJs are appointed by the agency head and insulated from agency-head control through a variety of mechanisms regarding, among other matters, their discipline and removal, performance evaluation, compensation, assignment of duties, and assignment of cases.¹⁶⁸ Additionally, ALJs may not be supervised by and are insulated from agency personnel, other than agency heads, who are involved in investigation and prosecution.¹⁶⁹

The agency is permitted generally to adopt and publish rules governing the authority of presiding officers and practice before the agency. The presiding officer must base his or her decision—whether initial, recommended, or tentative—on an exclusive record, consisting of the transcript of testimony, exhibits, and other filings.¹⁷⁰ Presiding officers may not engage in ex parte communications.¹⁷¹

The decision of the presiding officer is subject to review by the agency head—either automatically (in the case of a recommended or tentative decision), upon a party’s request (in the case of an initial decision), or on the agency head’s own motion. When reviewing an initial

¹⁶¹ 5 U.S.C. § 555(b).

¹⁶² ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 64 (1946).

¹⁶³ ASIMOW, *supra* note 23, at 44.

¹⁶⁴ ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 162, at 64.

¹⁶⁵ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1984 (2021) (citing Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 157 (2019)).

¹⁶⁶ Eisenberg & Mendelson, *supra* note 120.

¹⁶⁷ 5 U.S.C. § 556(b).

¹⁶⁸ *See generally* Lubbers, *supra* note 30, at 101–09.

¹⁶⁹ 5 U.S.C. § 554(d).

¹⁷⁰ *Id.* § 556(d), (e).

¹⁷¹ *Id.* § 557(d).

decision, the agency has “all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”¹⁷²

Parties are entitled to a reasonable opportunity to present proposed findings, exceptions, and supporting reasons before the recommendation, initial, or tentative decision and on agency-head review.¹⁷³ The decision of the agency head must explain its findings and conclusions on all material issues of fact, law, or discretion.¹⁷⁴ On judicial review, it must be supported by substantial evidence review on the record of the agency hearing,¹⁷⁵ which includes the decision of the presiding officer.¹⁷⁶

Informed by the recommendations of the Attorney General’s Committee on Administrative Procedure (1941),¹⁷⁷ this model represents a congressional attempt to balance multiple objectives, including procedural integrity and political control of policymaking. Procedural integrity is achieved through statutory mechanisms safeguarding presiding officers’ decisional independence, while political control of policymaking is achieved through agency-head review. To ensure the latter does not subsume the former, the APA constrains agency-head review in important ways and requires that such review take place transparently. Transparency facilitates external oversight of political appointees’ exercise of control by the courts, Congress, the President, and the public.¹⁷⁸

2. Agency- and Program-Specific Statutes

The APA establishes default requirements that Congress may supplement or depart from for specific agencies and programs. Many statutes governing programs in which adjudication is conducted according to the APA’s formal-hearing provisions contain such supplements or departures. And of course, as ACUS has examined on several occasions,¹⁷⁹ much agency adjudication is not subject to the formal hearing requirements of the APA.

Agency- and program-specific statutes may specify alternative structures for administrative adjudication and direct and indirect participation by PAS officials. Among the most notable are statutes that seem to exclude any PAS officials from participating directly in the adjudication of cases, such as the statute at issue in *Arthrex*, and those assigning adjudicative authority to PAS officials other than the head of the agency with primary responsibility for administering the program. Additionally, specific statutes might authorize or restrict the

¹⁷² *Id.* § 557.

¹⁷³ *Id.* § 557(b)

¹⁷⁴ *Id.* § 557(c).

¹⁷⁵ *Id.* § 706(2)(E).

¹⁷⁶ *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

¹⁷⁷ FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941).

¹⁷⁸ Bremer, *supra* note 97; Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication* 103 TEX. L. REV. (forthcoming 2024) (manuscript at 16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4563879/.

¹⁷⁹ See Recommendation 2023-5, *supra* note 6; Recommendation 2016-4, *supra* note 6; see generally ASIMOW, *supra* note 23.

delegation of adjudicative functions or constrain how PAS officials may participate directly in the adjudication of individual cases.

3. Transparency Statutes

As noted above, the APA seeks to balance procedural integrity and political control of policymaking through a transparent process for agency-head review. Two generally applicable transparency statutes—the Government in the Sunshine Act and the Freedom of Information Act (FOIA)—are also relevant here.

The Sunshine Act generally requires multimember agencies to conduct business in open hearings, though there are myriad exceptions to that general rule. The Sunshine Act also permits proceedings to take place by notation voting, a process whereby an agency’s members “receive written materials, review the same, and then provide their votes in writing.”¹⁸⁰ As a practical matter, however, the Sunshine Act “seldom gives the public a right to access anything other than formal meetings of commissioners, which tend to be somewhat pro forma. It does not play a significant role in granting public access to adjudicative proceedings.”¹⁸¹

FOIA establishes no requirements specific to PAS officials’ participation in administrative adjudication, though it does require that each agency make available for public inspection in an electronic format “final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases.”¹⁸² Although the scope of this provision is debated, it almost certainly covers many written decisions issued by PAS officials in the course of adjudicating individual cases.¹⁸³

III. Who Should Determine How PAS Officials Participate

The institutional design of any agency is a function of choices by Congress and the executive branch. For some programs, Congress has defined an agency’s organization and procedure with great specificity, including the role of PAS officials. Title 38 of the U.S. Code, for example, regulates how veterans file claims for veterans’ disability compensation; how adjudicators within the Veterans Benefits Administration (VBA), directed and supervised by a PAS official, process claims and issue initial decisions; how the BVA, chaired by a PAS official, reviews VBA decisions; and how Senate-confirmed judges of the Court of Appeals for Veterans Claims—an independent, executive-branch tribunal whose members are all PAS officials—review appeals from the BVA.¹⁸⁴ Specifically regarding adjudication, at least historically, the

¹⁸⁰ Reeve T. Bull, *The Government in the Sunshine Act in the 21st Century 9–10* (Mar. 10, 2024) (report to the Admin. Conf. of the U.S.).

¹⁸¹ Jeremy Graboyes & Mark Thomson, *Public Access to Agency Adjudicative Proceedings 15* (Nov. 22, 2021) (report to the Admin. Conf. of the U.S.).

¹⁸² 5 U.S.C. § 552(a)(2)(A).

¹⁸³ *See infra* Part VI.

¹⁸⁴ *See* Appendix W.

establishment of independent agencies may reflect congressional intent that PAS officials will participate personally in the adjudication of at least those cases that are especially significant.¹⁸⁵

For many programs, though, Congress has left most important structural decisions to executive-branch officials. All aspects of administering a program are commonly assigned to a PAS official or collegial body made up of several PAS officials, and that official (or those officials) are given broad discretion to structure a system for adjudicating cases as they see fit.¹⁸⁶

Legislative flexibility allows Congress to create bureaucratic structures, binding on executive branch actors, that for each program strike the desired balance between administrative expertise and external accountability.¹⁸⁷ At the same time, cases such as *Lucia* and *Arthrex* suggest that the Supreme Court views certain legislatively mandated structures as violating the separation of powers, because they “break[] the chain of dependence” between the President and executive-branch officers.¹⁸⁸

Delegations of authority within the executive branch do not raise the same constitutional concerns.¹⁸⁹ And as a policy matter, granting agencies greater flexibility to structure their adjudicative systems may make it easier to modify those structures in light of lived experience and changed circumstances. At the same time, such flexibility narrows the options available for congressional oversight and prevents Congress from insulating career adjudicators from political control when such insulation is desired.

Congress has passed many statutes regulating the conduct of hearings. With some notable exceptions, it has not regulated administrative review nearly as much. By way of example, consider the APA. While Congress established a comprehensive scheme for the conduct of hearings required by law to be conducted on the record, it rejected proposals to formalize review and “instead gave agencies discretion to determine the structure of their appellate processes.”¹⁹⁰

Historical ACUS recommendations reiterate this approach. In Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, ACUS encouraged Congress to amend the APA to clarify agencies’ discretion in cases of formal adjudication to establish intermediate appellate boards and accord administrative finality to the

¹⁸⁵ See Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 263–64, 269 (1988); Gifford, *supra* note 29, at 970; Ralph F. Fuchs, *Fairness and Effectiveness in Administrative Agency Organization and Procedures*, 36 IND. L.J. 1, 31 (1960) (“There are legal limits to delegation within an agency. . . . [I]t can scarcely be doubted that, for example, the members of a regulatory commission are required either to render personally a decision which the governing statute entrusts to the commission, or to hold themselves available to review if objection is raised to the determination of subordinates acting for them.”); HIROSHI OKAYAMA, *JUDICIALIZING THE ADMINISTRATIVE STATE: THE RISE OF THE INDEPENDENT REGULATORY COMMISSIONS IN THE UNITED STATES, 1883–1937* (2019).

¹⁸⁶ Fuchs, *supra* note 185, at 30.

¹⁸⁷ Eisenberg & Mendelson, *supra* note 120, at 3.

¹⁸⁸ See *supra* note 105; see also Eisenberg & Mendelson, *supra* note 120; Nikolas Bowie & Daphna Renan, *The Separation-of-Power Counterrevolution*, 131 YALE L.J. 2020 (2022).

¹⁸⁹ See Barnett, *supra* note 156.

¹⁹⁰ Weaver, *Appellate Review*, *supra* note 44, at 287.

initial decisions of presiding officers.¹⁹¹ In Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, ACUS more explicitly recommended that Congress grant agencies broad discretion to structure their adjudicative systems, stating:

In drafting legislation governing the institutional structure for agency adjudicatory proceedings, Congress should favor delegation of decisional authority and should not prescribe detailed review structures. The presumption should be that each agency head is best able to allocate review functions within the agency.

ACUS recommended that Congress authorize agency heads to review initial decisions of presiding officers on a discretionary basis and delegate review authority to a judicial officer or appellate board “either with possibility for further review by the agency head in his [or her] discretion or without further administrative review.” ACUS recommended that Congress require agency heads to review decisions personally “[o]nly in the rarest circumstances.” ACUS listed only two circumstances (apparently an exclusive list):

- (i) In the case of an agency headed by an individual, the subject matter at issue is of such importance that attention at the very highest level is imperative; or
- (ii) In the case of an agency headed by a collegial body, the subject matter at issue is of special importance, the cases comprising the relevant class of decisions are few in number, and the agency either has no other significant non-adjudicatory functions or has few such functions and has a sufficient number of members adequately to perform review and other tasks.¹⁹²

As the case studies appended to this report illustrate, institutional design is an ongoing, iterative process in which both congressional and executive-branch actors (and perhaps increasingly the courts) actively participate. As Eisenberg and Mendelson observe: “Over time the political branches have continued to gather information and innovate, modifying agency structures and procedures to improve them in light of experience”¹⁹³

IV. Options for Structuring Direct Participation by PAS Officials

As an initial matter, policymakers must consider whether or not PAS officials should participate at all in the adjudication of individual cases. We briefly address that question below. But the participation by PAS officials in the adjudication of individual cases is not a binary choice. There are many options for structuring participation by PAS officials, each with potential benefits and drawbacks.

¹⁹¹ Recommendation 68-6, *supra* note 11.

¹⁹² Recommendation 83-3, *supra* note 12.

¹⁹³ Eisenberg & Mendelson, *supra* note 120, at 74–77.

As we discuss below, policymakers must consider at least the following questions to determine the appropriate role a PAS official(s) should play in the adjudication of individual cases under a program:

- (1) Should a PAS official(s) participate in any capacity in the adjudication of individual cases and, if so, which PAS official(s)?

For programs in which direct participation by a PAS official(s) is deemed beneficial:

- (2) At what level or stage of adjudication should the PAS official(s) participate?
- (3) In what circumstances should the PAS official(s) participate directly in the adjudication of cases?
- (4) What procedures should the PAS official(s) use when they participate in the adjudication of individual cases?
- (5) What legal or precedential effect should decisions of the PAS official(s) be accorded?
- (6) When, if ever, should the PAS official(s) be disqualified or recuse himself or herself from participating directly in the adjudication of a case?
- (7) What staff support should be available to the PAS official(s) when he or she participates directly in the adjudication of cases?

A. To Participate Directly or Not

Determining whether PAS officials should participate in the adjudication of individual cases—and, if they do, when, how, and how often they should participate—depends ultimately on consideration of the policy objectives that policymakers aim to achieve for a specific adjudicative system and whether participation by PAS officials best accomplishes them. In Recommendation 2020-3, *Agency Appellate Systems*,¹⁹⁴ ACUS considered best practices for agency appellate systems, whether staffed by PAS officials or by non-PAS officials such as career administrative appeals judges¹⁹⁵ or senior executives. The recommendation identified several possible objectives of agency appellate systems, including:

the correction of errors, inter-decisional consistency of decisions, policymaking, political accountability, management of the hearing-level adjudicative system, organizational effectiveness and systemic awareness, and the reduction of litigation in federal courts.

In this section, we assume the potential value of agency appellate systems in achieving such objectives but consider the extent to which adjudication by PAS officials, in particular, might serve or disserve them.

There are potential benefits and costs to assigning administrative functions to PAS officials. In terms of benefits, assigning a function to one or more PAS officials may promote democratic accountability and legitimacy by ensuring that elected officials in two branches of

¹⁹⁴ Recommendation 2020-3, *supra* note 7.

¹⁹⁵ See 5 U.S.C. § 5372b.

government have a say in selecting the individuals who perform that function. Embedding high-level political appointees within agencies may also improve communication and coordination between bureaucratic and political institutions.¹⁹⁶ On the other hand, there may be costs to politicizing the bureaucracy. (The optimal level of political control over agency decision making is outside the scope of this study.¹⁹⁷) And as a practical matter, requiring presidential nomination and Senate confirmation is a costly and time-consuming way to fill high-level positions.¹⁹⁸

Adjudication serves several objectives in the administration of federal programs. It is concerned primarily with the case-by-case determination of individuals' rights and obligations, of course. But adjudication is also an important component of policy implementation and, in some programs, can be an important vehicle for policy development. In determining the appropriate role for PAS officials in adjudication under an administrative program, policymakers must consider whether PAS participation in the adjudication of individual cases might serve a valuable function in (1) ensuring the accuracy, consistency, fairness, efficiency, and timeliness of adjudication; and (2) ensuring an optimal level of political oversight over policy development and implementation. Policymakers must also consider the potential risks of PAS participation, as well as the comparative advantages and disadvantages of alternatives to PAS participation, such as managerial controls and policymaking by other means.

The potential benefits and costs of a PAS official's participation in the adjudication of individual cases under a program depend on substantive, procedural, and organizational aspects of the program and the task environment in which the program takes place. These factors are necessarily program specific. At root, however, policymakers must consider whether the PAS official, given his or her other assigned duties, has the capacity, expertise, and incentives to consider and decide cases in an accurate, consistent, fair, impartial, efficient, and timely manner.

The programs surveyed for this report, and described in the appended case studies, illustrate nicely how policymakers in Congress and the executive branch have navigated tradeoffs. They encompass a range of structures, including (1) a complete absence of direct participation by a PAS official(s) as a matter by statute (e.g., civilian contract disputes, longshore and harbor worker's compensation, immigrant and nonimmigrant visas) or internal delegation of authority (e.g., old-age, survivors, and disability insurance; animal health protection enforcement); (2) legally authorized but unused direct participation by a PAS official(s) (e.g., air and water pollution enforcement); (3) infrequent or intermittent review by PAS officials (e.g., immigration removal, payment of prevailing wage rates by federal contractors); and (4) frequent and routinized appellate review by PAS officials (e.g., securities fraud enforcement, tax deficiency cases, veterans disability compensation, unfair practices in import trade).

In this section, we consider eight characteristics that are common, but not necessarily universal, to PAS officials in the executive branch, and their potential consequences for accurate, consistent, fair, impartial, efficient, and timely adjudication:

¹⁹⁶ See *infra* Part II.C.3 and Part II.C.5.

¹⁹⁷ See generally Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008).

¹⁹⁸ See *infra* Part II.C.1.

- (1) It is comparatively time-consuming to appoint PAS officials;
- (2) There is comparatively high turnover, short tenure, and varying expertise among PAS officials;
- (3) PAS officials have a constitutional and statutory role in politically responsive policymaking;
- (4) PAS officials vary in their working relationships with agency officials;
- (5) PAS officials often are statutorily assigned a broad range of duties within and across programs;
- (6) PAS officials sit atop agency hierarchies;
- (7) PAS officials have alternative venues for policymaking influence; and
- (8) PAS officials are among the highest earning officials in the executive branch.

1. Time Needed to Appoint PAS Officials

Filling a PAS position in the federal executive branch is a staged process that requires action by multiple actors in the executive and legislative branches. Given competing demands on the President's and Senate's time, and the potential for politicization of the confirmation process, it can take a comparatively long time to appoint officials to PAS positions.

Presidents must make nominations under time and resource constraints and under increasing scrutiny from Congress, the media, and the public.¹⁹⁹ There are roughly 1,200 PAS positions in the federal executive establishment—about one third of all presidentially appointed positions²⁰⁰—and filling all of these positions in a way that promotes effective administration and coordination across agencies is a complex endeavor.²⁰¹ Indeed, many presidents learn from their initial appointment choices, become better managers of the executive branch over time, and adjust their appointment strategies throughout their tenure in office.²⁰²

The ability of presidents to find appropriate persons for each PAS position depends not only on presidential capacity, but also on the number, quality, and distribution of potential nominees.²⁰³ Put another way, PAS appointments are part of an economic labor market that depends on presidential demand and on the number of qualified people who are willing to serve in a PAS role (labor supply).²⁰⁴ Practically, the labor supply is greater in some policy contexts than others. For example, simply because of the nature of the job and the employment pipeline, the number of people willing and able to serve as the Commissioner of the IRS or the Administrator of the VBA differs from those qualified for positions such as Assistant Secretary

¹⁹⁹ David E. Lewis, *The Personnel Process in the Modern Presidency*, 42 PRES. STUD. Q. 577 (2012).

²⁰⁰ SELIN & LEWIS, *supra* note 33.

²⁰¹ See, e.g., Bradley H. Patterson & James P. Pfiffner, *The White House Office of Presidential Personnel*, 31 Pres. Stud. Q. 415 (2001); THOMAS J. WEKO, *THE POLITICIZING PRESIDENCY* (1995).

²⁰² George A. Krause & Anne Joseph O'Connell, *Experiential Learning and Presidential Management and Evidence of the U.S. Federal Bureaucracy: Logic and Evidence from Agency Leadership Appointments*, 60 AM. J. POL. SCI. 914 (2016).

²⁰³ Gary E. Hollibaugh, Jr., *Vacancies, Vetting, and Votes: A Unified Dynamic Model of the Appointments Process*, 27 J. THEORETICAL POL. 206 (2015).

²⁰⁴ Jennifer L. Selin, *Political Control of Regulatory Authorities*, in *HANDBOOK OF REGULATORY AUTHORITIES* (Martino Maggetti, Fabrizio Di Mascio & Alessandro Natalini eds., 2022).

of Defense for Nuclear, Chemical, and Biological Defense Programs.²⁰⁵ Similarly, the political environment and organization of key stakeholders can influence the number of people available for a PAS position.²⁰⁶

When making nominations, presidents are strategic. Presidents tend to prioritize key legal or policy appointments over managerial appointments,²⁰⁷ and, as a result, the time it has taken for presidents to appoint people to these key positions has been less than for other PAS officials.²⁰⁸ In contrast, presidents tend to delay nominations in accordance with the character of vacant positions and presidential priorities.²⁰⁹

Of course, once nominated, PAS officials must be confirmed by the Senate. There is great variation in the amount of time it takes for the Senate to confirm presidential appointments.²¹⁰ The importance of the position, characteristics of the appointee, inter-institutional dynamics of the Senate, and political relationship between the Senate and the President all affect the speed of the confirmation process.²¹¹ For example, appointees nominated during the first 90 days of a President's term tend to be confirmed significantly faster than those nominated during a President's second term in office.²¹² Additionally, nominees to the offices most important to presidential administration (e.g., Attorney General, Secretary of Defense) tend to be confirmed

²⁰⁵ See e.g., Center for Presidential Transition, Layered Leadership: Examining How Political Appointments Stack Up at Federal Agencies, <https://presidentialtransition.org/reports-publications/layered-leadership-examining-how-political-appointments-stack-up-at-federal-agencies/> (last visited June 9, 2024); Eric Katz, *The Jobs Boom is Hitting the Federal Sector, Too*, GOV'T EXEC. (Feb. 2, 2024).

²⁰⁶ ROBERT MARANTO, BEYOND A GOVERNMENT OF STRANGERS: HOW CAREER EXECUTIVES AND POLITICAL APPOINTEES CAN TURN CONFLICT INTO COOPERATION (2005).

²⁰⁷ Nicholas R. Bednar & David E. Lewis, *Presidential Investment in the Administrative State*, 118 AM. POL. SCI. REV. 442 (2024).

²⁰⁸ Gary E. Hollibaugh, Jr. & Lawrence S. Rothenberg, *The When and Why of Nominations: Determinants of Presidential Appointments*, 45 AM. POL. RSCH. 280 (2017). *But see* David E. Lewis & Mark D. Richardson, *The Very Best People: President Trump and the Management of Executive Personnel*, 51 PRES. STUD. Q. 51 (2021) (finding that President Trump was slow to nominate officials to key agency positions).

²⁰⁹ Christina M. Kinane, *Control without Confirmation: The Politics of Vacancies in Presidential Appointments*, 115 AM. POL. SCI. REV. 599 (2021); Christopher Piper, *Presidential Strategy Amidst the "Broken" Appointments Process*, 52 PRES. STUD. Q. 843 (2022).

²¹⁰ Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996*, 43 AM. J. POL. SCI. 1122 (1999).

²¹¹ E.g., Fang-Yi Chiou & Lawrence S. Rothenberg, *Executive Appointments: Duration, Ideology, and Hierarchy*, 26 J. THEO. POL. 496 (2014); Gary E. Hollibaugh, Jr., *The Incompetence Trap: The (Conditional) Irrelevance of Agency Expertise*, 27 J. PUB. ADMIN. RSCH. & THEORY 217 (2015); Gary E. Hollibaugh & Lawrence S. Rothenberg, *The Who, When, and Where of Executive Nominations: Integrating Agency Independence and Appointee Ideology*, 62 AM. J. POL. SCI. 296 (2018); George A. Krause & Jason S. Byers, *Confirmation Dynamics: Differential Vetting in the Appointment of US Federal Agency Leaders*, 84 J. POL. 1189 (2022); McCarty & Razaghian, *supra* note 210; Ian Ostrander, *The Logic of Collective Inaction: Senatorial Delay in Executive Nominations*, 60 AM. J. POL. SCI. 1063 (2016).

²¹² Matthew Dull, Patrick S. Roberts, Michael S. Keeney & Sang Ok Choi, *Appointee Confirmation and Tenure: The Succession of U.S. Federal Agency Appointees, 1989-2009*, 72 PUB. ADMIN. REV. 902 (2012). *But see* Christopher Piper & David E. Lewis, *Do Vacancies Hurt Federal Agency Performance?* 33 J. PUB. ADMIN. RSCH. & THEORY 313 (2023) (noting that by the fall of President Biden's first year in office the Senate had confirmed leaders for only 127 of the 800 most important policymaking positions).

more quickly.²¹³ Similarly, the Senate tends to be quicker to confirm PAS positions at the top of an agency's hierarchy than those in lower level positions, such as a deputy or assistant secretary.²¹⁴

As a result of delays in both presidential nominations and Senate confirmations, vacancies in PAS positions are common but varied.²¹⁵ Empirically, independent regulatory commissions tend to have significantly fewer vacancies in PAS positions than other agencies.²¹⁶ This may be a result of statutory design features—many independent regulatory commissions' authorizing statutes contain provisions that permit members of the commission or board to serve until their successor has been appointed and qualified²¹⁷—and correlate with the amount and distribution of an agency's adjudicative versus non-adjudicative workload.

There are legal workarounds during periods when PAS positions are vacant, of course, including the appointment of acting officials and the delegation of the duties of PAS positions to lower-level officials.²¹⁸ The Federal Vacancies Reform Act of 1998 establishes requirements for temporarily filling vacant PAS positions.²¹⁹ While the first assistant to the vacant office is the default acting official under the Act, the President may direct a PAS official or senior agency employee meeting certain criteria to serve as an acting official.²²⁰ Acting officials can provide continuity in leadership and help agencies maintain their workflows, but may be perceived as less accountable than traditional appointments because they have not been confirmed to their jobs.²²¹

However, not all agencies may use acting officials, as the Vacancies Act only applies to vacancies in executive departments and agencies that are not independent establishments, led by multimember bodies, or Article I courts.²²² Furthermore, under the Vacancies Act, nominees to a position generally may not serve as the acting officer.²²³

²¹³ Joel D. Aberbach & Bert A. Rockman, *The Appointments Process and the Administrative Presidency*, 39 PRES. STUD. Q. 38 (2009); Chiou & Rothenberg, *supra* note 211; Glen S. Krutz, Richard Fleisher & Jon R. Bond, *From Abe Fortas to Zoe Barid: Why Some Presidential Nominations Fail in the Senate*, 92 AM. POL. SCI. REV. 871 (1998); McCarty & Razaghian, *supra* note 210.

²¹⁴ Krause & Byers, *supra* note 211; Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913 (2009).

²¹⁵ William G. Resh, Gary E. Hollibaugh, Jr., Patrick S. Roberts & Matthew M. Dull, *Appointee Vacancies in US Executive Branch Agencies*, 41 J. PUB. POL'Y 653 (2021); *see also* Recommendation 2019-7, *supra* note 2.

²¹⁶ Anthony Madonna & Ian Ostrander, *No Vacancy: Holdover Capacity and The Continued Staffing of Major Commissions*, 37 J. PUB. POL'Y 341 (2016).

²¹⁷ *Id.* *See also* SELIN & LEWIS, *supra* note 33.

²¹⁸ *See, e.g.*, *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328 (Fed. Cir. 2022); *McIntosh v. Dep't of Def.*, 53 F.4th 630, 641 (Fed. Cir. 2022).

²¹⁹ 5 U.S.C. § 3345.

²²⁰ *Id.*

²²¹ Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613 (2020).

²²² 5 U.S.C. §§ 3345(a), 3349c. Additionally, the Vacancies Act does not apply to the Government Accountability Office. However, in these and other cases, agency authorizing statutes may provide for acting officials.

²²³ 5 U.S.C. § 3345(b)(1); *NLRB v. SW Gen., Inc.*, 580 U.S. 288 (2017). However, there are exceptions to this general rule, including for nominees who have served for a period of time as first assistant to the position, are

Of course, many agencies' authorizing statutes also provide rules concerning vacancies and acting appointments.²²⁴ For example, in the USPTO, the Deputy Director is authorized to act in the capacity of the Director in the event of a vacancy.²²⁵ In the Consumer Product Safety Commission, the Vice Chairman has the authority to act in case of a vacancy in the office of the Chairman.²²⁶ In total, 64 agency authorizing statutes contain language specifying who may serve in an acting capacity with respect to agency leadership.²²⁷ An additional 38 agency statutes, like the SEC's statute, specify that agency leaders may remain in office until their successor is appointed and qualified.²²⁸ In these agencies, the complexities of the appointment process may have less effect on adjudication than in others.

Another legal workaround is the delegation of functions. Instead of relying on an acting official, some agencies will delegate the functions of the vacant position to someone else in the agency.²²⁹ While the Vacancies Act prevents delegation of tasks that are established by statute or regulation to be performed by only the applicable officer,²³⁰ delegation is common across all presidential administrations.²³¹

Presidents also periodically use recess appointments to fill PAS positions involved in the adjudication of cases.²³² Historically, recess appointments allowed presidents not only to fill positions that become vacant during Senate recess but also to appoint individuals the Senate may not have been willing to confirm.²³³ However, since the Supreme Court's decision in *NLRB v. Noel Canning*, use of recess appointments is restricted to lengthy Senate recesses (not less than ten days).²³⁴ These recesses are increasingly unlikely to occur, as evolution in senatorial practices mean that the chamber rarely is in recess more than ten days.²³⁵

As ACUS has recognized, vacancies in PAS positions "may lead to agency inaction, generate confusion among nonpolitical personnel, and lessen public accountability."²³⁶ Vacancies affect adjudication systems in different ways depending on the different roles that PAS officials play in them. In programs where no PAS official participates in the adjudication of individual

currently first assistant (if the position is a PAS position and the nominee was confirmed by the Senate to that position, or if the nominee has previously held the covered position and the President nominated them for reappointment without a break in service. 5 U.S.C. § 3345.

²²⁴ SELIN & LEWIS, *supra* note 33.

²²⁵ 35 U.S.C. § 3(b)(1).

²²⁶ 15 U.S.C. § 2053(d).

²²⁷ SELIN & LEWIS, *supra* note 33.

²²⁸ *Id. See, e.g.*, 15 U.S.C. § 78d(a).

²²⁹ O'Connell, *supra* note 221.

²³⁰ 5 U.S.C. § 3348.

²³¹ Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533 (2020); O'Connell, *supra* note 221.

²³² U.S. CONST. art II, § 2, cl. 3.

²³³ Mendelson, *supra* note 231.

²³⁴ *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

²³⁵ Ryan C. Black, Anthony J. Madonna, Ryan J. Owens, & Michael S. Lynch, *Assessing Congressional Responses to Growing Presidential Powers: The Case of Recess Appointments*, 41 PRES. STUD. Q. 569 (2011); Ian Ostrander, *Powering Down the Presidency: The Rise and Fall of Recess Appointments*, 45 PRES. STUD. Q. 558 (2015).

²³⁶ Recommendation 2019-7, *supra* note 2.

cases, the effects of a vacancy may be minimal or indirect. For example, while the Social Security Administration has been led by acting officials for more than a third of its 28-year history as an independent agency, the absence of a Senate-confirmed Commissioner has never prevented the agency from adjudicating cases. Of course, the absence of Senate-confirmed leadership may affect adjudication indirectly, such as by affecting the agency’s ability to secure adequate funding or needed legislative changes or its willingness to take risks or introduce significant reforms.

In programs where PAS officials play a direct role in adjudicating cases, however, vacancies can significantly impact agencies’ ability to decide cases in a timely manner. This is especially true for multi-member agencies with quorum requirements. Vacancies at the Merit Systems Protection Board (MSPB) between January 2017 and March 2022, for example, prevented the agency from adjudicating about 3,800 petitions for review of AJs’ decisions until the quorum was restored.

2. High Turnover, Short Tenure, and Varying Expertise Among PAS Officials

Closely related to, but distinct from, vacancies in PAS positions is turnover.²³⁷ “The single most obvious characteristic of . . . political appointees is their transience.”²³⁸ Turnover among PAS officials is relatively high for a variety of reasons, including high levels of stress, new job opportunities (within their agencies, the federal government, or the private sector), difficult relationships with career administrators, political conflict, and overall job dissatisfaction.²³⁹

However, the diversity in PAS positions means that there is a wide variation in how long PAS officials hold office, with (on average) a quarter serving less than 18 months and a quarter serving almost a full presidential term.²⁴⁰ In general, the average length of service for a PAS official serving in a position with statutorily fixed terms tends to be longer than the length of service of those without fixed-terms. Additionally, PAS agency heads tend to serve longer than PAS appointees that are lower in an agency’s hierarchy, such as deputy or assistant secretaries.²⁴¹

²³⁷ Piper & Lewis, *supra* note 212.

²³⁸ HUGH HECLLO, A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON 103 (1977).

²³⁹ E.g., Jeff Gill & Richard W. Waterman, *Solidary and Functional Costs: Explaining the Presidential Appointment Contradiction*, 14 J. PUB. ADMIN. RSCH. & THEORY 547 (2004); Philip G. Joyce, *An Analysis of the Factors Affecting the Employment Tenure of Federal Political Executives*, 22 ADMIN. & SOC’Y 127 (1990); George A. Krause & Jason S. Byers, *Proponents, Caretakers, and the Dynamics of Administrative Leadership Turnover in U.S. Executive Agencies*, 76 POL RSCH. Q. 1707 (2023); O’Connell, *supra* note 214, at 918–19; B. Dan Wood & Miner P. Marchbanks III, *What Determines How Long Political Appointees Serve?* 18 J. PUB. ADMIN. RSCH. & THEORY 375 (2008).

²⁴⁰ Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989-2009*, 39 PRES. STUD. Q. 432 (2009). See also U.S. GEN. ACCT. OFF., GGD-94-115FS, POLITICAL APPOINTEES: TURNOVER RATES IN EXECUTIVE SCHEDULE POSITIONS REQUIRING SENATE CONFIRMATION (1994) (noting that because of differences in the statutorily prescribed lengths of fixed-term positions calculating a government-wide turnover rate or median length of service estimate is not meaningful).

²⁴¹ Dull et al., *supra* note 212.

There are several potential consequences of frequent turnover for administrative adjudication. First, turnover represents lost human capital to an agency and can slow down agency decision making, especially during changes in presidential administrations.²⁴² High turnover rates, paired with the slow-moving appointment process described earlier, means that PAS positions frequently are vacant.²⁴³ This can affect the timeliness of adjudication in programs in which review by a PAS official(s) is mandatory or petition for review by a PAS official(s) is a prerequisite to judicial review.²⁴⁴

Furthermore, PAS departures can have domino effects within their agencies. Those who work closely with appointees often depart alongside their bosses (voluntarily or otherwise), and, because it can be difficult to successfully recruit administrators when these vacancies exist, agencies may tend to defer other employee searches until management positions within the organization are filled.²⁴⁵

Any system in which PAS officials participate in the adjudication of individual cases must account for frequent turnover and vacancies among PAS officials. The establishment of boards, commissions, and tribunals at which members have long or staggered terms may mitigate this problem, but quorum requirements can still pose challenges.²⁴⁶ Additionally, across all administrative programs, “[f]requent turnover typically creates instability within an agency and prevents coherence across the administrative state.”²⁴⁷

Turnover also may mean that PAS officials do not serve long enough in their positions to become expert adjudicators.²⁴⁸ Adjudication is substantively, procedurally, and organizational complex. For adjudication to satisfy core values such as accuracy, consistency, fairness, efficiency, and timeliness, adjudicators must have certain competencies. Those competencies can take years to develop.

²⁴² Weaver, *Appellate Review*, *supra* note 44, at 292.

²⁴³ Given the higher rates of delay and turnover for PAS officials who are not agency heads (e.g., assistant secretaries, heads of bureaus located in executive departments), vacancies may be a particularly acute problem for those programs that rely on these types of PAS officials.

²⁴⁴ See 5 U.S.C. § 704 (“Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority”); see also *Darby v. Cisneros*, 509 U.S. 137 (1993).

²⁴⁵ Amanda Rutherford, Jeryl L. Mumpower, Ricardo A. Bello-Gomez & Malisa Griffin, *Understanding Vacancy Time: A Theoretical Framework Informed by Cross-Sector Comparison*, 2 *PERSP. ON PUB. MGMT & GOVERNANCE* 3 (2019); Kathryn Dunn Tenpas, *White House Staff Turnover in Year One of the Trump Administration: Context, Consequences, and Implications for Governing*, 48 *PRES. STUD. Q.* 502 (2018).

²⁴⁶ E.g., Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 *HARV. L. REV.* 585 (2021) (detailing variation in quorum requirements and recent challenges those requirements have posed for independent commissions).

²⁴⁷ O’Connell, *supra* note 214, at 947–48. Frequent turnover may also have benefits, including exposure to “new ideas and fresh connections with certain relevant outside groups.” *Id.*

²⁴⁸ Given turnover generally and turnover between presidential administrations specifically, agencies may turn to subdelegation. Brian D. Feinstein & Jennifer Nou, *Strategic Subdelegation*, 20 *J. EMPIR. LEG. STUD.* 746 (2023).

Yet, upon entering office, PAS officials have relatively little formal orientation and often hail from different backgrounds than career adjudicators, meaning PAS officials bring fewer years of agency-specific or governmental management experience to their positions.²⁴⁹ Not only might PAS officials lack the scientific or technical expertise needed in some programs to adjudicate cases,²⁵⁰ PAS officials may not have the procedural, managerial, and organizational expertise obtained by career officials through years of experience.²⁵¹ Thus, PAS officials can have a difficult transition period in their agencies as they attempt to learn agency policies and processes and learn to work within an established organization populated by employees they did not hire and only tenuously control.²⁵² This steep learning curve means that, on average, PAS officials' capacity and effectiveness matures just around the same time they decide to leave office.²⁵³

Relatedly, PAS officials may not serve long enough to become expert at managing adjudication systems. There are important differences between managing public- and private-sector organizations, and PAS officials' fewer years of public management experience and fewer years of federal government experience overall as compared to career managers can mean that these appointees must work hard to adapt to their new environments.²⁵⁴ Adjudication systems, especially high-volume systems, pose extraordinarily difficult organizational challenges. Efficient and effective management involves expertise not only in substantive and procedural policymaking but also skills such as organizational design, human capital management, procurement of office space, and development of information technology capabilities. It can take years to gain mastery, let alone a basic understanding, of adjudication systems' complexity.

Furthermore, because PAS officials by definition are transitory employees, it can be hard for them to build relationships with and effectively manage more permanent members of the federal civil service.²⁵⁵ Conflicts between PAS officials and the administrators they manage can arise due to their differential knowledge about the technical core of their agencies' work; varying

²⁴⁹ E.g., Aberbach & Rockman, *supra* note 213; Nick Gallo & David E. Lewis, *The Consequences of Presidential Patronage for Federal Agency Performance*, 22 J. PUB. ADMIN. RSCH. & THEORY 219 (2012); David E. Lewis, *Testing Pendleton's Premise: Do Political Appointees Make Worse Bureaucrats*, 69 J. POL. 1073 (2007); David E. Lewis, *Revisiting the Administrative Presidency: Policy, Patronage, and Agency Competence*, 39 PRES. STUD. Q. 60 (2009).

²⁵⁰ Eisenberg & Mendelson, *supra* note 120, at 62–64.

²⁵¹ Cf. Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571, 1596–97 (2015).

²⁵² MARANTO, *supra* note 206. As a result, it is not unusual for presidents to remove poorly performing PAS officials in the first year they are on the job. *See, e.g.*, Tenpas, *supra* note 245.

²⁵³ HECLLO, *supra* note 238.

²⁵⁴ Gallo & Lewis, *supra* note 249; DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* (2008). *But see* Matthew R. Auer, *Presidential Environmental Appointees in Comparative Perspective*, 68 PUB. ADMIN. REV. 68 (2008) (finding that more than 40 percent of appointed officials in the environmental bureaucracy have prior federal management experience).

²⁵⁵ Patricia W. Ingraham, *Building Bridges or Burning Them? The President, the Appointees, and the Bureaucracy*, 47 PUB. ADMIN. REV. 425 (1987); Patricia W. Ingraham, James R. Thompson & Elliot F. Eisenberg, *Political Management Strategies and Political/Career Relationships: Where Are We Now in the Federal Government*, 55 PUB. ADMIN. REV. 263 (1995).

political, policy, and ideological perspectives; and different sensitivities to timelines.²⁵⁶ These conflicts not only can make it difficult for PAS officials to acclimate to their positions but also can affect appointees' trust in administrators' ability to perform tasks and adhere to agency goals.²⁵⁷ This lack of trust can have real consequences for adjudication, particularly when PAS officials have the authority to review adjudicative decisions, as a lack of trust may affect the frequency of PAS officials' discretionary involvement in adjudication.

Finally, many PAS officials come to government from the private sector and, as noted above, expect to return to the private sector after a relatively short stint in government service. A PAS official's past and anticipated future employers and clients may have an interest in the outcome of proceedings that come before the agency to which the PAS official was appointed. There may be concerns in some contexts about the official's ability to impartially decide cases that come before them, a possibility we explore in the next subsection.²⁵⁸

3. PAS Officials' Roles in Politically Responsive Policymaking

A traditional rationale for assigning administrative policymaking to PAS officials, both as a constitutional and policy matter, is to ensure that policymaking is responsive to the preferences of the electorate.²⁵⁹ By constitutional design, PAS officials exist to ensure democratic accountability in administrative decision making²⁶⁰ because of their relationships (a) with the President and political appointees and (b) the Senate.

a. PAS Officials' Relationship with the President and Political Appointees

Most executive-branch personnel are appointed and supervised according to merit system principles. Those principles ensure that civil servants are "hired, promoted, rewarded, and retained on the basis of individual ability and fitness for employment" and "protected from discrimination, improper political influence and personal favoritism."²⁶¹ But PAS officials, like other political appointees, are not subject to merit system principles. Indeed, they are often appointed precisely *because* of their political affiliation, activity, or beliefs.

Through the appointment of officials on the basis of similar ideology or programmatic support, presidents can take direct action to enhance political responsiveness throughout the

²⁵⁶ MARANTO, *supra* note 206.

²⁵⁷ WILLIAM G. RESH, *RETHINKING THE ADMINISTRATIVE PRESIDENCY: TRUST, INTELLECTUAL CAPITAL, AND APPOINTEE-CAREERIST RELATIONS IN THE GEORGE W. BUSH ADMINISTRATION* (2015).

²⁵⁸ See generally Barnett, *supra* note 155; Barnett & Wheeler, *supra* note 46; Madeline June Kass, *Presidentially Appointed Environmental Agency Saboteurs*, 87 UMKC L. REV. 697 (2019); Cole D. Taratoot, *The Influence of Administrative Law Judge and Political Appointee Decisions on Appellate Courts in National Labor Relations Board Cases*, 36 LAW & POL'Y 35 (2014); see also JAMES M. LANDIS REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 11–12 (1960).

²⁵⁹ Weaver, *Appellate Review*, *supra* note 44, at 287–88; Walker & Wasserman, *supra* note 165.

²⁶⁰ *Edmond v. United States*, 520 U.S. 651 (1997).

²⁶¹ 4 C.F.R. § 2.4.

executive branch.²⁶² As a result, presidents have used PAS appointments as an important management strategy to promote democratic accountability and counteract administrative inertia.²⁶³ PAS officials tend to be more sensitive to politics when performing their jobs, and they are more likely to make decisions that reflect the preferences of their democratically elected principals.²⁶⁴

Many types of agency decision making involve a fair measure of discretion, and, within limits, politics (defined broadly) can fairly inform those decisions.²⁶⁵ To the extent that the adjudication of cases involves substantive policymaking on important issues, responsiveness to politics may be valuable. Indeed, at the time of the APA's enactment, adjudication was a primary means for developing policy,²⁶⁶ and today adjudication is an important mode for developing policy in some programs. The NLRB, for example, famously relies on case-by-case adjudication as its primary policymaking mode.²⁶⁷ In such contexts, "political oversight of adjudication resembles rulemaking oversight and supports consistent, accountable policy development."²⁶⁸

In general, though, political control of particularized adjudication is more controversial than political control of generally applicable rulemaking. Democratic accountability is only one of many considerations in agency adjudication.²⁶⁹ In adjudicating cases, agencies are expected to reach decisions based on a "neutral, objective application of the law" to case-specific facts.²⁷⁰ Yet a variety of considerations go into selecting PAS officials, including loyalty, responsiveness,

²⁶² Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION OF AMERICAN POLITICS* (John E. Chubb & Paul E. Peterson eds., Brookings 1985).

²⁶³ E.g., Linda J. Bilmes & Jeffrey R. Neal, *The People Factor: Human Resources Reform in Government*, in *FOR THE PEOPLE: CAN WE FIX PUBLIC SERVICE?* (John D. Donahue & Joseph S. Nye eds., Brookings 2003); Matthew J. Dickinson & Andrew Rudalevige, *Presidents, Responsiveness, and Competence: Revisiting the "Golden Age" and the Bureau of the Budget*, 119 *POL. SCI. Q.* 633 (2004); ROBERT F. DURANT, *THE ADMINISTRATIVE PRESIDENCY REVISITED: PUBLIC LANDS, THE BLM, AND THE REAGAN REVOLUTION* (1992); MARISSA MARTINO GOLDEN, *WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS* (2000); Kagan, *supra* note 97; LEWIS, *supra* note 254; B. DAN WOOD & RICHARD W. WATERMAN, *BUREAUCRATIC DYNAMIC: THE ROLE OF BUREAUCRACY IN DEMOCRACY* (1994).

²⁶⁴ E.g., LEWIS, *supra* note 254; David E. Lewis, *Presidential Politicization of the Executive Branch in the United States*, in *EXECUTIVE POLITICS IN TIMES OF CRISIS* (Martin Lodge & Kai Weigrich eds., Palgrave Macmillan 2012); Moe, *supra* note 262.

²⁶⁵ See generally Kathleen Bawn, *Political Control versus Expertise: Congressional Choices about Administrative Procedures*, 89 *AM. POL. SCI. REV.* 62 (1995); Randall L. Calvert, Mathew D. McCubbins & Barry R. Weingast, *A Theory of Political Control and Agency Discretion*, 33 *AM. J. POL. SCI.* 588 (1989); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *VA. L. REV.* 431 (1989); Pierce, *supra* note 160; Walker et al., *supra* note 36.

²⁶⁶ See Gifford, *supra* note 29, at 978.

²⁶⁷ See Admin. Conf. of the U.S., Recommendation 91-5, *Facilitating the Use of Rulemaking by the National Labor Relations Board*, 56 *Fed. Reg.* 33,851 (July 24, 1991).

²⁶⁸ Rebecca Eisenberg & Nina Mendelson, *Limiting Agency Head Review in the Design of Administrative Adjudication*, *YALE J. REG. NOTICE & COMMENT* (Feb. 21, 2022), <https://www.yalejreg.com/nc/symposium-decisional-independence-06/>.

²⁶⁹ E.g., Lisa Shultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 *N.Y.U. L. REV.* 461 (2003); Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 *YALE L.J.* 1 (2022).

²⁷⁰ Louis J. Virelli III, *Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators* 53 (May 14, 2020) (report to the admin. Conf. of the U.S.).

professionalism, expertise, organizational competence, or a combination of these factors.²⁷¹ Furthermore, trends in contemporary administrative management suggest that agencies increasingly are likely to place salient policy decisions within components of an agency's hierarchy that are more likely to share the views of the President, are more amenable to receiving political signals, and are more responsive to oversight.²⁷²

There have long been concerns about the potential for politics to distort adjudicative decision making.²⁷³ In a few programs, such concerns have prompted Congress to establish separate agencies to execute these functions.²⁷⁴ Even when there is an internal separation of functions, Weaver suggests that there may be “perception problems.” He explains:

In some agencies, the agency head delegates the review process to the agency's office of general counsel—the same office that is litigating the case. The agency's regulations may provide a wall of separation between those who litigate and those who adjudicate, but it is difficult for those outside the agency to know whether this separation is actually observed. Parties know that their case has been appealed, and they may have the chance to file briefs. But they may hear little or nothing for the many months the agency head takes to consider the case. During this time, the agency head may consult with many different people within the agency. Parties outside the agency will generally know little about who discussed what with whom, and may question the fairness of the process.²⁷⁵

Simply put, review by a PAS official sometimes may “detract[] from the appearance of independence.”²⁷⁶

²⁷¹ E.g., Kenneth W. Abbott, Philipp Genschel, Duncan Snidal & Bernhard Zangl, *Beyond Opportunism: Intermediary Loyalty in Regulation and Governance*, 15 REGUL. & GOVERNANCE 83 (2021); George A. Krause & Anne Joseph O'Connell, *Loyalty-Competence Trade-offs for Top U.S. Federal Bureaucratic Leaders in the Administrative Presidency Era*, 49 PRES. STUD. Q. 527 (2019); Yu Ouyang, Evan T. Haglund & Richard W. Waterman, *The Missing Element: Examining the Loyalty-Competence Nexus in Presidential Appointments*, 47 PRES. STUD. Q. 62 (2017); Richard W. Waterman & Yu Ouyang, *Rethinking Loyalty and Competence in Presidential Appointments*, 80 PUB. ADMIN. REV. 717 (2020).

²⁷² See Adam B. Cox & Christina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015); Jennifer L. Selin, Cody A. Drolc, Jordan Butcher, Nicholas L. Brothers, & Hanna K. Brant, *Under Pressure: Centralizing Regulation in Response to Presidential Priorities*, 52 PRES. STUD. Q. 340 (2022); Jerry L. Mashaw & David Bereke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549 (2018).

²⁷³ See, e.g., Barnett, *supra* note 156; Jack M. Beermann, *Administrative Adjudication and Adjudicators*, 26 GEO. MASON L. REV. 861 (2019); Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 GEO. MASON L. REV. 897 (2019); Weaver, *Appellate Review*, *supra* note 44, at 293; Kagan, *supra* note 97, at 2363; see also Bremer, *supra* note 97.

²⁷⁴ See Recommendation 86-4, *supra* note 40.

²⁷⁵ Weaver, *Appellate Review*, *supra* note 44, at 293.

²⁷⁶ Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 1988 IMMIGR. & NAT'LITY REV. 233, 319; see also Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 544 (2011) (“Board [of Immigration Appeals] members adjudicative with the knowledge that their boss, a politically appointed prosecutor, may take a case away from them.”).

To counter this possibility, Congress often has restricted the President’s ability to remove officials who exclusively or principally perform adjudicative functions.²⁷⁷ Indeed, tenure protections for PAS officials with predominately adjudicative duties have sometimes been inferred even in the absence of an statutory provisions expressly providing them.²⁷⁸ Likewise, the APA establishes structures to insulate non-PAS ALJs from the influence of politically appointed agency heads.²⁷⁹

Some have voiced a fear that political appointees in certain circumstances may be tempted to use their office to benefit friends and political allies, undermining rule-of-law values.²⁸⁰ While there are certainly historical instances of politicization,²⁸¹ the likelihood and consequences of politicization vary from program to program. Eisenberg and Mendelson raise the concern that participation by PAS officials in “low-visibility decisions with high financial stakes for well-funded and politically-connected interests” carries a heightened risk of injecting politics into adjudication without clear benefits.²⁸² Furthermore, assuming good intent, PAS officials may simply be more likely to have strongly held and publicly expressed beliefs on politically salient issues relevant to cases that come before them; some parties may perceive this as prejudice.²⁸³

In sum, perceptions of politicization will depend on factors including the nature of cases under a program, the types of matters frequently in dispute in cases, and the relationship between parties and the agency.

b. PAS Officials’ Relationship with the Senate

The nature of their appointment provides PAS officials with the endorsement of two branches of government and therefore offers credibility and legitimacy to the choices made by those officials.²⁸⁴ Additionally, the PAS confirmation process both directly and indirectly provides the Senate with opportunities to communicate with agency leadership in ways that can translate to increased agency responsiveness to congressional preferences.

²⁷⁷ SELIN & LEWIS, *supra* note 33, at 96–99.

²⁷⁸ See *Wiener v. United States*, 357 U.S. 349 (1958).

²⁷⁹ See generally Lubbers, *supra* note 30, at 125–57; Louis J. Virelli III, *Integrity in Agency Adjudication*, in A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 30, at 159–76; see also Bremer, *supra* note 97 (manuscript at 6).

²⁸⁰ Eisenberg & Mendelson, *supra* note 120, at 72.

²⁸¹ The Teapot Dome scandal is perhaps the best known incident.

²⁸² Eisenberg & Mendelson, *supra* note 120, at 68–71.

²⁸³ See, e.g., Jay Greene & Rachel Lerman, *Amazon seeks recusal of FTC Chair Khan, a longtime company critic*, WASH. POST (June 30, 2021), <https://www.washingtonpost.com/technology/2021/06/30/amazon-khan-ftc-recusal/>; see also Louis J. Virelli III, *An Ethical Gap in Agency Adjudication*, 69 BUFF. L. REV. 1329, 1334 (2021).

²⁸⁴ Joshua D. Clinton, Anthony Bertelli, Christian R. Grose, David E. Lewis & David C. Nixon, *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341 (2012); Resh et al., *supra* note 215.

First, presidents account for the preferences of senators when making PAS nominations.²⁸⁵ In this way, PAS officials are part of a larger conversation between the legislative and executive branches about the direction and content of agency policy implementation.²⁸⁶ Through the confirmation process, the Senate articulates its vision for an agency and establishes a relationship with agency leadership.

Second, because senators understand the important roles PAS officials play in agency policy, the oversight relationship between senators and PAS appointees can be stronger than with other agency officials.²⁸⁷ Agency responsiveness to congressional direction often is linked to the committees and subcommittees actively involved in overseeing an agency and confirming presidential appointees.²⁸⁸ Simply, the investment of congressional effort to understand agency policy and process during confirmation translates to higher quality oversight once an appointee has been confirmed.

Traditionally, this is particularly true with respect to agencies created as independent commissions (those led by multi-member bodies whose members serve fixed terms and are protected from removal for political reasons). Combined with partisan balancing requirements, congressional design decisions in this respect are intended to limit presidential control and facilitate a non-partisan environment where experts can apply their knowledge.²⁸⁹ Indeed, these agencies not only are seen as quasi-judicial, but also as “creatures of Congress.”²⁹⁰

²⁸⁵ E.g., Thomas H. Hammond & Jeffrey S. Hill, *Deference or Preference?: Explaining Senate Confirmation of Presidential Nominees to Administrative Agencies*, 5 J. THEORETICAL POL. 23 (1993); Hollibaugh & Rothenberg, *supra* note 211; McCarty & Razaghian, *supra* note 210; David C. Nixon, *Separation of Powers and Appointee Ideology*, 20 J. L. ECON. & ORG. 438 (2004).

²⁸⁶ See Aberbach & Rockman, *supra* note 213; Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006); MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL & HISTORICAL ANALYSIS* (2003).

²⁸⁷ See Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 ADMIN. L. REV. 259 (2017); Seymour Scher, *Conditions for Legislative Control*, 25 J. of Pol. 526 (1963).

²⁸⁸ David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487 (2015).

²⁸⁹ See Staff of S. Comm. on Gov't Operations, 95th Cong., *Study on Federal Regulation: The Regulatory Appointments Process* (1977); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459 (2008); Peter L. Strauss, *The Place of Agencies in Government Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* (2003). Consistent with this research, empirical evidence suggests that structuring an agency as a commission removes the agency from presidential influence. However, administrators in independent commissions do not perceive a statistically different amount of congressional influence than those who work in executive departments or independent administrations. Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971 (2015). Put another way, it may be that independent commissions are not necessarily more responsive to Congress than other agencies, just that they are less responsive to the President. *Id.*

²⁹⁰ E.g., *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS. 145 (1993); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); Susan Sommer, *Independent Agencies as Article One Tribunals: Foundations of a Theory of Agency Independence*, 39 ADMIN. L. REV. 83 (1987).

In total, the direct and indirect effects of Senate confirmation may result in PAS officials who are more responsive to Congress than other agency officials.²⁹¹

4. PAS Officials' Relationship with their Agencies

While PAS officials may have the endorsement of both the President and the Senate, their effectiveness in leading their agencies' adjudicative processes depends in large part on their relationships with career administrators. Without accounting for these relationships, there can be uncertainty regarding how PAS officials' authority over their agencies will be exercised.²⁹² Bluntly, a federal agency is a "they," not an "it"²⁹³ and the desirability and effectiveness of participation of PAS officials' in administrative adjudication varies with context.²⁹⁴

Promotion of accurate, consistent, fair, impartial, efficient, and timely adjudication requires PAS leadership that not only facilitates administrative responsiveness but also encourages communication and information sharing throughout the administrative hierarchy.²⁹⁵ The very thing that makes the participation of Senate-confirmed officials in adjudication attractive (connection to elected officials and the promotion of democratic accountability) can hurt program performance if those officials are unfamiliar with agency processes or unreceptive to the expertise and experience of career administrators.²⁹⁶ Positively or negatively, PAS officials have a strong influence on the behavior of career civil servants throughout their agencies and the most successful PAS officials fully understand their agencies' adjudicative processes and adjust their leadership strategies accordingly.²⁹⁷ Such strategies promote trust throughout the agency and ultimately work to sanction the legitimacy of PAS involvement.²⁹⁸ In such environments, the delegation of final decisional authority might actually "encourage appointees and civil servants alike to develop more specialized expertise."²⁹⁹

While volumes could be written on dissecting appointee-careerist relations, two aspects of PAS officials' relationships with administrators are of note when considering agency

²⁹¹ Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L. J. 1002 (2017); Kenneth Lowande, *Politicization and Responsiveness in Executive Agencies*, 81 J. POL. 33 (2018).

²⁹² George A. Krause, *Organizational Complexity and Coordination Dilemmas in U.S. Executive Politics*, 39 PRES. STUD. Q. 74 (2009).

²⁹³ E.g., Elisabeth Magill & Adrian Vermuele, *Allocating Power within Agencies*, 120 YALE L.J. 1032 (2011); Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L. J. 157 (2014).

²⁹⁴ See generally Scott Limbocker, Mark D. Richardson & Jennifer L. Selin, *The Politicization Conversation: A Call to Better Define and Measure the Concept*, 52 PRES. STUD. Q. 10 (2022); Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 29 AM. J. POL. SCI. 721 (1985); Christopher Reenock, David M. Konisky & Matthew J. Uttermark, *Chain of Command vs. Who's in Command: Structure, Politics, and Regulatory Enforcement*, 50 Pol'y Stud. J. 797 (2022).

²⁹⁵ See Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349 (2019) (discussing the concept of reciprocal hierarchy).

²⁹⁶ Lewis, *supra* note 249.

²⁹⁷ E.g., Gary E. Hollibaugh, Jr., *How Effective are Political Appointees?*, OXFORD RSCH. ENCYCLOPEDIA OF POL. (2019); GOLDEN, *supra* note 263.

²⁹⁸ RESH, *supra* note 257.

²⁹⁹ Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 486–87 (2017).

adjudication. First, PAS officials often express frustration with the pace of their agencies' policy processes.³⁰⁰ This usually is a result of a lack of familiarity with agency culture, capacity, and structure (including decentralization).³⁰¹ Thus, there tends to be a "cycle of accommodation" that takes, on average, two to three years of learning on the part of both PAS officials and career administrators before the agency reaches peak performance.³⁰² However, close working relationships between PAS officials and the administrators they oversee can help speed up this process.³⁰³

PAS involvement in adjudication may help facilitate this process. Specifically, PAS-official participation can "help[] the agency head gain greater awareness of how a regulatory system is functioning."³⁰⁴ Such awareness not only helps the agency head "tailor[] training and instruction for the agency's adjudicators" but also helps him or her "consider whether adjustments to the regulatory scheme are necessary." PAS participation in adjudication might also raise awareness of case processing challenges that require political solutions such as additional funding or legislative reforms. This awareness is "even more critical with respect to agencies that have substantial enforcement or similar regulatory responsibilities."³⁰⁵

Second, these relationships can become stifled depending on the President and Senate's understanding of why a particular official was appointed to an agency.³⁰⁶ For example, when PAS officials assume office with widespread agreement and continued support of an agency's mission, their leadership tends to be more effective.³⁰⁷ When policy questions arise, PAS officials might have a comparative advantage over non-PAS officials given that "greater access to experts and staff that provide inputs and partake in the deliberative process that lead to better informed decisions than adjudicatory officers."³⁰⁸

However, when tensions arise because the views of political leadership diverge from existing agency practices, PAS involvement not only can hurt agency performance, but also lead

³⁰⁰ Carolyn Ban & Patrician W. Ingraham, *Political Appointee Mobility and Its Impact on Political-Career Relations in the Reagan Administration*, 22 ADMIN. & SOC'Y 106 (1990).

³⁰¹ Martin Laffin, *The President and the Subcontractors: The Role of Top Level Policy Entrepreneurs in the Bush Administration*, 26 PRES. STUD. Q. 550 (1996).

³⁰² James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57 (1987).

³⁰³ Judith E. Michaels, *A View from the Top: Reflections of the Bush Presidential Appointees*, 55 PUB. ADMIN. REV. 273 (1995).

³⁰⁴ Weaver, *Appellate Review*, *supra* note 44, at 289.

³⁰⁵ Walker & Wasserman, *supra* note 165, at 177.

³⁰⁶ Karen M. Hult & Robert Maranto, *Does Where You Stand Depend on Where You Sit? Careerists' Attitudes toward Political Appointees under Reagan*, 31 AM. REV. POL. 91 (2010).

³⁰⁷ Hyunjung Kim, Haeil Jung & Sun Young Kim, *Does Politicization Influence Senior Public Officials' Work Attitudes? Different Forms and Effects of Politicization in the Civil Service*, 24 PUB. MGMT. REV. 1100 (2022); Robert Maranto, *Still Clashing after All These Years: Ideological Conflict in the Reagan Executive*, 37 AM. J. POL. SCI. 681 (1993).

³⁰⁸ Walker & Wasserman, *supra* note 165, at 175.

to turnover among the career administrators who are regularly engaged in an agency's adjudicative processes.³⁰⁹

Considering these two points together along with existing research on the relationship between PAS officials and career administrators, it is clear that effective PAS involvement in agency adjudication requires appointees who have the capacity for and adopt strategies to anticipate, understand, and constructively engage adjudicators within their agencies.³¹⁰ The most successful PAS officials exhibit developmental and supportive leadership, are willing to learn from and trust career adjudicators, and seek counsel regarding best practices in agency adjudication.³¹¹ Such cooperative leadership not only can promote consistency, accountability, and efficiency in agency adjudication, but can also promote internal checks on waste, fraud, and abuse.³¹²

5. Range of Duties Assigned to PAS Officials

There is substantial variation in the range of functions assigned to PAS officials with adjudicative authority and in the size and complexity of the programs they administer.

At one end of the spectrum are officials assigned limited duties under a single program. Members of the Occupational Safety and Health Review Commission (OSHRC), for example, statutorily are responsible only for deciding contests of citations that the Occupational Safety and Health Administration issues to employers following workplace inspections.³¹³ OSHRC received a total of 1,881 new cases in fiscal year 2023, only a small percentage of which resulted in appeals of ALJ decisions to the members of the Commission.³¹⁴ Given a relatively small caseload and few competing demands on their time, such officials may have capacity to participate personally in the adjudication of cases, at least in an appellate role.

At the other end of the spectrum are officials—in particular the heads of executive departments—who are responsible for a much broader range of duties under multiple programs. Consider the assignment of veterans disability compensation (one of the highest-volume

³⁰⁹ E.g., Susannah Bruns Ali, *Does Political Turbulence Encourage Fight or Flight for Federal Employees? Examining Political Environments and Turnover Intent*, 49 PUB. PERS. MGMT. 262 (2020); Ban & Ingraham, *supra* note 300; Alexander Bolton, John de Figueredo & David E. Lewis, *Elections, Ideology, and Turnover in the U.S. Federal Government*, 31 J. PUB. ADMIN. RSCH. & THEORY 451 (2021); Kathleen M. Doherty, David E Lewis & Scott Limbocker, *Presidential Control and Turnover in Regulatory Personnel*, 51 ADMIN. & SOC'Y 1606 (2019); Kathleen M. Doherty, David E Lewis & Scott Limbocker, *Executive Control and Turnover in the Senior Executive Service*, 29 J. PUB. ADMIN. RSCH. & THEORY 159 (2019); Mark D. Richardson, *Politicization and Expertise: Exit, Effort, and Investment*, 81 J. POL. 878 (2019).

³¹⁰ See Robert F. Durant, *Beyond Fear or Favor: Appointee-Careerist Relations in the Post-Reagan Era*, 50 PUB. ADMIN. REV. 319 (1990).

³¹¹ See generally Michaels, *supra* note 303; Sung Min Park & Hal G. Rainey, *Leadership and Public Service Motivation in U.S. Federal Agencies*, 11 INT'L PUB. MGMT. J. 109 (2008).

³¹² See Hongseok Lee, *The Implications of Organizational Structure, Political Control, and Internal System Responsiveness on Whistleblowing Behavior*, 40 REV. PUB. PERS. ADMIN. 155 (2020).

³¹³ 29 U.S.C. § 659.

³¹⁴ U.S. OCCUPATIONAL SAFETY & HEALTH REV. COMM'N, FY 2023 PERFORMANCE AND ACCOUNTABILITY REPORT 3–10 (2023).

adjudication programs) to the Secretary of Veterans Affairs. In addition to supervising all aspects of the program, including the annual adjudication of millions of claims and payment of billions of dollars to millions of beneficiaries, the Secretary is responsible for managing pension and other benefits programs; administering education, insurance, and vocational rehabilitation programs; managing more than 150 national cemeteries; and providing health care to more than nine million veterans at more than 1,000 facilities nationwide. It would be impossible for the Secretary to attend personally to any but a small fraction of veterans disability compensation cases. Adjudication of individual cases—even in a limited, appellate capacity—may not be an effective use of the Secretary’s time given other assigned duties.

The Attorney General’s Committee on Administrative Procedure emphasized that the limited capacity of PAS officials to individually decide large numbers of cases in a timely manner:

In single headed departments and agencies, like the Post Office and the Departments of Commerce and Agriculture, the Committee recommends that all pretense of consideration of each case by the agency head be abandoned and that there be created either boards of review, as in immigration procedure, or chief deciding officers who shall exercise the final power of decision. But if the agency head in these departments does review a case, he must assume the burden of personal decision. It is obviously impossible for the Postmaster General to give personal consideration to every case of use of the mails to defraud, for the Secretary of Commerce to pass on the suspension or revocation of seamen’s licenses, or for the Secretary of Agriculture to adjudicate all the cases arising under the many statutes administered by his Department. In such instances the cases should be heard and initially decided by the hearing commissioners and reviewed if necessary by designated officials who are charged with that responsibility and who will perform it personally.³¹⁵

Given competing demands on their time, many agency heads realistically would need to delegate many tasks associated with decision making and engage personally “in a very limited review process.”³¹⁶ Otherwise, the adjudication of individual cases could quickly occupy much of agency heads’ busy schedules.³¹⁷

The competing demands on the limited capacity of PAS officials makes delegation an essential characteristic of public administration. Policymakers must determine which duties warrant personal attention by a limited number of PAS officials and which duties lower-level officials can perform effectively. As the Attorney General’s Committee on Administrative Procedure explained in its 1941 final report:

³¹⁵ FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 177, at 53.

³¹⁶ Weaver, *Appellate Review*, *supra* note 44, at 290–92.

³¹⁷ The *Morgan* cases offer perhaps the best historical example of this reality. See *United States v. Morgan*, 313 U.S. 409 (1941); *United States v. Morgan*, 307 U.S. 183 (1939); *Morgan v. United States*, 304 U.S. 1 (1938); *Morgan v. United States*, 298 U.S. 468 (1936).

[I]t becomes obvious at once that the major work of the heads of an agency is normally supervision and direction. They cannot themselves be specialists in all phases of the work, but specialists must be immediately available to them. They cannot themselves receive material which must be filed and analyze [sic] it. They cannot, and they should not, conduct investigations, determine in every instance whether or not action is required, hear controversies, and at the same time make all decisions. Administrative procedures must be founded upon the reality that many persons in the agency other than the heads must do the bulk of this work. When agency heads permit themselves to be overwhelmed by detail, they rob themselves of time essential for their most important tasks.³¹⁸

In designing a program, policymakers must determine whether it is an effective use of a PAS official's limited time to participate in some capacity in the adjudication of individual cases under the program, or whether the PAS official can more effectively direct and supervise the program in other ways.

Aside from whether a PAS official has capacity to participate in the adjudication of individual cases in light of other functions assigned to him or her, policymakers must also consider whether certain functions should be combined or separated in a single individual. For programs in which adjudication is an important component of policy development, for example, the combination of generalized policymaking and case-by-case adjudication in a single official may be valuable. As Christopher J. Walker and Melissa Feeney Wasserman have written:

There are several reasons why the traditional administrative model vests final decision-making authority with the agency head. Perhaps most saliently, it ensures agency heads control the regulatory structure they supervise. Agency heads—who can comprise a single director, secretary, or administrator; or a commission, board, or body with five to seven members—oversee the agency's activities and set the agency's policy preferences. It is widely accepted that agency heads have a comparative advantage in policy expertise relative to agency adjudicators. Generally, agency leadership has greater access to experts and staff that provide inputs and partake in the deliberative process that lead to better informed decisions than adjudicatory officers. Moreover, in contrast to agency heads, adjudicatory officers often have significant caseloads that rob them of the time necessary to think deeply about policy matters. Because adjudication is a primary policy-making vehicle for federal agencies, granting agency-head review authority over adjudication helps to ensure agency-head control over policy development.³¹⁹

³¹⁸ FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 177, at 20–21.

³¹⁹ Walker & Wasserman, *supra* note 165, at 167 (internal citations omitted).

On the other hand, providing a PAS official free rein to implement policy preferences through generally applicable rules or through case-by-case adjudication might disincentivize the official from using rulemaking to make policy.³²⁰

The combination of traditionally adversarial functions, namely investigation and prosecution, with adjudicative functions may raise policy concerns,³²¹ even if it does not violate constitutional due process.³²² There may be concerns about assigning cases to PAS officials who interface regularly with Congress and the public and face external pressures to improve timeliness, improve decisional quality, reduce costs, or ensure program—all worthy objectives that might lead a decision maker to consider factors beyond the relevant law and facts of a specific case.³²³ There may also be concerns about combining functions under multiple programs in a single officials. A PAS official who serves as investigator and prosecutor under one program may not be perceived as an impartial adjudicator under another, even when he or she plays no adversarial role in that program.³²⁴

Congress and agencies have devised different methods for separating adjudicative from other functions. For example:

- (1) In many programs, the separation of adversarial functions (e.g., investigation, prosecution) from adjudicative functions is achieved “through internal barriers within the agency which separate and insulate those employees who judge from those who investigate and prosecute.” The most notable example is the APA’s formal-adjudication process, which restricts interactions between ALJs and adversarial personnel. “The chains of command, however, come together at the top in the person of the head or heads of the agency, who, through subordinates, are responsible for all three functions.”³²⁵ Still, the APA insulates ALJs from agency heads’ influence, granting them qualified decisional independence.³²⁶ And although PAS officials are generally free to reverse ALJs’ decisions on appeal or on their own motion, they must

³²⁰ Eisenberg & Mendelson, *supra* note 120, at 6, 71.

³²¹ FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 177, at 55–60; *see also* Asimow, *supra* note 48, at 251–56; Eisenberg & Mendelson, *supra* note 120, at 66–67.

³²² *See* *Withrow v. Larkin*, 421 U.S. 35 (1975); *see also* Asimow, *supra* note 48, at 258–60. *But see* Vollmer, *supra* note 149.

³²³ *See* Eisenberg & Mendelson, *supra* note 120, at 26–27.

³²⁴ Writing about immigration removal adjudication, one commentator wrote in 1981 that “The Attorney General’s ability to review Board [of Immigration Appeals] decisions inappropriate injects a law enforcement official into a quasi-judicial appellate process.” Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644, 650 (1981). At the time, the Attorney General also oversaw the Immigration and Naturalization Service, which enforced the immigration laws. Nevertheless, similar arguments have been made since 2003, when the Service’s functions were transferred to new agencies under the supervision of the Secretary of Homeland Security. SARAH PIERCE, MIGRATION POLICY INSTITUTE, OBSCURE BUT POWERFUL: SHAPING U.S. IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW 10 (2021), https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review_final.pdf (“The attorney general’s referral and review power is unique compared to agency head review in other departments in that it rests in the hands of the nation’s chief law enforcement officer.”).

³²⁵ Recommendation 86-4, *supra* note 40.

³²⁶ Weaver, *Appellate Review*, *supra* note 44, at 252.

- provide reasons for doing so, and the ALJ's initial or recommended decision remains part of the whole record for judicial review.³²⁷
- (2) The NLRB offers a historically unique example. Adjudication is assigned to the Board (made up of five PAS officials), while adversarial functions are assigned to a separate PAS official (the General Counsel) who is located within the agency but statutorily independent of the Board.³²⁸
 - (3) The split-enforcement model offers a strong form of separation. The Mine Safety and Health Act, for example, authorizes the Secretary of Labor to adopt policies regulating mine safety and health, inspect workplaces for compliance with the Act and policies adopted under it, and issue citations to employers who violate the law. If an employer contests a citation, a separate agency—the Federal Mine Safety and Health Review Commission, made up of five PAS officials—hears and decides the matter.³²⁹ Similar models exist for adjudicating occupational safety and health³³⁰ and airmen certification matters.³³¹ Similarly, certain federal employment-related actions may be appealed to a separate agency, MSPB, headed by PAS officials.³³² Actions to remove noncitizens from the United States are prosecuted by employees of one agency (DHS) in a tribunal administered by another (the Department of Justice (DOJ)).³³³ And many IRS and VA decisions are subject to review by Tax Court and CAVC judges, respectively.³³⁴
 - (4) In some programs, the wholesale delegation of the adjudicative function to lower-level officials might serve to separate conflicting functions. In part to separate adversarial from adjudicative functions, for example, the Environmental Protection Agency (EPA) Administrator in 1992 delegated nearly all final decisional authority to the Environmental Appeals Board (EAB), then composed of three career senior executives.³³⁵

6. *PAS Officials' Positions in Bureaucratic Hierarchies*

Given the transaction costs inherent in and the internal coordination required for consistency in an agency's adjudicative system, agencies have experimented with different ways of using PAS officials to limit variance in adjudication decisions, including thinking carefully about the layers of hierarchy within an agency and the workflow processes that allocate

³²⁷ See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); see also Eisenberg & Mendelson, *supra* note 120, at 29; Nielson et al., *supra* note 178 (manuscript at 15–16).

³²⁸ Asimow, *supra* note 48, at 241–42; see also Gifford, *supra* note 29, at 965, 985–87; see also LANDIS, *supra* note 258, at 4, 59–64.

³²⁹ Recommendation 86-4, *supra* note 40.

³³⁰ *Id.*

³³¹ Recommendation 91-8, *supra* note 84; Recommendation 90-1, *supra* note 84.

³³² 5 U.S.C. § 7513(d).

³³³ See Recommendation 2012-3, *supra* note 79.

³³⁴ 26 U.S.C. § 7442; 38 U.S.C. § 7252.

³³⁵ 57 Fed. Reg. 5320, 5322 (Feb. 13, 1992).

decisional authority across that hierarchy.³³⁶ “The most important reason for allowing agency heads to retain their review authority,” Weaver observed, “is to permit them to control regulatory schemes under their supervision.”³³⁷

Because it is impossible to design a “neutral hierarchy,” or an agency hierarchy that does not affect decision-making,³³⁸ PAS officials’ positions in their agencies’ hierarchies affect administrative adjudication. Adjudication most often is organized like a pyramid. In many programs, all cases are processed at an initial stage, and some cases are appealed or selected for review at subsequent stages. Fewer and fewer cases are processed at each subsequent stage. Decision makers at the final stage of administrative appeal or review have a vantage point to correct errors made at previous stages and identify systemic quality issues.

This sort of system, where those at the top of the hierarchy delegate authority to those subordinate to them, while at the same time holding those subordinate officials responsible for their decisions through review, is one of the most commonly known and long-standing mechanisms of accountability.³³⁹ Hierarchical controls can enhance program responsiveness to democratically elected officials and can promote consistency in decision making within an agency.³⁴⁰ With respect to adjudication, PAS officials’ review authority can play an important role ensuring uniformity, consistency, effective supervision, and decisional quality in adjudication.³⁴¹

Of course, a PAS official’s ability to promote interdecisional consistency by exercising review authority likely depends on his or her ability to personally consider a sufficient proportion of cases. Rebecca Eisenberg and Nina Mendelson have questioned how well PAS officials can play this role in practice.³⁴² Layers of hierarchy (and, as a result, layers of decision-makers) can dilute accountability.³⁴³ Increasing the number of actors involved in moving a case from initial to final decision raises the costs of adjudication, can slow agency processes, and can make it difficult to communicate goals and expectations across the agency.³⁴⁴

³³⁶ See generally Cox & Rodríguez, *supra* note 272; Emmanuelle Mathieu, Koen Verhoest & Joery Matthys, *Measuring Multi-Level Regulatory Governance: Organizational Proliferation, Coordination, and Concentration of Influence*, 11 REGUL. & GOVERNANCE 252 (2016); Selin et al., *supra* note 272.

³³⁷ Weaver, *Appellate Review*, *supra* note 44, at 288–89.

³³⁸ Thomas H. Hammond & Paul A. Thomas, *The Impossibility of a Neutral Hierarchy*, 5 J. L. ECON. & ORG. 155 (1989).

³³⁹ Mark D. Jarvis, *Hierarchical Accountability*, in THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY (Mark Bovens, Robert E. Goodin & Thomas Schillemans, eds., 2014).

³⁴⁰ See generally Melvin J. Dubnik & H. George Frederickson, *Accountable Agents: Federal Performance Measurement and Third-Party Government*, 20 J. PUB. ADMIN. RSCH. & THEORY 1143 (2010); Luther Gulick, *Notes on the Theory of Organization with Special Reference to Government in the United States*, in PAPERS ON THE SCIENCE OF ADMINISTRATION (Luther Gulick et al. eds. 1937); Herbert A. Simon, *Decision-Making and Administrative Organization*, 4 PUB. ADMIN. REV. 16 (1944).

³⁴¹ FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 177, at 51; Walker & Wasserman, *supra* note 165, at 176–77.

³⁴² Eisenberg & Mendelson, *supra* note 120, at 5–6.

³⁴³ See Krause, *supra* note 292.

³⁴⁴ See generally PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY (1995)

At the same time, adjudication may involve “interpretations of statutory and regulatory provisions, and these interpretations can contain policy choices that result in the creation of new policies and rules.”³⁴⁵ Programs vary in the extent to which non-PAS adjudicators must confront such important or novel questions of law or policy in the course of adjudicating individual cases. In agencies or programs that require PAS officials to make politically sensitive or thorny decisions, “[t]he political appointee has more clout in the regulatory structure, which makes it easier for him to take difficult positions.”³⁴⁶ Programs differ, of course, in the extent to which individual cases are politically sensitive.

7. Resource Constraints

Perhaps most tangibly, agencies adjudicate in a resource-constrained environment. PAS participation in adjudication necessarily requires resources to be directed towards that participation, and away from other aspects of the agencies’ task environments.

Notably, PAS officials typically are compensated under the Executive Schedule, which generally exceeds the pay rates for employees under the General Schedule, ALJs, and many other career adjudicators.³⁴⁷ Policymakers must consider the potential added financial costs associated with the participation of PAS officials in determining whether, when, and how they should participate directly in the adjudication of individual cases.

Financial resource considerations are only part of the equation. Agencies also face real time constraints as they work to adjudicate. Considerations of PAS officials’ participation must be sensitive to this reality. For example, regardless of whether PAS officials’ participation is direct or indirect, when appointments are delayed or positions remain vacant, agencies must shuffle responsibilities among their current staff to fill the gaps. Once a PAS official onboard, it takes time to become familiar with agency processes and build rapport with administrators. Inefficiencies and uncertainties arising from these things can trickle down an agency’s hierarchy and affect adjudication in unexpected ways.

Additionally, because PAS officials balance a variety of tasks, including the need to build relationships with the president, Congress, and other political officials, PAS officials must make consequential decisions regarding which tasks to prioritize and when. These decisions are variable over time, depending upon the agency’s current policy environment. The practical reality of political leadership is that, at times, PAS officials will have to deprioritize adjudication in favor of another policy or managerial task.

8. Comparison with Other Participation Mechanisms

In addition to considering the potential advantages and disadvantages of PAS officials’ participation in a specific program, policymakers also must consider whether alternatives to

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ See *Salaries & Wages*, U.S. OFF. OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/> (last visited June 9, 2024).

participation are more likely to achieve policy objectives and less likely to raise the concerns described in the previous subsections. In particular, and ironically given their constitutional justification as essential to democratic accountability, the participation of PAS officials in adjudication may limit public participation, particularly in review procedures.

For example, PAS review is especially meaningful because the official may not be bound by the findings of the lower-level adjudicator. At the same time, the agency head often has limited practical capacity to personally consider the law and facts of the case and so typically conducts his or her review “on the record,” perhaps with an opportunity to submit additional arguments but rarely an opportunity for oral presentation. Reflecting this practical reality, Russell Weaver observes that the “major problem with agency review is that the agency head’s review is often the most meaningful part of the adjudicative process, but litigants often have little opportunity to participate.”³⁴⁸

In particular, there is a consensus that public participation is valuable when agencies develop policy. As ACUS has stated in the context of rulemaking: “By providing opportunities for public input and dialogue, agencies can obtain more comprehensive information, enhance the legitimacy and accountability of their decisions, and increase public support for their rules.”³⁴⁹ Opportunities for public participation may be absent or less robust when agencies develop policies through adjudication. Even when opportunities for public participation do exist (e.g., amicus briefing), individual adjudications may lack the visibility of notice-and-comment rulemakings and thus may not attract the same degree of public engagement. Of course, the same is true even when non-PAS adjudicators are required to answer novel or important questions of law or policy in the course of adjudicating a case.³⁵⁰

Alternatives include the adoption of substantive and procedural rules, the issuance of administrative manuals and staff instructions, managerial controls, and quality assurance systems.³⁵¹ There is a longstanding, widely held consensus that generalized rulemaking is a more effective mechanism for policymaking than particularized adjudication.³⁵² Separating a program’s chief policymaker from its adjudicative apparatus and requiring him or her to “communicate policies to an independent adjudicating body in advance” by regulation may lead the policymaker to “draft those policies with precision and coherence.”³⁵³ Conversely, combining policymaking and adjudication in a single official might incentivize the policymaker to rely on adjudication to develop policy and disincentivize the use of notice-and-comment rulemaking.³⁵⁴

³⁴⁸ Weaver, *Appellate Review*, *supra* note 44, at 290–92.

³⁴⁹ Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).

³⁵⁰ Weaver, *Appellate Review*, *supra* note 44, at 296.

³⁵¹ See *supra* Part II.A.12.

³⁵² See Recommendation 91-5, *supra* note 267; M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1396–97 (2004); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 87 HARV. L. REV. 921, 922 (1965). *But see* Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 498–99 (2021).

³⁵³ Gifford, *supra* note 29, at 984–85.

³⁵⁴ Weaver, *Appellate Review*, *supra* note 44, at 294–96.

By way of example, the potential advantages of PAS-official participation may outweigh the potential disadvantages in a program in which only a small number of cases require resolution through trial-like proceedings and cases regularly require the agency to resolve novel or important questions of law, policy, or discretion. Alternative mechanisms may not be as effective at coordinating or ensuring political accountability over regulatory policymaking.³⁵⁵

Conversely, the potential disadvantages of PAS-official participation may outweigh potential advantages in a program in which a high volume of cases mostly require individualized factfinding and rarely raise novel or important questions of law, policy, or discretion. No doubt, there is a great deal of interstitial policy interpretation and policy implementation even in such systems—whether or not termed “policymaking”³⁵⁶—but there may be more efficient and effective mechanisms that a busy PAS official, charged with other tasks, can use to coordinate policy development, promote decisional accuracy and interdecisional consistency, and gain systemic awareness.³⁵⁷

B. Structural and Procedural Considerations

1. Choosing the PAS Official(s) to Participate

Deciding that direct participation by a PAS official(s) is warranted in a particular program does not determine *which* PAS official(s) should be assigned that function. As discussed earlier, Congress typically assigns overall administration for a program (including adjudication) to a single PAS official or a collegial body made up multiple PAS officials. In such programs, the PAS official(s) may (1) retain authority to participate directly in the adjudication of cases, (2) delegate that function to another PAS official(s) under his or her supervision, or (3) transfer the function to a PAS official(s) elsewhere in the executive branch.

The first approach is common. In establishing a system of discretionary review of ARB decisions by a PAS official, for example, then-Secretary of Labor Eugene Scalia assigned that function to the Secretary rather than the Senate-confirmed heads of relevant DOL subunits, such as the Administrator of the Wage and Hour Division. Since its inception, the ARB has reported directly to the Secretary and Deputy Secretary, rather than the heads of subunits, in order to internally separate adjudicative from enforcement functions.³⁵⁸

The second approach is common among executive departments. The Secretary of Transportation, for example, has delegated authority to adjudicate matters under several programs to, among others, the Federal Aviation Administrator,³⁵⁹ the Federal Motor Carrier

³⁵⁵ Eisenberg & Mendelson, *supra* note 120, at 28–29; Gifford, *supra* note 29, at 992–93.

³⁵⁶ See generally Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 25 J. NAT’L ASS’N ADMIN. L. JUDGES 49 (2005).

³⁵⁷ Eisenberg & Mendelson, *supra* note 120, at 27–28; Gifford, *supra* note 29, at 967–68.

³⁵⁸ See Appendix Q.

³⁵⁹ 49 C.F.R. § 1.83(a)(8).

Safety Administrator,³⁶⁰ Pipeline and Hazardous Materials Safety Administrator,³⁶¹ and the Senate-confirmed heads of other DOT operating units. And the Attorney General has delegated authority to adjudicate matters relating to controlled pharmaceuticals to the Administrator of the Drug Enforcement Administration.³⁶² In such programs, delegations likely represent an effort to optimize, among other values, capacity and expertise.

The third approach can be accomplished through formal delegations, memoranda of understanding, and other documents transferring authority from one executive-branch agency to another or delineating the jurisdiction of different agencies. Bijal Shah discusses one example involving transfers of authority between the Secretary of the Treasury, Customs and Border Patrol, and the Food and Drug Administration. Such intra-branch transfers of authority likely represent efforts to optimize expertise and capacity.³⁶³

Multimember bodies often have statutory authority to delegate adjudicative authority to a single member or a division or panel of members. This is particularly common among Article I tribunals, such as the Tax Court and CAVC. Some administrative agencies, including the NLRB³⁶⁴ and historically the Interstate Commerce Commission,³⁶⁵ also rely on delegates to single members or divisions or panels of members. In such programs, delegations likely represent an effort to optimize capacity.

Finally, in some programs, Congress has specifically chosen an alternative PAS official(s) to adjudicate matters. Examples include occupational safety and health matters, mine safety and health matters, airmen certification matters, immigration removal, federal employee adverse actions, federal employment discrimination, tax deficiency cases, veterans disability compensation. In such cases, Congress typically assigns adjudication to a multimember body independent of the PAS official(s) with primary administrative authority for the program. Members are often protected from at-will removal by the President, and they may serve relatively long, fixed terms.³⁶⁶ They may also be subject to statutory limitations on the types of persons who can serve in such positions, including expertise and party balancing requirements.³⁶⁷ These bodies may also be exempted from presidential control over budgeting and other congressional relationships.³⁶⁸

Such structures can serve any of several objectives. Most obviously, they are often intended to separate adjudication from other executive-branch functions (e.g., policymaking, investigation, prosecution) and firmly shield decision making from control by the President, political appointees, and other executive-branch actors.³⁶⁹ Additionally, their creation may

³⁶⁰ *Id.* § 1.87(a)(8)–(9).

³⁶¹ *Id.* § 1.97(a)(3), (5).

³⁶² *See* Appendix F.

³⁶³ Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 842–46 (2015).

³⁶⁴ Walker & Wiener, *supra* note 37, app. K at 5–6.

³⁶⁵ *See infra* note 391.

³⁶⁶ SELIN & LEWIS, *supra* note 33, at 97.

³⁶⁷ *See id.* at 92.

³⁶⁸ *See id.* at 104.

³⁶⁹ *See* Recommendation 86-4, *supra* note 40.

“help[] mitigate concerns with the delegation of . . . adjudicatory authority to executive officials who may be tempted to use this authority for partisan benefit.”³⁷⁰ Moreover, the establishment of such bodies may optimize capacity by creating an adjudicative authority that “can focus on a narrow task of national importance and not have to compete with other sub-department agencies for attention, budgets, or personnel.”³⁷¹ Finally, the combination of long fixed terms and relative job security may incentivize individual members to develop expertise.³⁷²

2. Preliminary Decision, Hearing, First-Level Review, or Second-Level Review

Systems of administrative adjudication often entail multiple stages.³⁷³ A typical structure in which there is a legally required opportunity for an evidentiary hearing contains at least three stages: (1) a preliminary³⁷⁴ decision reached through bureaucratic methods; (2) an initial, tentative, or recommended decision made after a trial-like hearing; and (3) an opportunity for final administrative review.³⁷⁵ A typical structure in which no evidentiary hearing is required may consist of an informal decision-making process, resulting in an initial, proposed, or preliminary decision, followed by an opportunity for reconsideration or final administrative review.³⁷⁶ Such structures allow matters to be concluded as efficiently as possible, reserving the added time and cost of additional procedures and more senior adjudicators only for matters that cannot be resolved satisfactorily at earlier stages.³⁷⁷

PAS officials could participate at any or all stages of an adjudicative process, but there often would be little value in their doing so. But given PAS officials’ limited capacity, policymakers must consider the stages of an overall adjudicative process at which participation by a PAS official is likely to be most valuable.

a. Preliminary Decision

The Attorney General’s Committee recommended that agency heads (typically PAS officials) delegate their authority to (1) dispose of routine matters, (2) dispose of matters

³⁷⁰ SELIN & LEWIS, *supra* note 33, at 53.

³⁷¹ *Id.*

³⁷² See *Humphrey’s Executor v. United States*, 295 U.S. 602, 624 (1935).

³⁷³ See generally Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377 (2021); Christopher J. Walker, *Stages of Agency Adjudication Processes*, in A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 30, at 125–57.

³⁷⁴ A note on terminology: The Attorney General’s Committee on Administrative Procedure used “informal” to mean the first stage of adjudication at which agency personnel decide matters through essentially bureaucratic methods like examinations and investigations. It reserved the term “formal” for a subsequent stage involving a hearing and any opportunity for final review by the agency head. See Bremer, *supra* note 373, at 404. Because “informal” has come to mean any adjudication not subject to the APA’s hearing provisions, we use the term “preliminary,” also used by the Committee, to refer to the adjudication of matters through bureaucratic methods, whether or not there exists a subsequent opportunity for an evidentiary or other quasi-judicial hearing.

³⁷⁵ See 5 U.S.C. §§ 554, 556–557; Recommendation 2016-4, *supra* note 6.

³⁷⁶ See Recommendation 2023-5, *supra* note 6.

³⁷⁷ Jeremy S. Graboyes & Jennifer L. Selin, *Improving Timeliness in Agency Adjudication* 13 (Dec. 11, 2023) (report to the Admin. Conf. of the U.S.).

informally, and (3) initiate formal proceedings. Although it recognized there may be good reasons for agency heads to retain some role in the informal disposition of matters and the initiation of formal proceedings,³⁷⁸ the Committee recommended:

Cases of difficulty or novelty should continue to have the attention of the agency heads. But where the matter falls into an established pattern, and where the agency's policies have become crystallized so that little question arises concerning whether a complaint should or should not be issued, the agency heads should be relieved of the duty of making the decision to proceed or not to proceed in each case.

Rather than participating in the adjudication of all cases, the Committee believed that, in most cases, agency heads could effectively supervise and direct the activities of lower-level officials through guidance, careful selection of personnel, monitoring, and in rare cases, "consideration by the agency heads of cases for which no such policies have been crystallized or in which application of the policies is difficult."³⁷⁹

The Committee's recommendations, and the APA which incorporated them, have informed administrative practice over the past eight decades. There are, of course, many programs in which PAS officials participate in the informal disposition of matters or the initiation of formal proceedings. At several independent regulatory agencies, for example, PAS officials routinely participate in approving settlement agreements and "greenlighting" formal proceedings.³⁸⁰

b. Hearing

The Committee focused much of its attention on the proper role of agency heads in cases that require resort to formal proceedings. The Committee observed (correctly) that most cases can be concluded informally, and that formality was required only in two limited circumstances: first, when a case is of "such far-reaching importance to so many interests that sound and wise government is thought to require that proceedings be conducted publicly and formally so that the information on which action is to be based may be tested, answered if necessary, and recorded"; and second, when the differences between the parties' interests "have proved sufficiently irreconcilable to require settlement through formal public proceedings in which the parties have an opportunity to present their own and attack the others' evidence and arguments before an official body with authority to decide the controversy."³⁸¹

Although PAS officials might play a valuable role in either circumstance, the Committee acknowledged that, though comparatively few in number, formal proceedings might still

³⁷⁸ See Asimow, *supra* note 48.

³⁷⁹ FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 177, at 22-24.

³⁸⁰ See Asimow, *supra* note 48.

³⁸¹ FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 177, at 43.

consume a fair amount of agency heads' limited capacity. It observed: "In very few agencies can the heads of the agency sit, individually or together, to hear the testimony of witnesses in formal proceedings. The press of their many duties is too great."³⁸²

A better use of agency heads' limited capacity, the Committee believed, was "to supervise and direct and to hear protests of alleged error." In many cases, a decision by a lower-level official, bearing "a hallmark of fairness and capacity," would likely resolve the matter. And in the limited cases in which an initial decision did not resolve the matter, it would at least provide "the statement of it from which appeal may be taken to the heads."³⁸³ For this purpose, the Committee recommended importing into the administrative context the equity courts' practice of using special masters.³⁸⁴ This recommendation led Congress to create the ALJ system. As the legislative history to the APA notes, "the examiner system is made necessary because agencies themselves cannot hear cases."³⁸⁵

For formal adjudication, the APA contemplates that one or more PAS officials might preside at the reception of evidence. More often, agencies have delegated the hearing function to ALJs. A 1964 study of the Federal Trade Commission (FTC), for example, found that no Commissioner had presided over a hearing since 1956.³⁸⁶ The same is generally true for adjudications, not subject to the APA's formal hearing provisions, in which there is a legally required opportunity for an evidentiary hearing. Although some agencies have rules that permit PAS officials to preside over hearings,³⁸⁷ it is unclear how often they actually do so.

c. First-Level and Second-Level Review

Most commonly, PAS officials who participate in the adjudication of individual cases do so in a reviewing capacity. At some agencies, PAS officials provide the first and only opportunity for appellate review.³⁸⁸ This is particularly common among independent regulatory agencies³⁸⁹ but also exists in some programs administered by cabinet departments.³⁹⁰

Some multimember agencies have delegated decision-making authority in certain circumstances to individual members or panels of members, with the full agency "reviewing decisions only in cases of exceptional importance or upon petition." Historically, both the

³⁸² *Id.* at 24.

³⁸³ *Id.* at 43–44.

³⁸⁴ REPORT OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ON S. 7, A BILL TO IMPROVE THE ADMINISTRATION OF JUSTICE BY PRESCRIBING FAIR ADMINISTRATIVE PROCEDURE, H.R. REP. NO. 79-1980, at 38 (1946).

³⁸⁵ ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79TH CONG. 210 (1946).

³⁸⁶ Carl A. Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 466 (1964).

³⁸⁷ *See, e.g.*, 85 Fed. Reg. 63,166.

³⁸⁸ Walker & Wiener, *supra* note 37, at 7–9.

³⁸⁹ *Id.* at 8.

³⁹⁰ *See, e.g.*, Weaver, *Appellate Review*, *supra* note 44, at 265–69.

Interstate Commerce Commission and the Board of Tax Appeals followed this model.³⁹¹ The chief benefit of this model is that it affords members more time to give personal attention to cases brought before them. Some Article I courts follow a similar model today, including CAVC and the Tax Court (the successor to the Board of Tax Appeals). At CAVC, cases are ordinarily decided by a single judge. In exceptional circumstances, however, cases may be decided by a three-judge panel or the entire court sitting en banc.³⁹² Tax Court cases are ordinarily decided by a single judge, but the Chief Judge may determine whether the full court sitting en banc should review a case.³⁹³ Of course, both CAVC and the Tax Court have more members than the typical multimember agency; CAVC has seven members,³⁹⁴ and the Tax Court has 19.³⁹⁵

In some programs, PAS officials have delegated first-level review authority to an appellate board staffed by non-PAS officials (or, in some cases, a single non-PAS judicial officer), with PAS officials reviewing cases only in very limited circumstances. This model developed in the mid-twentieth century as agencies such as the Federal Power Commission, Federal Communications Commission (FCC), Interstate Commerce Commission, and NRC struggled to keep up with increasingly high caseloads.³⁹⁶ Delegating review of routine decisions to intermediate appellate boards allowed PAS officials “more time for cases raising significant policy questions.”³⁹⁷

In 1960, James Landis recommended that then-President-Elect John F. Kennedy address delays in agency adjudication at several multimember regulatory agencies through the adoption of reorganization plans that expressly permitted “delegation of the decision making powers to subordinate officials, such as hearing examiners or employee boards, subject only to a limited administrative review by the agency itself.”³⁹⁸

Eight years later, ACUS recommended that agencies that have “a substantial caseload of formal adjudications” consider establishing intermediate appellate boards and that Congress amend the APA to permit such delegations expressly. ACUS explained that doing so would “make more efficient use of the time and energies of agency members and their staffs,” “improve the quality of decision without sacrificing procedural fairness,” and “help eliminate delay in the administrative processes.”³⁹⁹

³⁹¹ FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 177, at 53; LANDIS, *supra* note 258, at 38–39.

³⁹² U.S. Ct. of Vet. App., CAVC Court Process, <https://www.uscourts.cavc.gov/documents/CourtProcess.pdf> (last visited June 9, 2024).

³⁹³ *See* 26 U.S.C. § 7444.

³⁹⁴ 38 U.S.C. § 7253.

³⁹⁵ 26 U.S.C. § 7443.

³⁹⁶ J. Parker Connor, *The Right to Review at the Agency Level—Recent Federal Legislative Changes*, 67 DICK. L. REV. 53 (1962); James O. Freedman, Report of the Committee on Agency Organization and Procedure in Support of Intermediate Appellate Boards: Subparagraph 1(a) of Recommendation No. 6 (1968) (report to the Admin. Conf. of the U.S.).

³⁹⁷ Gifford, *supra* note 29, at 990–91.

³⁹⁸ LANDIS, *supra* note 258, at 65–66.

³⁹⁹ Recommendation 68-6, *supra* note 11.

Although the model first took hold in the independent regulatory agencies, the shift in preference from particularized proceedings (usually adjudications) to generalized rulemaking as means for developing policy eventually reduced many independent regulatory agencies' caseloads. Several intermediate appellate boards were eliminated as a result, including the NRC's in 1991 and the FCC's in 1996.⁴⁰⁰ Intermediate appellate boards continue to exist in executive departments and single-headed agencies. Current examples include the Justice Department's Board of Immigration Appeals,⁴⁰¹ the Labor Department's ARB,⁴⁰² and USPTO's Trademark Trial and Appeal Board.⁴⁰³ Post-*Arthrex*, PTAB also functions as an intermediate appellate board.⁴⁰⁴

As a general principle, it may make sense for PAS officials to serve as first-level reviewers when caseloads are relatively low and cases regularly raise novel or important questions of law, policy, or discretion. As caseloads increase and the frequency of cases raising novel or important questions of law, policy, and discretion decrease, it may be a more efficient and effective use of a PAS official's limited time to serve as a second-level reviewer. (And as agencies receive increasingly high caseloads and cases only rarely raise novel or important questions of law, policy, or discretion, the utility of direct participation by the PAS official in adjudication becomes less clear.⁴⁰⁵)

3. Case Selection

This section examines the manner in which cases are selected for direct participation by a PAS official(s). We focus on six aspects of case selection: (1) the force and effect of decisions issued by lower-level adjudicators, (2) events triggering direct participation during a proceeding before a lower-level decision maker, (3) events triggering direct participation following issuance of a decision by a lower-level decision maker, (4) mandatory and discretionary participation by PAS officials, and (5) grounds for exercising discretion to participate directly in the adjudication of cases, and (6) direct participation as a prerequisite to judicial review.

a. Force and Effect of Decisions Issued by Lower-Level Adjudicators

In many programs, non-PAS adjudicators generally issue decisions that become final and binding unless the decision is appealed to or selected for further review by a PAS official. This practice is common among agencies surveyed for this study and was the approach recommended by the Attorney General's Committee on Administrative Procedure in 1941.⁴⁰⁶ As discussed earlier, ACUS in 1968 recommended that "every agency having a substantial caseload of formal adjudication" consider adopting "procedures for according administrative finality to presiding in

⁴⁰⁰ Weaver, *Appellate Review*, *supra* note 44, at 263–70.

⁴⁰¹ See Appendix K.

⁴⁰² See Appendix Q.

⁴⁰³ See Appendix T.

⁴⁰⁴ See Appendix P.

⁴⁰⁵ Gifford, *supra* note 29, at 992–99.

⁴⁰⁶ FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 177, at 50–51.

officers' decisions."⁴⁰⁷ The chief benefit of this approach is that, given competing demands on their time, PAS officials only participate in cases in which there is a legitimate dispute or an issue of exceptional importance. This "make[s] more efficient use of the time and energies of agency members" and "help[s] eliminate delay in the administrative process."⁴⁰⁸

There are several programs, however, in which non-PAS adjudicators generally issue recommended decisions, which trigger automatic review (often by one or more PAS officials). The decision becomes final and binding only after the reviewing authority takes some affirmative action. The chief benefit of this approach, depending on one's perspective, is that the reviewing authority exercises closer supervision of the adjudicative system and gains more comprehensive awareness of the system's functioning. In systems in which PAS officials serve as reviewers, the drawback, of course, is that each case requires the personal attention of PAS officials.

The APA's formal-adjudication provisions contemplate the issuance of recommended decisions, and some agencies surveyed for this study, including the ITC and DEA, continue to use this approach. An interesting case is the FTC, which recently transitioned from a decades-only rule, under which ALJs issue initial decisions, to a new rule under which ALJs issue recommended decisions requiring further action by the Commission.⁴⁰⁹ No public explanation was provided for the change.

Some programs strike a balance between the approaches, specifying limited circumstances in which a recommended decision should be issued⁴¹⁰ or giving PAS officials flexibility to direct non-PAS adjudicators to issue recommended decisions only in those cases in which the PAS officials wish to issue the final decision of the agency.⁴¹¹ Non-PAS adjudicators might also be given flexibility to issue recommended decisions when they believe participation by PAS officials is warranted.

***b. Events Triggering Direct Participation by a PAS Official(s)
During a Proceeding Before a Lower-Level Adjudicator***

In many programs, direct participation by a PAS official(s) takes place only after a lower-level adjudicator has issued a decision. In some programs, however, a rule provides for interlocutory review by the PAS official(s) while a proceeding is before a lower-level adjudicator. One benefit of a process for interlocutory review by a PAS official(s) is that it allows the official(s) to decide novel or important issues of law, policy, and discretion as soon as they arise. Interlocutory review may be an especially beneficial tool for coordinating policy development when an issue is present in multiple pending cases. One drawback is that

⁴⁰⁷ Recommendation 68-6, *supra* note 11. In 1962, the second temporary ACUS recommended that Congress amend the APA to "make clear than an agency, upon review of the presiding officer's decision, may confine its review to alleged errors in that decision" and require parties to clearly show prejudicial error requiring further review. SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. DOC. NO. 88-24, at 153-63 (1963); *see also* FINAL REPORT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 13-15 (1962).

⁴⁰⁸ *Id.*

⁴⁰⁹ 88 Fed. Reg. 42,872 (July 5, 2023).

⁴¹⁰ *See, e.g.*, 14 C.F.R. § 302.31 (DOT aviation proceedings); 15 C.F.R. § 766.17 (export controls).

⁴¹¹ *See, e.g.*, 17 C.F.R. § 201.360(a)(1) (SEC); 47 C.F.R. § 1.274 (FCC).

interlocutory review creates an additional workload for the PAS official(s), who may already have limited capacity to decide matters in a timely manner. Consideration of the issue by the PAS official(s) may also benefit from further argument or evidentiary development before the lower-level adjudicator.

There are examples of programs in which a party may petition the PAS official(s) directly to consider a matter at issue in a proceeding before a lower-level adjudicator. One example is the trademark registration program.⁴¹² (Interlocutory review apparently is not available in patent cases.⁴¹³)

In other programs, requests for interlocutory review are routed through the lower-level adjudicator. MSPB provides a representative example. A party must file a motion for certification of an interlocutory appeal with the lower-level adjudicator before whom the case is pending. The adjudicator determines whether to grant or deny the motion. The adjudicator may also certify an interlocutory appeal to the Board on his or her own motion. The adjudicator may only certify a ruling for review if the record shows that “[t]he ruling involves an important question of law or policy about which there is substantial ground for difference of opinion” and “[a]n immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public.”⁴¹⁴ This process—and indeed the quoted language—is consistent with ACUS Recommendation 71-1, *Interlocutory Appeal Procedures*.⁴¹⁵ It is also the approach adopted by the working group that revised ACUS’s *Model Adjudication Rules* in 2018⁴¹⁶ and used in the federal courts.⁴¹⁷

In some programs, interlocutory review may be available but “disfavored.” SEC rules, for example, provide that the Commission “ordinarily will grant a petition to review a hearing officer ruling prior to its consideration of an initial decision only in extraordinary circumstances.”⁴¹⁸

c. Events Triggering Direct Participation by a PAS Official Following Issuance of a Decision by a Lower-Level Adjudicator

Our survey revealed six events that may trigger direct participation by a PAS official (or collegial body of PAS officials) following issuance of a decision by a lower-level adjudicator: (1) issuance of a recommended decision by the lower-level adjudicator, (2) petition for review filed directly with the PAS official(s) by a party or other interested person, (3) petition for review filed with the lower-level adjudicator or adjudicative body by a party or other interested person, (4) certification to the PAS official(s) by the lower-level adjudicator or adjudicative body, (5)

⁴¹² 37 C.F.R. § 2.146(e).

⁴¹³ See *Revised Interim Director Review Process*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/patents/ptab/decisions/revised-interim-director-review-process> (last visited June 9, 2024).

⁴¹⁴ 5 C.F.R. §§ 1201.91, 1201.92.

⁴¹⁵ 38 Fed. Reg. 19787 (July 23, 1973).

⁴¹⁶ Admin. Conf. of the U.S., *Model Adjudication Rules* § 400 (2018).

⁴¹⁷ 28 U.S.C. § 1292.

⁴¹⁸ 17 C.F.R. § 201.400.

certification to the PAS official(s) by a high-level non-adjudicator, and (6) sua sponte review by the PAS official(s).

1. Issuance of a Recommended Decision. Issuance of a recommended decision by an adjudicator at the level immediately below a PAS official automatically triggers consideration by the PAS official. As discussed above, lower-level adjudicators issue recommended decisions as a matter of course in some programs. In other programs, PAS officials direct lower-level officials to issue recommended decisions in specific cases, or lower-level adjudicators may have discretion to issue recommended decisions in specific cases and certify the records in such cases to the PAS official for final action.⁴¹⁹

2. Petition for Review Filed Directly with the PAS Official(s) by a Party or Other Interested Person. A party or other interested person (e.g., an intervenor) dissatisfied with the decision of a lower-level adjudicator may petition the PAS official(s) directly to request further consideration. This is most common among agencies where PAS officials serve as first-level reviewers (e.g., FCC, MSPB, NLRB, SEC) and programs in which an Article I court serves as the second-level reviewer (e.g., CAVC, Tax Court). An example of a program in which a party or other interested person may petition a PAS official for second-level review is USPTO—for trademark cases and, after *Arthrex*, patent cases.

3. Petition for Review Filed with the Lower-Level Adjudicator or Adjudicative Body by a Party or Other Interested Person. A party or other interested person dissatisfied with the decision of a lower-level adjudicator may petition the adjudicator or adjudicative body, requesting that the case be referred to the PAS official for further consideration. In Davis-Bacon Act proceedings, for example, a party dissatisfied with a decision of the Labor Department's ARB may file a petition with the ARB requesting further review by the Secretary of Labor. The ARB considers the petition and refers the case to the Secretary for review if a majority of Board members determines further review is warranted.⁴²⁰

A petition filed under option two or three typically must contain exceptions to the lower-level decision and explain clearly why further review by the PAS official is warranted.⁴²¹

4. Certification to the PAS Official(s) by the Lower-Level Adjudicator or Adjudicative Body. A lower-level adjudicator or adjudicative body may certify a case to a PAS official for consideration. The Board of Immigration Appeals, for example, may refer to the Attorney General for review any case that the Chairman or a majority of the Board believes

⁴¹⁹ See *supra* Part IV.C.1.

⁴²⁰ 85 Fed. Reg. 13,186 (Mar. 6, 2020).

⁴²¹ See, e.g., 37 C.F.R. § 2.146(c)(1).

should be so referred.⁴²² And the EAB may refer any case or motion to the EPA Administrator whenever it, “in its discretion, deems it appropriate to do so.”^{423 424}

5. Certification to the PAS Official(s) by a High-Level Non-Adjudicator. In at least one program, a high-level official other than an adjudicator who is dissatisfied with the decision of a lower-level official may certify the case to a PAS official for consideration. Specifically, the Board of Immigration Appeals is directed to refer to the Attorney General all cases that “[t]he Secretary of Homeland Security, or specific officials of [DHS] designated by the Secretary with the concurrence of the Attorney General, refers to the Attorney General for review.”⁴²⁵

6. Sua Sponte Review by the PAS Official(s). Following issuance of decision by a lower-level official, a PAS official may on his or her own motion select a case for further consideration. The APA contemplates that agency heads might review lower-level decisions on their own motion,⁴²⁶ and the Attorney General’s Committee on Administrative Procedure anticipated that the availability of own-motion review would help “preserve uniformity and effective supervision of an agency’s work.”⁴²⁷ In Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, ACUS stated: “Normally, a reviewing authority should call up a case for review sua sponte only where policy issues are involved and the functions of that authority include resolution of such issues.”⁴²⁸ More recently, in Recommendation 2020-3, *Agency Appellate Systems*, ACUS encourages agencies to “consider implementing procedures for sua sponte appellate review of non-appealed hearing-level decisions.”⁴²⁹

Programs in which a PAS official retains explicit authority to review the decisions of lower-level adjudicators on his or her own motion include Davis-Bacon Act enforcement,⁴³⁰ federal employee adverse actions,⁴³¹ immigration removal,⁴³² immigration-related employment discrimination,⁴³³ patentability,⁴³⁴ securities fraud enforcement,⁴³⁵ and matters within the

⁴²² 8 C.F.R. § 1003.1.

⁴²³ 40 C.F.R. § 22.4(a)(1). A similar rule exists at USPS, under which the Judicial Officer may “refer the record in any proceeding to the Postmaster General or the Deputy Postmaster General for final agency decision.” Unlike the EPA Administrator, however, neither the Postmaster General nor the Deputy Postmaster General is a PAS official. The Postmaster General is appointed by nine Governors, who are PAS officials. 39 U.S.C. §§ 202(a)(1), (c). The Deputy Postmaster General is appointed by the Governors and Postmaster General. *Id.* § 202(d).

⁴²⁴ 39 C.F.R. § 952.26(a)(5).

⁴²⁵ 8 C.F.R. § 1003.1(h)(1)(ii). DHS attorneys prosecute immigration removal cases in proceedings before the Justice Department.

⁴²⁶ 5 U.S.C. § 557(b).

⁴²⁷ FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 177, at 51.

⁴²⁸ Recommendation 83-3, *supra* note 12.

⁴²⁹ Recommendation 2020-3, *supra* note 7.

⁴³⁰ 85 Fed. Reg. 13,136 (Mar. 6, 2020).

⁴³¹ 5 U.S.C. § 7701(e)(1)(B).

⁴³² 8 C.F.R. § 1003.1(h)(1)(i).

⁴³³ 28 C.F.R. § 68.55(a).

⁴³⁴ *Revised Interim Director Review Process*, *supra* note 413.

⁴³⁵ 17 C.F.R. §§ 201.360(d)(1), 201.411(c).

jurisdiction of the Bureau of Indian Affairs.⁴³⁶ Some agencies have adopted standards for exercising discretion to review cases sua sponte. For patentability cases, for example, sua sponte review is “[t]ypically . . . reserved for issues of exceptional importance.”⁴³⁷ Similarly, the MSPB may, in the exercise of its discretion, reopen any of its decisions on its own motion.⁴³⁸ In considering whether to reopen a final decision, the Board balances the desirability of finality against the public interest in reaching what ultimately appears to be the right result.⁴³⁹

d. Mandatory and Discretionary Participation by a PAS Official(s)

In some programs, parties have a legal right to consideration of their cases by a PAS official(s). The NLRB, for example, provides for an appeal as of right from any ALJ decision.⁴⁴⁰ The SEC, will grant any petition to review certain types of initial decisions.⁴⁴¹ And CAVC and the Tax Court will review most timely appeals within their jurisdictions.⁴⁴²

More commonly, though, a PAS official(s) has discretion to review, decline to review, or take no action regarding a decision of a lower-level adjudicator. This practice is generally consistent with Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, in which ACUS recommended that each agency “having a substantial caseload” accord administrative finality to the decisions of lower-level adjudicators “with discretionary authority in the agency to affirm summarily or to review, in whole or in part [such decisions].”⁴⁴³ It is also consistent with Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, in which ACUS recommended that Congress authorize agency heads to review decisions “on a discretionary basis” and “only in the rarest circumstances” require agency heads to review decisions personally.⁴⁴⁴ This practice is intended, among other objectives, to preserve the limited time of PAS official(s) to decide matters that merit their personal attention (e.g., novel or important issues of law, policy, or discretion) and conclude matters before the agency expeditiously.

Among programs in which review is discretionary, one point of variation is whether the PAS official(s) must take action when they receive a petition for review or a matter is certified to

⁴³⁶ 25 C.F.R. §§ 2.508–2.511. Historically, the Secretary was “frequently asked” to assume jurisdiction. Weaver, *Appellate Review*, *supra* note 44, at 262. But current rules provide no process for requesting that the Secretary consider a case and prohibit parties from requesting that the Assistant Secretary-Indian Affairs take jurisdiction. *See id.* §§ 2.509, 2.511.

⁴³⁷ *Revised Interim Director Review Process*, *supra* note 413.

⁴³⁸ 5 U.S.C. § 7701(e)(1)(B); 5 C.F.R. § 1201.118.

⁴³⁹ *Azarkhish v. Off. of Pers. Mgmt.*, 915 F.2d 675, 679 (Fed. Cir. 1990).

⁴⁴⁰ 29 C.F.R. § 102.46.

⁴⁴¹ 17 C.F.R. § 201.411(b)(1).

⁴⁴² *See* U.S. Ct. App. Vet. Cl., Rules of Practice and Procedure, https://www.uscourts.cavc.gov/rules_of_practice.php (last visited June 9, 2024); U.S. Tax Ct., Rules of Practice and Procedure, <https://www.ustaxcourt.gov/rules.html> (last visited June 9, 2024).

⁴⁴³ Recommendation 68-6, *supra* note 11.

⁴⁴⁴ The Recommendation stated that review by right “is appropriate in certain cases because of the severe consequences to the parties, such as cases involving the imposition of a substantial penalty or the revocation of a license.” Recommendation 83-3, *supra* note 12.

them, or whether the passage of time with no action by the PAS official(s) functions as a decision not to review a decision. FMSHRC rules, for example, permit parties to file a petition for Commission review within 30 days after issuance of an ALJ’s decision. Any petition that the Commission does not grant within 40 days after issuance of the decision is “deemed denied.”⁴⁴⁵ The ACUS *Model Adjudication Rules* follow this approach “[i]n the interest of encouraging prompt appellate review of an adjudicator’s decision.”⁴⁴⁶

e. Grounds for Exercising Discretion to Participate Directly in a Case

In some programs in which a PAS official(s) retains discretion to reconsider matters decided by lower-level adjudicators, there is no publicly stated standard for exercising such discretion. Examples include immigration removal adjudication,⁴⁴⁷ immigration-related employment discrimination,⁴⁴⁸ Bureau of Indian Affairs-administered programs,⁴⁴⁹ and trademark registration cases.⁴⁵⁰ Similarly, in some programs in which lower-level adjudicators have authority to refer cases to a PAS official(s), there is no publicly stated standard for doing so. Examples include the EAB⁴⁵¹ and the USPS’s Judicial Officer.⁴⁵²

In other programs, a regulation or other public statement includes an exclusive or nonexclusive list of circumstances in which the PAS official(s) will reconsider a matter decided by a lower-level official. This is consistent with Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, which stated: “Where the agency head retains the right of discretionary review of an initial or intermediate decision, the agency should provide by regulation the grounds and procedures for invoking such review.”⁴⁵³ ACUS also reaffirmed this view in Recommendation 2020-3, *Agency Appellate Systems*, urging agencies to address in their codified procedural regulations “[t]he standards for granting review, if review is discretionary.”⁴⁵⁴

Here, it is useful to separate first-level reviewers from second-level reviewers because different levels of review serve—or should serve—different purposes. In many programs, for example, first-level review is intended to correct a broader range of legal and factual errors. Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, provides a useful list of circumstances in which first-level review (either by a PAS official(s) or an entity exercising delegated review authority) may be warranted. In that recommendation, ACUS urged agencies to “consider the desirability in routine

⁴⁴⁵ 29 C.F.R. § 2700.70(h).

⁴⁴⁶ Admin. Conf. of the U.S., Model Adjudication Rules § 410 (2018).

⁴⁴⁷ 8 C.F.R. § 1003.1(h).

⁴⁴⁸ 28 C.F.R. § 68.55.

⁴⁴⁹ 25 C.F.R. §§ 2.508–2.511.

⁴⁵⁰ 37 C.F.R. § 2.146.

⁴⁵¹ 8 C.F.R. § 1003.1; 25 C.F.R. §§ 2.508–2.511.

⁴⁵² 39 C.F.R. § 952.26(a)(5). A similar rule exists at the USPS, though referral there is to the Postmaster General or Deputy Postmaster General, neither of which is a PAS official. See *supra* note 424.

⁴⁵³ Recommendation 83-3, *supra* note 12.

⁴⁵⁴ Recommendation 2020-3, *supra* note 7, ¶ 2(c).

cases of authorizing the review authority to decline review in the absence of a reasonable showing” that:

- (i) a prejudicial error was committed in the conduct of the proceeding, or
- (ii) the initial decision embodies (A) a finding or conclusion of material fact which is erroneous or clearly erroneous, as the agency may by rule provide; (B) a legal conclusion which is erroneous; or (C) an exercise of discretion or decision of law or policy which is important and which should be reviewed.⁴⁵⁵

Several agencies have adopted regulations mirroring this language.

Second-level review, where it exists, is often restricted to issues of exceptional importance that more clearly warrant personal attention by the PAS official(s). ACUS recommended that second-level review by an agency head “should normally be exercisable only in his [or her] discretion on a showing that important policy issues are presented or that the delegate erroneously interpreted agency policy. Multilevel review of purely factual issues should be avoided.⁴⁵⁶ The Secretary of Labor, for example, may review a decision of the ARB if a case “presents a question of law that is of exceptional importance and warrants review by the Secretary.”⁴⁵⁷

Other options are possible. For example, the original rule establishing the Board of Immigration Appeals, in effect between 1940 and 1947, included a nonexclusive list of circumstances in which the Attorney General would review decisions of the Board of Immigration Appeals, namely: (1) “any case in which a dissent has been recorded,” (2) “any case in which the Board shall certify that a question of difficulty is involved,” and (3) “any case in which the Board orders the suspension of deportation pursuant to the provisions of section 19(c) of the Immigration Act of 1917, as amended.”⁴⁵⁸

In a 2016 article, former Attorney General Alberto Gonzales reflected on how the current rule—which focuses on who may direct review rather than when review is appropriate—considered how the rule might be amended to include “substantive or objective grounds” encompassing “those cases where a decision on an important legal or policy matter is warranted.” Gonzales observed:

One example of a decision that should be referred is a precedential Board decision with a registered dissent. Such an occurrence signals a question of some difficulty, as adjudicators would have reached different conclusions on the issue presented,

⁴⁵⁵ Recommendation 83-3, *supra* note 12.

⁴⁵⁶ Recommendation 83-3, *supra* note 12.

⁴⁵⁷ 85 Fed. Reg. 13,186 (Mar. 6, 2020).

⁴⁵⁸ 8 C.F.R. § 90.12 (1940). For a history of the rule, see Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841, 845–52 (2016).

and the potential need for the Attorney General to step in, review the issue, and provide a definitive resolution for immigration officials. Questions of exceptional importance or difficulty should also be referred. Rather than one simple, broad category that would guide referral, however, an amended regulation should provide illustrative circumstances when such a question is presented. For instance, if the case implicates significant constitutional interests or necessitates rendering an interpretation of a provision of the [Immigration and Nationality Act] that has engendered division in the courts of appeals, such a question could be deemed “difficult.” Questions of exceptional importance might be those where the resolution of the issue would have significant practical ramifications in the enforcement of the immigration laws, the granting of discretionary relief from removal, or the manner in which aliens could be apprehended, detained, and removed. In some sense, these criteria would track the spirit of the rehearing criteria of the Federal Rules of Appellate Procedure, which contemplate en banc proceedings in rare circumstances.⁴⁵⁹

f. Direct Participation by a PAS Official(s) as a Prerequisite to Judicial Review

One final consideration is whether a party must seek review by a PAS official(s) before seeking judicial review. One benefit of requiring appeal to a PAS official(s) is that the PAS official(s) can publicly address novel or important questions of law, policy, or discretion before judicial proceedings. Requiring appeal also gives the PAS official(s) greater control over which cases it (or DOJ) must litigate in federal court. The downside, of course, is that PAS official(s) will need to devote time and resources to considering and acting on petitions. Especially when PAS positions are vacant, or a collegial agency lacks a quorum, requiring action by the PAS official(s) may delay case processing.

In some programs, a party must first request review by a PAS official before seeking judicial review. This is particularly common in programs in which PAS officials serve as first-level reviewers. In other programs, however, even when parties may request review by a PAS official, appeal is not required for exhaustion of administrative remedies. Examples include adverse action appeals before the MSPB,⁴⁶⁰ federal-sector discrimination cases before the Equal Employment Opportunity Commission,⁴⁶¹ and trademark and patent cases before USPTO.⁴⁶² In such programs, parties can, and often do, opt instead to seek review directly in the federal courts.

4. Procedures

In this section, we examine six procedural aspects related to the direct participation of PAS officials in the adjudication of cases: (1) notice to parties and other interested persons, (2) issues the PAS official(s) will consider, (3) standard of review, (4) record on review, (5) submission of additional arguments by parties, and (6) public participation.

⁴⁵⁹ Gonzales & Glen, *supra* note 458, at 915.

⁴⁶⁰ 5 U.S.C. § 7703; 5 C.F.R. § 1203.113.

⁴⁶¹ 29 C.F.R. § 1614.405(c).

⁴⁶² 37 C.F.R. § 2.145; *Revised Interim Director Review Process*, *supra* note 413.

a. Notice to Parties and Other Interested Persons

A preliminary procedural question is the provision of notice to affected parties, which may include notice that a petition for review has been granted or denied, that a matter has been referred to a PAS official(s) for possible consideration, or that a PAS official(s) has assumed jurisdiction of a case on their own motion or upon referral, as well as notice of the issues that the PAS official(s) will consider on review. Concerns have been raised in some systems about a lack of notice, particularly in cases in which a PAS official(s) reviews a case on their own motion.⁴⁶³

b. Issues the PAS Official(s) Will Consider

Statutes often provide PAS officials broad discretion to determine what issues they will consider in reviewing the decisions of lower-level adjudicators. In cases of formal adjudication, for example, the APA grants agency heads “all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”⁴⁶⁴

Because a traditional rationale for the direct participation of PAS officials in agency adjudication is control of policymaking, it makes sense for PAS officials to consider legal issues—at least those that are sufficiently novel or important. Whether it is a good use of a PAS official’s limited capacity to consider questions of fact or mixed questions of law and fact will depend on the policy purpose for their direct participation in the adjudication of individual cases. It can be challenging in practice to separate questions of law from questions of fact, of course, and “it is not difficult to imagine the jurisdictional skirmishes that such a separation would set off.”⁴⁶⁵

Relatedly, policymakers must determine which issues PAS officials should consider in individual cases. In many programs, there are rules limiting consideration to issues raised before the lower-level decision maker. In programs in which PAS officials typically participate in a case in response to a petition for review, PAS officials may also limit their consideration to issues raised in the petition.

c. Standard of Review

Statutes often provide PAS officials with plenary review of all factual and legal questions. In cases of formal adjudication, for example, the APA grants the agency head “all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”⁴⁶⁶ Because a traditional rationale for the direct participation of PAS officials in administrative adjudication is coordination and political oversight of policymaking, it makes sense for PAS officials to review questions of law de novo.

⁴⁶³ See, e.g., Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766 (2010); PIERCE, *supra* note 324.

⁴⁶⁴ 5 U.S.C. § 557(b).

⁴⁶⁵ Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 1988 IMMIGR. & NAT'LITY L. REV. 233, 319 (1988).

⁴⁶⁶ 5 U.S.C. § 557(b).

But for the same reasons that appellate adjudicators typically defer to certain findings and conclusions of lower-level adjudicators, it often makes little sense for PAS officials—sitting either as first- or second-level reviewers—to consider factual questions or mixed questions of fact and law de novo.⁴⁶⁷

The precise standard of review that a PAS official(s) should employ when considering questions of fact, mixed questions of law and fact, and questions of discretion will depend on the purpose behind and role of direct participation in the adjudication of cases. For example, PAS officials who serve as a second-level reviewers, have limited adjudicative capacity, and participate solely to control policymaking should use a highly deferential standard of review in considering nonlegal findings and conclusions—to the extent they consider such findings and conclusions at all. In such cases, agencies avoid “[m]ultilevel review of purely factual issues.”⁴⁶⁸

Conversely, a less deferential standard may be appropriate for PAS officials who serve as first-level reviewers, have ample adjudicative capacity, and participate directly to accomplish a broader range of policy purposes (e.g., error correction, consistency, systemic awareness). Still, policymakers should pay close attention to the comparative advantages of different adjudicators. While a PAS official serving as an appellate reviewer may have greater policy expertise, for example, a lower-level adjudicator who presided over an evidentiary hearing may have greater expertise ruling on routine procedural motions and judging parties’ and witnesses’ credibility.

d. Record on Review

Rules regarding direct participation by PAS officials rarely provide explicitly for the consideration of new evidence. Indeed, ACUS has recommended for all agency appellate systems that agencies “consider limiting the introduction of new evidence on appeal that is not already in the administrative record from the hearing-level adjudication.”⁴⁶⁹

One notable exception is the MSPB, which provides that the Board may grant a petition for review upon a showing that “[n]ew and material evidence . . . is available that, despite the petitioner’s due diligence, was not available when the record closed.”⁴⁷⁰ It is worth recognizing, however, that the MSPB may be particularly well suited to receive at least some new evidence. First, Board members serve as first-level reviewers and most of their statutory responsibilities relate to the adjudication of cases. Further, because the Board receives many petitions from self-represented parties, fairness may counsel a more permissive rule on the receipt of new evidence.

e. Presentation of Arguments by Parties

In programs in which a PAS official(s) serves as a first-level reviewer, parties are often permitted to present arguments to the PAS official(s)—typically arguments raised before the lower-level adjudicator rather than new arguments. Arguments may be presented through written

⁴⁶⁷ See Recommendation 2020-3, *supra* note 7, ¶ 10.

⁴⁶⁸ Recommendation 83-3, *supra* note 12.

⁴⁶⁹ See Recommendation 2020-3, *supra* note 7, ¶ 10.

⁴⁷⁰ 5 C.F.R. § 1201.115(d).

submissions, such as pleadings and briefs, or through oral arguments or presentations. ACUS has recommended that agencies “assess the value of oral argument . . . in their appellate system based on the agencies’ identified objectives for appellate review.” Criteria that may favor oral argument include “issues of high public interest, issues of concern beyond the parties to the case, specialized or technical matters, and a novel or substantial question of law, policy, or discretion.”⁴⁷¹

In many programs in which a PAS official(s) serves as second-level reviewer and parties lack the right to petition the PAS official(s) for further consideration, rules do not explicitly provide for the submission of arguments. Concerns have been raised in some such systems about the lack of such an opportunity.⁴⁷² Certainly there is value in minimizing the submission or presentation of arguments that are already included in the record. And there is certainly value in ensuring that any nonduplicative arguments are received in the most efficient way possible. At the same time, there may be value in at least providing parties with a short window in which to submit brief and nonduplicative written arguments.

f. Public Participation

There may be value in public participation in cases in which an agency, in the course of adjudicating a matter, must decide novel or important questions of law, policy, or discretion, because rulings on such issues are likelier to affect persons beyond the parties to the case. In such cases, public participation serves much the same role in adjudication as it does in rulemaking.⁴⁷³ PAS officials are not the only adjudicators who must decide important questions of law, policy, or discretion, of course. But cases involving such questions may be likelier to reach PAS officials, control over policymaking presents the clearest normative rationale for direct participation by PAS officials, and PAS officials typically are the final word within the executive branch.

Concerns have been raised in some systems about a lack of public participation in cases in which a PAS official(s) exercises discretion to participate directly in a case involving a novel or important question of law, policy, or discretion.⁴⁷⁴ ACUS has recommended that agencies “assess the value of . . . amicus participation in their appellate system,” especially in cases that present “issues of high public interest, issues of concern beyond the parties to the case, specialized or technical matters, and a novel or substantial question of law, policy, or discretion.”⁴⁷⁵ As an alternative to amicus participation, a process for public notice and comment may also be useful in some programs.

⁴⁷¹ Recommendation 2020-3, *supra* note 7, ¶ 13.

⁴⁷² See, e.g., Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766 (2010).

⁴⁷³ See Phillips, *supra* note 352, at 520–22, 544–46.

⁴⁷⁴ See, e.g., Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766 (2010).

⁴⁷⁵ Recommendation 2020-3, *supra* note 7, ¶ 13.

5. Effect of Decisions

A decision rendered by a PAS official(s) is typically the final decision of the agency and becomes final and binding absent reconsideration by the PAS official(s) or judicial review—if one or both are available.

Aside from the effect of a decision with respect to the parties to a proceedings, agencies must also determine what effect, if any, the decision will have in subsequent proceedings involving similar issues but different parties. As ACUS examined in Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, many agencies rely on precedential decision making to promote consistency, predictability, uniformity, and efficiency in their adjudicative systems. Agencies also use precedential decision making to coordinate the development of policy, to “communicate how they interpret legal requirements or intend to exercise discretionary authority.”⁴⁷⁶ In this way, precedential decision making serves many of the same objectives as direct participation by PAS officials, and the two should be considered in combination.

As Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, notes, there is tremendous variation in precedential decision-making practices. Some agencies treat all decisions issued by an appellate decision maker (whether or not a PAS official(s)) as precedential, while others treat only certain, designated decisions as precedential. Some agencies treat no decisions as precedential.⁴⁷⁷ In determining whether to treat all, some, or no appellate decisions as precedential, ACUS recommended that agencies consider the extent to which they issue (a) “decisions that would be useful as precedent and are written in a form that lends itself to use as precedent;” (b) “decisions that mainly concern only case-specific factual determinations or the routine application of well-established policies, rules, and interpretations to case-specific facts; and (c) “such a large volume of decisions that adjudicators cannot reasonably be expected to identify those which should control future decisions.”⁴⁷⁸ A decision may be particularly useful as precedent if it:

- (a) Addresses an issue of first impression;
- (b) Clarifies or explains a point of law or policy that has caused confusion among adjudicators or litigants;
- (c) Emphasizes or calls attention to an especially important point of law or policy that has been overlooked or inconsistently interpreted or applied;
- (d) Clarifies a point of law or policy by resolving conflicts among, or by harmonizing or integrating, disparate decisions on the same subject;
- (e) Overrules, modifies, or distinguishes existing precedential decisions;
- (f) Accounts for changes in law or policy, whether resulting from a new statute, federal court decision, or agency rule;

⁴⁷⁶ Recommendation 2022-4, *supra* note 15.

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

- (g) Addresses an issue that the agency must address on remand from a federal court; or
- (h) May otherwise serve as a necessary, significant, or useful guide for adjudicators or litigants in future cases.⁴⁷⁹

When a PAS official(s) participates directly in the adjudication of cases under a program, it is common for the agency to treat at least some decisions by the PAS official(s) as precedential. When a PAS official(s) serves as a first-level reviewer, and review is discretionary and limited to factors such as those discussed in Part IV.C.5, many of his or her decisions are likely to satisfy one of the eight factors listed above and should be designated as precedential.

When PAS officials serve as second-level reviewers, the decisions they issue will or almost certainly should satisfy one of those factors. Indeed, the grounds for exercising second-level, discretionary review sometimes track these factors. In determining whether the Secretary of Labor should review a decision of the ARB, for example, the relevant consideration is whether the case “involves a matter of exceptional importance.”⁴⁸⁰ (All decisions issued by the Secretary do, in fact, serve as “binding precedent on all Department employees and in all Department proceedings involving the same issue or issues.”⁴⁸¹) As a general principle, then, designating such decisions as precedential is likely to further bolster the underlying objective of direct participation by a PAS official(s), whether the objective is to coordinate and ensure expert policymaking, subject policymaking to political control, gain and act on systemic awareness, or promote interdecisional consistency.

Of note, precedential decision making may not be appropriate in contexts in which a PAS official(s) decides matters under a generally applicable statute, particularly if authority for making policy under the statute is assigned to another agency. Examples include matters adjudicated under FOIA,⁴⁸² the Program Fraud Civil Remedies Act,⁴⁸³ the Equal Access to Justice Act,⁴⁸⁴ and the Debt Collection Act.⁴⁸⁵

6. Disqualification and Recusal

Impartiality is an important value in administrative adjudication. Recognizing that recusal (or “the voluntary or involuntary withdrawal of an adjudication from a particular proceeding”) is an “important tool for maintaining the integrity of adjudication,” ACUS in 2018 recommended that agencies adopt recusal rules for adjudicators who preside over adjudications in which there is a legally required evidentiary hearing and appellate adjudicators.⁴⁸⁶

⁴⁷⁹ *Id.*

⁴⁸⁰ 85 Fed. Reg. 13,186, 13,188 (Mar. 6, 2020).

⁴⁸¹ *Id.*

⁴⁸² 5 U.S.C. § 552.

⁴⁸³ 31 U.S.C. §§ 3801–3812.

⁴⁸⁴ 5 U.S.C. § 504.

⁴⁸⁵ *Id.* § 5514.

⁴⁸⁶ Recommendation 2018-4, *supra* note 13.

By its own terms, the recommendation “does not apply to adjudications conducted by agency heads.” (ACUS noted, however, that “agencies could take into account many of the provisions in the Recommendation when determining rules for the recusal of agency heads.”) As Louis Virelli has written, designing an effective recusal regime for agency heads is complex:

[T]he applicability of recusal standards to agency heads has intuitive appeal when they are reviewing specific adjudications, for the same reasons that recusal is appropriate for traditional judges. Unlike judges, however, agency heads also function as chief policymakers for the agency. Their policymaking role makes recusal of agency heads more complex than recusal of more easily replaceable, less powerful initial adjudicators. Policymaking is an inherently value-laden enterprise; it requires policymakers to employ their own normative viewpoints in a way that traditional adjudication—especially in the courts—seeks to avoid. Conversely, the higher public profile of agency heads makes the substantive and procedural recusal standards discussed earlier potentially more important to their conduct than that of less visible intermediate or initial adjudicators. Because agency heads’ decisions are more likely to be publicly scrutinized than those of individual adjudicators, the public confidence engendered by clear and transparent recusal standards may be even more valuable at the top of the agency hierarchy.⁴⁸⁷

Virelli notes an additional complication at multimember agencies, namely that recusal by one or more members of a multimember agency might “change the nature of adjudication among agency heads by changing the number and, potentially, the collective ideology of the decisionmakers.” Recusal might “cause the agency to lose a quorum, thereby rendering it totally ineffective.” Recusal might also “deprive the group of an adjudicator who may have been an influential part of the agency’s ultimate decision.”⁴⁸⁸

As a general matter, PAS officials—whether acting in an adjudicative capacity or otherwise—are already subject to a host of requirements under the ethics laws and Office of Government Ethics (OGE) regulations. For example, officials who participate in proceedings in which they have a personal financial interest face criminal penalties.⁴⁸⁹ PAS officials who negotiate for or agree to any future employment or compensation while in office must recuse themselves “whenever there is a conflict of interest, or appearance of a conflict of interest.”⁴⁹⁰ And OGE rules specify when officials should recuse themselves from proceedings to “avoid an appearance of loss of impartiality in the performance of [their] official duties.”⁴⁹¹ Agencies have processes in place to promote compliance with generally applicable ethics requirements.

The political processes by which PAS officials are appointed and removed from office—and their susceptibility to presidential and congressional oversight—sometimes also shape

⁴⁸⁷ Louis J. Virelli III, *Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators* 42 (May 14, 2020) (report to the Admin. Conf. of the U.S.) (internal citations omitted).

⁴⁸⁸ *Id.* at 43.

⁴⁸⁹ 18 U.S.C. § 208.

⁴⁹⁰ Pub. L. No. 112–105, 126 Stat. 304 (2012).

⁴⁹¹ 5 C.F.R. §§ 2635.501–2635.503.

whether or not, as an ethical matter, PAS officials choose to participate in adjudications. There are instances in which senators have focused on the likelihood that a nominee for a PAS position might need to recuse himself or herself in many circumstances due to conflicts of interest.⁴⁹² And members of Congress periodically direct oversight activities at PAS officials who participate in proceedings in which they allegedly have a conflict of interest. In at least one instance, pressure promoted from Congress and the press promoted an agency to undertake a “thorough review” of its policies and practices for recusal by PAS officials.⁴⁹³

Beyond ethics requirements and political process, some agencies have extended their rules for adjudicator recusal to PAS officials. Examples Virelli cited include FMSHRC, FTC, and MSPB.⁴⁹⁴ And following the Supreme Court’s decision in *Arthrex* and the adoption of interim procedures for review of PTAB decisions by the USPTO Director, the Director established recusal procedures for “matters requiring the Director’s or Deputy Director’s review, approval, or other involvement” in trademark and patent appeals.⁴⁹⁵

Other agencies—for example, OSHRC, the SEC, and the CFTC—expressly exempt PAS officials from adjudicator recusal requirements.⁴⁹⁶ Virelli concluded: “When judging agencies’ recusal standards, it is important to distinguish between those that omit standards altogether and those that exclude only agency heads, as the latter may represent a strength, rather than a weakness, in the agency’s approach to recusal.”⁴⁹⁷

7. Support for Decision Making

Given limited capacity and, in policymaking, the need for expertise, PAS officials rely heavily on others for support. This is a practical necessity, but it may also be quite valuable. Given many PAS officials’ relatively short tenure, support by career employees may promote consistency of practice, the development of efficient processes over time, and other rule-of-law values.

The considerable role that staff play in supporting PAS officials who participate directly in the adjudication of cases—particularly more formal adjudications—is well documented.⁴⁹⁸

⁴⁹² See, e.g., Press Release, Catherine Cortez Masto, Cortez Masto Statement on Opposition to SEC Chair Nominee Jay Clayton (2017), <https://www.cortezmasto.senate.gov/news/press-releases/cortez-masto-statement-on-opposition-to-sec-chair-nominee-jay-clayton/>.

⁴⁹³ See, e.g., NAT’L LAB. RELS. BD., ETHICS RECUSAL REPORT (2019).

⁴⁹⁴ Louis J. Virelli III, Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators 43 (May 14, 2020).

⁴⁹⁵ Memorandum from Kathi Vidal, Under Sec’y of Commerce for Intell. Prop. & Dir. U.S. Pat. & Trademark Off., to Management Council, Procedures for Recusal to Avoid Conflicts of Interest and Delegations of Authority (Apr. 20, 2022), <https://www.uspto.gov/sites/default/files/documents/Director-Memorandum-on-Recusal-Procedures.pdf>.

⁴⁹⁶ Louis J. Virelli III, Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators 10 (May 14, 2020).

⁴⁹⁷ *Id.*

⁴⁹⁸ See, e.g., LANDIS, *supra* note 258, at 19–20.

Although they concern a ratemaking proceeding,⁴⁹⁹ the *Morgan* cases⁵⁰⁰ provide an illustration of the role that staff may play in judicialized proceedings. In *Morgan*, parties alleged that the Secretary of Agriculture deprived them of the right to a legally required hearing because “the Secretary made the rate order without having heard the oral arguments or having read or considered the briefs which the plaintiff submitted.”⁵⁰¹ The Supreme Court agreed, holding as a general matter that “[t]he one who decides must hear.” But it caveated that holding, stating:

This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important duty conferred.⁵⁰²

The Secretary answered interrogatories on remand, which revealed that he had communicated off the record with Department personnel and incorporated findings prepared by them in his decision.⁵⁰³ The Court condemned this practice and remanded again.

The Court’s decisions in these cases had important consequences for the use of support staff by agency officials performing quasi-judicial functions. That is especially true for PAS officials given the likelihood that they will be called upon to decide difficult and disputed matters and the press of other duties. As one congressman noted around the time of the *Morgan* cases: “The fact is that if the Secretary of Agriculture himself personally should read the record, and personally review the findings in each case, it would take all his time; there would be no other work done by him except that one task.”⁵⁰⁴

The *Morgan* cases certainly influenced the Attorney General’s Committee on Administrative Procedure, which emphasized organizing appellate systems so that “many of the perplexing problems of assistance by subordinate reviewers to the heads of the agency in deciding cases will disappear.” The Committee noted that “[l]ike judges, . . . each agency head may find it useful to have attached to his office one or more law clerks But these assistants

⁴⁹⁹ In part as a response to *Morgan*, the APA’s drafters classified ratemakings as rulemakings rather than adjudications. Daniel J. Gifford, *The Morgan Cases: A Retrospective Review*, 30 ADMIN. L. REV. 237, 242 (1978).

⁵⁰⁰ *United States v. Morgan*, 313 U.S. 409 (1941); *United States v. Morgan*, 307 U.S. 183 (1939); *Morgan v. United States*, 304 U.S. 1 (1938); *Morgan v. United States*, 298 U.S. 468 (1936).

⁵⁰¹ 298 U.S. 468, 474 (1936).

⁵⁰² 298 U.S. 468, 481–82 (1936).

⁵⁰³ 304 U.S. 1, 14 (1938).

⁵⁰⁴ 84 Cong. Rec. 7092 (1939).

should be aides and not substitutes. The heads of the agency should personally what the heads purport to do.”⁵⁰⁵

The *Morgan* cases also left many practical questions about the role of subordinates unanswered. As Daniel Gifford explained:

The Court said that the Secretary could use assistants to “sift” and “analyze” evidence, but that his decision nonetheless must be a “personal” one based upon his own weighing of the evidence. It is unclear how the assistants may both sift and analyze on the one hand, while the Secretary, on the other hand, makes a personal decision by weighing the evidence himself. The Court might have been thinking of the personal responsibility of a judge, who nevertheless receives assistance from his law clerk. Extrapolated to the functioning of a large agency, the Secretary might be said to decide “personally” when he closely supervises his assistants and discusses their conclusions with them. Yet the line between the close supervision of assistants and a “departmental” decision-making process which the Court condemned as impersonal is not easily drawn.⁵⁰⁶

As a matter of judicial review, the question is largely moot. On remand a third time in *Morgan*, the district court permitted the parties to depose the Secretary to develop evidence regarding his decision-making process. The Supreme Court held that “the Secretary should never have been subjected to this examination,”⁵⁰⁷ making it that much more difficult for parties to “probe” the Secretary’s “mental processes” and determine whether his decision in a case was a personal one.⁵⁰⁸

Today, staff supporting PAS officials play a critical role. In his 1993 study for ACUS, Russell Weaver reported:

At most agencies, the agency head takes little part in the review process. The agency head may have ultimate responsibility for the agency’s decision, but the agency head will delegate the review task to subordinates. Such delegation may be necessary and inevitable. Many agency heads are burdened with other responsibilities besides adjudication. Moreover, at most agencies, there are far too many cases for the agency head to carefully review all of them.

...

These circumstances force agency heads to engage in a very limited review process. They ask subordinates to review the records and briefs, and have them prepare proposed decisions. The agency head will usually meet with the

⁵⁰⁵ FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 177, at 52.

⁵⁰⁶ Gifford, *supra* note 499, at 256–57.

⁵⁰⁷ 313 U.S. 409, 422 (1941).

⁵⁰⁸ Weaver, *Appellate Review*, *supra* note 44, at 292.

subordinates to discuss the case, but the meeting may be brief depending on the interests and obligations of the agency head.⁵⁰⁹

And a review of contemporary agency materials makes clear that staff continue to perform a wide range of functions, including reviewing petitions for review and recommending whether they should be granted or denied, analyzing evidence and arguments, making recommendations regarding the disposition of cases, and drafting orders and decisions for review and signature.

Given the extensive role that staff play in supporting PAS officials, important to consider who supports PAS officials and what functions they perform. In this section, we address: (1) which subordinates support PAS officials when they participate directly in the adjudication of cases, and (2) what functions do those subordinates perform.

a. Types of Subordinates Who Support PAS Officials

Subordinates who support direct participation by PAS officials hold many different positions within agency hierarchies. Positions identified in our survey include: (1) lower-level adjudicators and staff, (2) dedicated appeals counsel, (3) personal assistants, (4) agency legal officers, (5) a clerk or executive secretary, (6) policymaking and operational officials, and (7) personnel with specialized scientific or technical expertise. In many programs, PAS officials rely on several different types of personnel. At the MSPB, for example, Board members are assisted in their appellate role by individual members' legal staff, dedicated appeals counsel, Office of General Counsel (OGC) staff, and clerk's office staff, with each performing distinct functions. At multimember agencies, certain functions may also be delegated to single members or divisions of members.

1. Lower-Level Adjudicators and Staff. In some programs, lower-level adjudicators, lower-level adjudicative bodies, or staff associated with lower-level adjudicative bodies support review by PAS official(s), for example by reviewing petitions for review and identifying cases that may warrant further consideration by a PAS official(s).⁵¹⁰

2. Dedicated Appeals Counsel. Some agencies—such as the MSPB,⁵¹¹ DEA,⁵¹² and FAA⁵¹³—have established positions or centralized offices dedicated primarily or solely to assisting PAS officials when they participate directly in the adjudication of cases. They may, for example, review petitions for review, evaluate case records, make recommendations regarding the disposition of cases, and prepare decisions and orders.

3. Advisors. Particularly at multimember agencies, such as the NLRB,⁵¹⁴ individual members of the agency often rely on advisors assigned to assist them. Legal advisors often

⁵⁰⁹ Weaver, *Organization of Adjudicative Offices*, *supra* note 44.

⁵¹⁰ *See supra* Part IV.C.3.

⁵¹¹ MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2022 5 (2023).

⁵¹² U.S. DEP'T OF JUST., OFF. OF INSPECTOR GEN., I-2014-003, THE DRUG ENFORCEMENT ADMINISTRATION'S ADJUDICATION OF REGISTRANT ACTIONS 25–26 (2014).

⁵¹³ 14 C.F.R. § 13.65(e).

⁵¹⁴ 29 U.S.C. § 154.

function like law clerks in federal courts. Individual members may also have access to policy advisors or subject-matter experts.

4. Agency Legal Officers. At many agencies, the chief legal officer or subordinates who report to the chief legal officer assist PAS officials when they participate directly in the adjudication of individual cases.⁵¹⁵ Legal officers play different role at different agencies. At some agencies, such as the SEC and FTC, they are the primary source of support for PAS officials.⁵¹⁶ Because chief legal officers might also be involved in investigation, prosecution, and litigation, some agencies have established mechanisms to insulate legal officers who support adjudication from legal officers who support enforcement activities.⁵¹⁷

5. Clerk or Executive Secretary. Some agencies have established the position of clerk or executive secretary, delegating to that office responsibility for functions such as receiving petitions, briefs, and evidence; docketing cases; and issuing decisions, orders, notices, and other correspondence.⁵¹⁸

6. Policymaking and Operational Officials. Senior officials involved in coordinating agency policymaking or operational functions may support PAS officials in some programs. The USPTO provides one example. When a party requests that the USPTO Director review a PTAB decision, the request is routed to an Advisory Committee established to review such requests and recommend to the Director whether review should be granted. The Advisory Committee includes at least 11 members drawn from relevant agency subcomponents, including the Office of the Under Secretary, PTAB, Office of the Commissioner for Patents, Office of the General Counsel, and Office of Policy and International Affairs. The Advisory Committee may be assisted by other personnel, including technical and subject matter experts.⁵¹⁹

7. Scientific or Technical Personnel. In some programs, especially those in which cases regularly demand scientific or technical expertise, PAS officials may have access to agency personnel with specialized expertise.⁵²⁰

b. Functions That Subordinates Perform

Subordinates perform a wide range of functions when PAS officials participate directly in the adjudication of individual cases. Functions identified in our survey include: (1) evaluating petitions for review; (2) granting, denying, and dismissing petitions for review; (4) affirming interlocutory rulings; (5) identifying unappealed cases that may warrant direct participation by a PAS official(s); (6) managing proceedings and responding to routine motions; (7) encouraging

⁵¹⁵ See *supra* note 275.

⁵¹⁶ 17 C.F.R. § 200.21(b) (SEC); FED. TRADE COMM'N, CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2025 130–31 (2024).

⁵¹⁷ See, e.g., U.S. Secs. & Exch. Comm'n, Statement, Commission Statement Relating to Certain Administrative Adjudications (Apr. 5, 2022), <https://www.sec.gov/news/statement/second-commission-statement-relating-certain-administrative-adjudications>.

⁵¹⁸ See, e.g., MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2022 5 (2023).

⁵¹⁹ Revised *Interim Director Review Process*, *supra* note 413.

⁵²⁰ See, e.g., *id.*

settlement; (8) reviewing lower-level decisions and evaluating evidence and arguments; (9) conducting legal and policy research; (10) recommending case dispositions; (11) preparing decisions and orders; and (12) staying decisions and orders pending reconsideration or judicial review.

1. Evaluating Petitions for Review. As described above, subordinates play an essential role in reviewing petitions for review. In some programs, lower-level adjudicators and adjudicative bodies receive and review petitions and refer cases that may warrant direct participation by a PAS official(s). In other programs, subordinates who work more closely with PAS official(s) may review petitions for review (and requests for reopening or rehearing) and recommend whether they should be granted, denied, or dismissed. As noted above, senior legal, policymaking and operational components may also play a role in evaluating petitions for review, particularly when the chief objective of direct participation by a PAS official(s) is to coordinate policymaking.

2. Granting, Denying, and Dismissing Petitions for Review. In some programs, subordinates have authority not only to evaluate petitions for review but also to grant and/or deny them in certain circumstances.⁵²¹ Subordinates may also be delegated authority to dismiss petitions under certain circumstances, for example when a petitioner alone or the parties jointly request it, or when a petition is repetitious or frivolous.⁵²²

4. Affirming Interlocutory Rulings. In at least one program, subordinates are delegated authority to consider and affirm interlocutory rulings certified by lower-level adjudicators.⁵²³

5. Identifying Unappealed Cases That May Warrant Direct Participation by a PAS Official(s). In some programs, lower-level adjudicators, a lower-level adjudicative body, support staff associated with the lower-level adjudicative body, or support staff who work more closely with a PAS official(s) may review decisions issued by lower-level adjudicators to identify cases in which it may be appropriate for the PAS official(s) to exercise own-motion review authority. At USPTO, for example, PTAB has “an internal post-issuance review team that alerts the Director that an issued decision may warrant Director Review.”⁵²⁴

6. Managing Proceedings and Responding to Routine Motions. Subordinates play a range of duties in managing proceedings pending before PAS officials. They may, for example, docket petitions, issue briefing schedules, schedule oral arguments before PAS officials, issue final decisions and orders, and rule on routine procedural motions (e.g., requests for extensions of time, requests to supplement the record, requests to consolidate multiple proceedings).⁵²⁵

⁵²¹ See, e.g., 17 C.F.R. § 200.30-14(h)(1)(v) (SEC).

⁵²² 14 C.F.R. § 13.65(e) (FAA); 17 C.F.R. § 200.30-14(h)(1)(viii) (SEC).

⁵²³ 17 C.F.R. § 200.30-14(h)(1)(ii) (SEC).

⁵²⁴ Revised Interim Director Review Process, *supra* note 413.

⁵²⁵ See, e.g., 14 C.F.R. § 13.65(e) (FAA); 17 C.F.R. § 200.30-14(h) (SEC); MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2022 5 (2023).

7. Encouraging Settlement. In some programs, subordinates are empowered to encourage settlement between parties⁵²⁶ and may have authority to issue findings and orders pursuant to offers of settlements.⁵²⁷

8. Reviewing Lower-Level Decisions and Evaluating Evidence and Arguments. Across programs, subordinates are frequently assigned responsibility for conducting an initial review of lower-level decisions and evaluating evidence and arguments. In this way, subordinates often function much like law clerks in federal courts.⁵²⁸

9. Conducting Legal and Policy Research. In addition to reviewing lower-level decisions and evaluating case-specific evidence and arguments, subordinates are frequently tasked with conducting legal and policy research to better inform how a PAS official(s) considers the case and potentially decides novel or important questions of law, policy, or discretion.⁵²⁹

10. Recommending Case Dispositions. Based on their evaluation of lower-level decisions, evaluation of case-specific evidence and arguments, and legal and policy research, subordinates in many programs are tasked with recommending how PAS officials should decide cases or rule on motions.⁵³⁰ In some programs, subordinates may convey their recommendations in a preliminary conversation or memorandum. In other programs, the subordinate might instead prepare and transmit a proposed decision or order for review by the PAS official(s).⁵³¹

11. Preparing Decisions and Orders. Subordinates are commonly assigned primary responsibility for preparing decisions and orders, either based on their initial review or according to instructions from a PAS official(s).⁵³²

12. Staying Decisions and Orders. Subordinates in some programs have authority to stay decisions and orders of a PAS official(s) pending judicial review or reconsideration.⁵³³

⁵²⁶ MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2022 5 (2023).

⁵²⁷ 17 C.F.R. § 200.30-14(h) (SEC).

⁵²⁸ 29 U.S.C. § 154(a) (NLRB); U.S. DEP'T OF JUST., OFF. OF INSPECTOR GEN., *supra* note 512, at 25–26; *Attorney Advisor (DEA)*, U.S. DEP'T OF JUST., <https://www.justice.gov/legal-careers/job/attorney-advisor-108> (last visited June 9, 2024); *Adjudication*, U.S. SECS. & EXCH. COMM'N, <https://www.sec.gov/ogc/adjudication> (last visited June 9, 2024).

⁵²⁹ MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2022 5 (2023); *Adjudication*, U.S. SECS. & EXCH. COMM'N, <https://www.sec.gov/ogc/adjudication> (last visited June 9, 2024).

⁵³⁰ *Adjudication*, U.S. SECS. & EXCH. COMM'N, <https://www.sec.gov/ogc/adjudication> (last visited June 9, 2024).

⁵³¹ U.S. DEP'T OF JUST., OFF. OF INSPECTOR GEN., *supra* note 512, at 25–26; *Attorney Advisor (DEA)*, *supra* note 527.

⁵³² MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2022 5 (2023); 14 C.F.R. § 13.65(e) (FAA); U.S. DEP'T OF JUST., OFF. OF INSPECTOR GEN., *supra* note 512, at 25–26; *Attorney Advisor (DEA)*, *supra* note 527; 29 U.S.C. § 154(a); 17 C.F.R. § 200.21 (SEC).

⁵³³ 14 C.F.R. § 13.65(e) (FAA).

V. Developing and Communicating Policies on Participation by PAS Officials

In prior statements, ACUS recommended that agencies adopt and make publicly available certain rules regarding the structure and process of their administrative review systems:

- In Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, ACUS recommended that Congress amend the APA (5 U.S.C. § 557) to clarify the authority of agencies to establish intermediate appellate boards and provide for discretionary review of initial decisions by agency heads. As amended, the APA would have authorized an agency by rule or order to (a) establish intermediate appellate boards; (b) delegate to such boards authority to review initial decisions; (c) prescribe procedures for the review of initial decisions by the intermediate appellate board or the agency head; and (d) restrict the scope of inquiry by such boards and the agency head “without impairing the authority of the agency in any case to decide on its own motion any question of procedure, fact, law, policy, or discretion as fully as if it were making the initial decision.” As amended, the APA would also have established default procedures for the operation of intermediate appellate boards and discretionary review of decisions by presiding officers.⁵³⁴
- In Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, ACUS recommended that “[w]here the agency head retains the right of discretionary review of an initial or intermediate decision, the agency should provide by regulation the grounds and procedures for invoking such review.”⁵³⁵
- In Recommendation 2020-3, *Agency Appellate Systems*, ACUS recommended that agencies adopt regulations covering all significant procedural matters pertaining to agency appellate review, whether or not conducted by a PAS official(s). The recommendation provided a long, nonexclusive list of topics that such regulations should cover:
 - (a) The objectives of the agency’s appellate review system;
 - (b) The timing and procedures for initiating review, including any available interlocutory review;
 - (c) The standards for granting review, if review is discretionary;
 - (d) The standards for permitting participation by interested persons and amici;
 - (e) The standard of review;

⁵³⁴ Recommendation 68-6, *supra* note 11.

⁵³⁵ Recommendation 83-3, *supra* note 12.

- (f) The allowable and required submissions by litigants and their required form and contents;
- (g) The procedures and criteria for designating decisions as precedential and the legal effect of such designations;
- (h) The record on review and the opportunity, if any, to submit new evidence;
- (i) The availability of oral argument or other form of oral presentation;
- (j) The standards of and procedures for reconsideration and reopening, if available;
- (k) Any administrative or issue exhaustion requirements that must be satisfied before seeking agency appellate or judicial review, including whether agency appellate review is a mandatory prerequisite to judicial review;
- (l) Openness of proceedings to the public and availability of video or audio streaming or recording;
- (m) In the case of multi-member appellate boards, councils, and similar entities, the authority to assign decision-making authority to fewer than all members (e.g., panels); and
- (n) Whether seeking agency appellate review automatically stays the effectiveness of the appealed agency action until the appeal is resolved (which may be necessary for appellate review to be mandatory, see 5 U.S.C. § 704), and, if not, how a party seeking agency appellate review may request such a stay and the standards for deciding whether to grant it.⁵³⁶

ACUS also recommended that agencies “include on their websites brief and accessibly written explanations as to how their internal decision-making processes work and, as appropriate, include links to explanatory documents appropriate for public disclosure.” Subjects agencies might address in such explanations include, among other things, “the role of staff.”⁵³⁷

- In Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, ACUS recommended that agency codify as part of their rules of practice rules regarding precedential decision making, including which decisions, if any, are treated as precedential; which official(s) designates decisions as precedential and through what process; and any opportunities for public participation in precedential decision making.⁵³⁸

In general, programs in which PAS officials regularly serve in an appellate—often first-level appellate—capacity have developed rules that are at least comparable in scope and detail to

⁵³⁶ Recommendation 2020-3, *supra* note 7, ¶ 2.

⁵³⁷ *Id.* ¶ 21.

⁵³⁸ Recommendation 2022-4, *supra* note 15, ¶ 17.

rules governing review by non-PAS adjudicators. Some programs, particularly those in which PAS officials regularly participate in an appellate—often first-level appellate—capacity, have detailed, codified regulations regarding the participation of PAS officials. These regulations typically cover at least those procedural aspects discussed above in sections A through E of Part IV—that is: (a) whether the PAS official(s) participate directly in the adjudication of individual cases, (b) the level or stage of adjudication at which the PAS official(s) participates directly, (c) the cases in which the PAS official(s) participate directly, (d) the procedures followed by the PAS official(s) when he or she participates directly, and (e) the legal effect of the decisions of PAS official(s). Some agencies have also publicly communicated standards—codified or not—for recusal by a PAS official(s)⁵³⁹ and the role of staff in proceedings before a PAS official(s).⁵⁴⁰

In other programs, policies regarding the participation of PAS officials are not as clear or as readily available to the public. In programs in which a PAS official(s) has delegated final decision making authority to a judicial officer or appellate board, delegations of final decision making authority may not be expressly codified or may be difficult to locate. Where delegations are available, they may not clearly explain that the PAS official(s) has opted not to retain any authority to review decisions issued by lower-level adjudicators.

For example, a Social Security Administration rule describes the administrative review process as consisting of (1) an initial determination, (2) reconsideration, (3) a hearing before an ALJ, (4) review by the Appeals Council (an appeal board established by the agency head in 1940 and made up of non-PAS officials), and (5) federal court review. Regulatory silence regarding review by the Commissioner may be read to preclude such review, but the Commissioner’s delegation of final decision making authority is not explicit, and there is at least one historical instance of the Commissioner participating directly in a case despite such a rule.⁵⁴¹

Compare this with a USDA rule, which authorizes the Judicial Officer to act as the “final deciding officer” in specified adjudicator proceedings.⁵⁴² By statute, this delegation is interpreted to mean that the adjudicative function has “(to the extent of the delegation) been vested by law in the individual to whom the delegation is made.” Although the Secretary may revoke the delegation at any time, he or she may not do so retroactively.⁵⁴³

In several programs in which a rule explicitly provides for some degree of second-level review by a PAS official(s), publicly available rules do not describe the circumstances in which such review may be warranted. In immigration removal adjudication, for example, the Board of Immigration Appeals is directed to refer cases to the Attorney General for review when the Attorney General or Secretary of Homeland Security (or his or her delegate) so requests, or when the Chairman or a majority of the Board believes referral is warranted. No publicly available guidance sets forth or provides illustrative examples of circumstances in which the Attorney

⁵³⁹ See *supra* Part IV.F.

⁵⁴⁰ See, e.g., 14 C.F.R. § 13.65(e) (FAA).

⁵⁴¹ See *generally* Appendix O.

⁵⁴² 7 C.F.R. § 2.35.

⁵⁴³ 7 U.S.C. § 2204–3.

General or Secretary may request referral or the Board may find referral warranted.⁵⁴⁴ Compare the original version of the rule, in effect between 1940 and 1947, which specified circumstances in which review by the Attorney General might be warranted.⁵⁴⁵

Similarly, an EPA rule specifies that the EAB “may refer any case or motion to the Administrator when the [EAB], in its discretion, deems it appropriate to do so.”⁵⁴⁶ The rule does not specify when referral is appropriate. (It is not evident that the EAB has ever referred a case or motion to the Administrator.⁵⁴⁷) And in Indian affairs matters, no rule explains when the Assistant Secretary-Indian Affairs may take jurisdiction over an appeal to the IBIA, or when the Secretary of the Interior may assume jurisdiction of a case or review a decision.⁵⁴⁸

In several programs, no rule describes in detail the procedures a PAS official(s) will use when he or she assumes jurisdiction over a case or review a decision. The current rule governing referral to and review by the Attorney General in immigration removal adjudication, for example, provides only that the Attorney General’s decision shall be in writing and transmitted to the parties.⁵⁴⁹ In contrast, the EPA Administrator is directed to generally follow the rules of practice used by the EAB when considering a case or motion.⁵⁵⁰

The lack of routinization and procedural transparency has been called “disruptive” in at least one program—immigration removal—given that review by the Attorney General has been historically irregular, varied across administrations, and used to effect significant changes in law or policy that are often viewed as political in nature.⁵⁵¹ Several commentators have suggested that the adoption of regularized and transparent procedures would improve the quality of and public confidence in agency decision making.⁵⁵² This seems generally consistent with previous ACUS recommendations regarding the adoption and public availability of rules regarding agency adjudication.⁵⁵³

There are at least three benefits of publicly available rules and standards. First, they may increase confidence in the integrity and regularity of agency proceedings. Second, they provide a procedural baseline against which action by a PAS official(s) can be measured by the President,

⁵⁴⁴ 8 C.F.R. § 1003.1(h)(1).

⁵⁴⁵ See *supra* note 458.

⁵⁴⁶ 40 C.F.R. § 22.4(a)(1).

⁵⁴⁷ See Appendix A.

⁵⁴⁸ 25 C.F.R. §§ 2.508–2.511; 43 C.F.R. § 4.5.

⁵⁴⁹ 8 C.F.R. § 1003.1(h)(2).

⁵⁵⁰ 40 C.F.R. § 22.4(a)(1).

⁵⁵¹ See Bijal Shah, *The Attorney General’s Disruptive Immigration Power*, 102 IOWA L. REV. 129 (2017).

⁵⁵² See *id.* at Bijal Shah, *The Attorney General’s Disruptive Immigration Power*, 102 IOWA L. REV. 129, 139–40 (2017); PIERCE, *supra* note 324, at 21–24; David A. Martin, *Improving the Exercise of the Attorney General’s Immigration Referral Power: Lessons from the Battle over the “Categorical Approach” to Classifying Crimes*, 102 IOWA L. REV. 1, 5–9 (2016); Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766 (2010).

⁵⁵³ See *supra* notes 534–538; see also Recommendation 2018-5, *supra* note 6.

Congress, the courts, and the public. Third, rulemaking—whether after notice and comment or otherwise⁵⁵⁴—offers pre- and post-promulgation opportunities for broad public engagement.⁵⁵⁵

Former Attorney General Alberto Gonzales has argued against adopting set procedures, at least for Attorney General review. In a 2016 article, he emphasized the low risk of erroneous deprivation of parties’ protected liberty or property interests following a hearing before an immigration judge and appellate review by the Board of Immigration Appeals, a potentially high burden on the government associated with set procedures, and an opportunity for judicial review. Regarding the burden on the government, Gonzales emphasized the potential value of flexibility in choosing the appropriate degree of formality needed for a given case:

The government has weighty interests in the procedures used, and the likelihood is that any additional procedures would entail administrative burdens disproportionate to any “due process” gains realized. Currently, the Attorney General has flexibility to dispose of referred cases in a number of ways, including through vacatur and remand, decision on the administrative record, or decision after briefing. How or why an Attorney General may settle on a particular procedure in a specific case may depend on a number of factors both intrinsically and extrinsically related to the case, including how important the issue is, whether he wants to render a decision on an issue not fully raised or aired below, whether he may simply want reconsideration or a stay of proceedings pending further developments, or what level of involvement and time his current commitments permit to be devoted to matters of immigration review. Because the determination of procedures is ad hoc, the Attorney General retains the maximum amount of flexibility to determine in specific cases how and to what extent he will be involved in the review.⁵⁵⁶

Citing the *Morgan* cases, discussed earlier,⁵⁵⁷ Gonzales wrote:

[T]here is a weighty government interest in confining Attorney General review to the written administrative record, while permitting the determination of additional procedures on an ad hoc basis. Mandating additional procedures to govern every case would have the effect of impinging on the Attorney General’s ability to discharge his multitudinous functions in an efficient manner. Requiring the opportunity to submit briefs, even when clearly cumulative and duplicative of arguments already contained in the administrative record on which the Attorney General’s decision will be based, does nothing to enhance due process protections, while necessarily requiring that the proceedings before the Attorney

⁵⁵⁴ See Admin. Conf. of the U.S., Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30,102 (July 8, 1992).

⁵⁵⁵ See Recommendation 2018-7, *supra* note 349.

⁵⁵⁶ Gonzales & Glen, *supra* note 458, at 909.

⁵⁵⁷ See *supra* notes 500–509.

General are more drawn out and that he must expend additional time and effort in the review of the case materials.⁵⁵⁸

While Gonzales ultimately advised against revising the regulation to establish set procedures governing referral and review, he appeared open to the idea of amending it to include “substantive or objective criteria” for selecting cases for Attorney General review.⁵⁵⁹

Of course, rules and standards need not be exhaustive and can be drafted to permit procedural flexibility, as indicated by the many ACUS recommendations regarding alternative dispute resolution,⁵⁶⁰ simplified proceedings,⁵⁶¹ and active case management.⁵⁶² Agency rules routinely permit decision makers and parties ample discretion to dispense with unnecessary formalities and supplement procedures in appropriate circumstances.⁵⁶³ One example is the Interim Process for Director Review, adopted by USPTO following the Supreme Court’s decision in *Arthrex*. Under that process, the Director “generally makes a decision based on the existing record but may order additional briefing, discovery, or oral argument.”⁵⁶⁴

VI. Transparency of Proceedings Involving PAS Officials

ACUS has addressed public access to adjudicative proceedings (e.g., hearings, meetings, conferences), decisions (e.g., orders, opinions), and supporting materials (e.g., pleadings, motions, briefs) on several occasions. Taken together, these recommendations suggest that most aspects of adjudication involving direct participation by PAS officials should be transparent.

With respect to proceedings, ACUS in 2021 recommended that agencies “ordinarily should presume that evidentiary hearings and appellate proceedings (including oral arguments) are open to public observation.”⁵⁶⁵ ACUS recognized that there may be a need to close proceedings, in whole or in part, when the need to protect national security, law enforcement interests, confidential business information, personal privacy interests, the interests of minors and juveniles, or other legally protected interests outweighs the public interest in openness.⁵⁶⁶ For other types of adjudicative proceedings, which are typically closed, ACUS recommended considering several factors, among them whether public access would promote important policy

⁵⁵⁸ Gonzales & Glen, *supra* note 458, at 910.

⁵⁵⁹ See *supra* note 459.

⁵⁶⁰ See, e.g., Admin. Conf. of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, 53 Fed. Reg. 26,030 (July 11, 1988); Admin. Conf. of the U.S., Recommendation 86-3, *Agencies’ Use of Alternative Means of Dispute Resolution*, 51 Fed. Reg. 25,643 (July 16, 1986).

⁵⁶¹ See Admin. Conf. of the U.S., Recommendation 90-6, *Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission*, 55 Fed. Reg. 53,271 (Dec. 28, 1990).

⁵⁶² See, e.g., Admin. Conf. of the U.S., Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 Fed. Reg. 46,989 (Dec. 30, 1986).

⁵⁶³ See, e.g., Recommendation 2023-7, *supra* note 5, ¶ 12.

⁵⁶⁴ CHRISTOPHER T. ZIRPOLI & KEVIN J. HICKEY, CONG. RSCH. SERV., R48016, *THE PATENT TRIAL AND APPEAL BOARD AND INTER PARTES REVIEW* 34 (2024).

⁵⁶⁵ Admin. Conf. of the U.S., Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*, 87 Fed. Reg. 1715 (Jan. 12, 2022).

⁵⁶⁶ *Id.*

objectives such as transparency, fairness, accuracy, efficiency, and public participation in agency decision making; whether there is public interest in proceedings; and whether proceedings involve “issues of broad public interest or the interests of persons beyond the parties.”⁵⁶⁷ These statements suggest that proceedings before PAS officials ordinarily should be open to public observation. Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*, provides best practices for facilitating public access, including through advance public notice of adjudicative proceedings and remote observation.⁵⁶⁸

With respect to adjudicative decisions, FOIA directs agencies to proactively disclose on their websites “final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases.”⁵⁶⁹ Although this formulation has existed in some form since 1946, its scope has never been clear. Commentators (including Kenneth Culp Davis) and many litigants have argued for a broad interpretation, while DOJ and some agencies have argued for a narrower interpretation.⁵⁷⁰ At a minimum, precedential decisions should be made publicly available.⁵⁷¹ But ACUS has recommended recently that agencies should make available on their websites all “[f]inal opinions and orders issued in adjudications that are governed by 5 U.S.C. § 554 and 556–557 or otherwise issued after a legally required opportunity for an evidentiary hearing,” regardless of whether they are designated as precedential.⁵⁷² This suggests that decisions issued by PAS officials in their personal capacity ordinarily should be made publicly available.

Finally, with respect to supporting materials, ACUS has recommended that agencies consider providing online access to supporting materials. Factors to consider in determining which materials to disclose include (a) “the interests of the public in gaining insight into the agency’s adjudicative processes;” (b) “the costs to the agency in disclosing adjudication materials in excess of FOIA’s requirements;” (c) “any offsetting benefits the agency may realize in disclosing these materials” (e.g., a reduction in the volume of FOIA requests); and (d) the volume of cases.⁵⁷³ All of these factors tend to favor making at least those supporting materials relevant to the issues considered by PAS officials publicly available, recognizing that certain legally protected or sensitive information may need to be redacted or withheld.

Aside from prior ACUS recommendations, there are particularly good reasons to promote transparency in proceedings involving PAS officials. As Aaron Nielson, Christopher Walker, and Melissa Wasserman have written, the APA’s model for adjudication relies substantially on

⁵⁶⁷ *Id.*

⁵⁶⁸ *Id.*; see also Admin. Conf. of the U.S., Recommendation 72-6, *Broadcast of Agency Proceedings*, 38 Fed. Reg. 19,791 (July 23, 1973); Graboyes & Thomson, *supra* note 181.

⁵⁶⁹ 5 U.S.C. § 552(a)(2)(A).

⁵⁷⁰ See generally Jeremy S. Graboyes, *Transparency*, in A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 30, at 447, 451–456; see also Recommendation 89-9, *supra* note 80.

⁵⁷¹ 5 U.S.C. § 552(a)(1); see also Recommendation 2022-4, *supra* note 15; Recommendation 2016-4, *supra* note 6, ¶ 27.

⁵⁷² Admin. Conf. of the U.S., Recommendation 2023-1, *Proactive Disclosure of Agency Legal Materials*, ¶ 1, 88 Fed. Reg. 42,678 (July 3, 2023).

⁵⁷³ Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

transparency as a tool to strike the appropriate balance between hearing-level adjudicators' decisional independence and political control by agency heads. They write:

[T]he standard [APA] model envisions the agency head exercising political control over agency adjudication but requires this power to be implemented through a transparent mechanism. This point cannot be overstated. The agency head has wide latitude to reverse the ALJ's initial decision, including for policy considerations, but must explain her reasons for the reversal in a written decision. The agency head's decision becomes part of the administrative record that is subject to judicial review by a federal court and scrutiny by Congress, the President, and the public more generally.⁵⁷⁴

Viewed in this way, broad transparency enables agencies to achieve the policy objectives of direct participation by PAS officials while mitigating potential risks⁵⁷⁵ through exposure to judicial, presidential, congressional, and public oversight.

Several statutes make explicit that proceedings involving direct participation by PAS officials should be publicly transparent, including the Government in the Sunshine Act⁵⁷⁶ (for agencies headed by multimember bodies) and any number of agency- or program-specific statutes.⁵⁷⁷ Agencies have also adopted rules ensuring transparency. In establishing a system of discretionary agency-head review of ARB decisions, for example, then-Secretary of Labor Eugene Scalia ordered the ARB to "publish" any decision issued by the Secretary.⁵⁷⁸

Recommendations

Determining Whether and When a PAS Official(s) Will Participate in the Adjudication of Cases

1. When a statute authorizes an officer appointed by the President by and with the consent of the Senate (a PAS official) or a collegial body of PAS officials to adjudicate matters arising under the statute, and such authority is delegable as a constitutional and statutory matter, the agency ordinarily should delegate to one or more non-PAS adjudicators responsibility for conducting initial proceedings (i.e., receiving and evaluating evidence and arguments and issuing a decision). PAS officials, individually or as a collegial body, who retain authority to conduct initial proceedings should exercise such authority only if a matter is exceptionally significant, broadly consequential, or politically sensitive, and they have the capacity to personally receive and evaluate evidence and arguments and issue a decision in a fair, accurate, consistent, efficient, and timely manner.

⁵⁷⁴ Nielson et al., *supra* note 178 (manuscript at 16).

⁵⁷⁵ *See supra* Part IV.A.2.

⁵⁷⁶ *See supra* Part II.C.2.

⁵⁷⁷ *See, e.g.*, 49 U.S.C. § 46102.

⁵⁷⁸ 85 Fed. Reg. 13,186 (Mar. 6, 2020).

2. When a statute authorizes a PAS official or a collegial body of PAS officials to adjudicate matters arising under the statute or review decisions rendered by other adjudicators, and such authority is delegable as a constitutional and statutory matter, the agency should determine whether it would be beneficial for a PAS official or collegial body of PAS officials to review decisions rendered by lower-level adjudicators or whether it would be more appropriate to delegate final decision-making authority to a non-PAS official (e.g., a judicial officer) or a collegial body of non-PAS officials (e.g., a final appellate board). Circumstances in which it may be beneficial to provide for review by a PAS official(s) include:
 - a. When a case involves legal or factual issues that are exceptionally significant, broadly consequential, or politically sensitive;
 - b. When a case involves a novel or important question of law, policy, or discretion, such that direct participation by the PAS official(s) would promote centralized or politically accountable coordination of policymaking;
 - c. When participation in the adjudication of individual cases would provide the PAS official(s) with greater awareness of how the agency's adjudicative or regulatory system is functioning; and
 - d. When participation by the PAS official(s) in the adjudication of individual cases would promote consistent decision making by lower-level adjudicators.
3. When it would be beneficial to provide for review by a PAS official(s), the agency should, consistent with constitutional and statutory requirements, determine the appropriate structure for such review. Structural options include:
 - a. *Providing the only opportunity for administrative review of decisions rendered by lower-level adjudicators.* Participation by PAS officials in "first-level" review may be appropriate when caseloads are relatively low and individual cases frequently raise novel or important questions of law, policy, or discretion.
 - b. *Delegating first-level review authority to a judicial officer or appellate board and retaining authority to exercise second-level administrative review in exceptional circumstances.* Participation by PAS officials in "second-level" review may be appropriate when caseloads are relatively high and individual cases infrequently raise novel or important questions of law, policy, or discretion or have significant consequences beyond the parties to the case.
 - c. *Delegating final review authority to another PAS office.* This option may be appropriate, for example, when individuals who hold the other office, by virtue of holding that office, have greater access to subject-matter expertise or greater capacity to adjudicate cases in a fair, accurate, consistent, efficient,

and timely manner.

- d. *For collegial bodies of PAS officials, delegating first-level review authority to a single member or panel, and retaining authority for the collegial body as a whole to exercise second-level (and final) administrative review.* This option may be appropriate when a collegial body manages a relatively high caseload and most individual cases do not raise novel or important questions of law, policy, or discretion or have significant consequences beyond the parties to the case.

Initiating Review by a PAS Official(s)

4. An agency ordinarily should provide that a decision subject to review by a PAS official(s) becomes final and binding after a specified number of days unless some event triggers participation by the PAS official(s). Events that may trigger participation by the PAS official(s) include, as appropriate:
 - a. A party or other interested person files a petition requesting review of the decision of a lower-level adjudicator by the PAS official(s);
 - b. A lower-level adjudicator or an appellate board (as a body or through its chief executive or administrative officer) refers a decision to the PAS official(s) for review;
 - c. A federal official who oversees a program impacted by a decision, or his or her delegate, requests review of the decision; and
 - d. The PAS official(s) exercises authority to review a decision on his or her own motion.
5. Unless the law entitles a party or other interested person to review of a decision of a lower-level adjudicator by a PAS official(s) as a matter of right, an agency should provide that the PAS official(s) retains discretion to affirm summarily, review, decline to review, or take no action with regard to the decision. The agency should determine the circumstances in which the PAS official(s) may review a case. Circumstances in which first-level review by a PAS official(s) may be appropriate include:
 - a. A prejudicial procedural error or abuse of discretion was committed in the conduct of the proceeding;
 - b. The lower-level decision embodies a finding or conclusion of material fact which is erroneous or clearly erroneous;
 - c. The lower-level decision embodies a legal conclusion which is erroneous;

- d. The lower-level decision embodies an exercise of discretion or decision of law or policy which is important; and
- e. The lower-level decision presents a recurring issue or an issue that lower-level adjudicators have decided in different ways, and the PAS official(s) can resolve the issue more accurately and efficiently through precedential decision making.

To avoid multilevel review of purely factual issues, second-level review by a PAS official(s) should be limited to circumstances in which:

- a. There is a novel or important issue of law, policy, or discretion, or
 - b. The first-level reviewer erroneously interpreted the law or agency policy.
6. When parties or other interested persons are permitted to file a petition requesting that a PAS official(s) review a decision of a lower-level adjudicator, and review is discretionary, the agency should require that petitioners explain in the petition why review by the PAS official(s) is warranted.
 7. When parties or other interested persons are permitted to file a petition for review, and a PAS official(s) has discretion to grant or deny petitions, an agency should consider providing that if a PAS official(s) or his or her delegate does not grant a petition within a set time period, the petition is deemed denied.
 8. In determining whether to provide interlocutory review by a PAS official(s) of rulings by lower-level adjudicators, an agency should consider the best practices identified in Recommendation 71-1, *Interlocutory Appeal Procedures*, and evaluate whether interlocutory appeals can be decided in a fair, accurate, consistent, efficient, and timely manner.

Procedures for Review by a PAS Official(s)

9. When a PAS official(s) exercises discretion to review a decision or assume jurisdiction of a case on his or her own motion, upon referral by a lower-level adjudicator or an appellate board, or upon request by another federal official who oversees a program impacted by a decision, the PAS official(s) should notify the parties, provide a brief statement of the grounds for taking such action, and provide the parties a reasonable time to submit written arguments.
10. When a PAS official(s) grants a petition for review, he or she should notify all other parties to the case that he or she has done so and provide them a reasonable time to respond to the petition or file a counterpetition.
11. When a PAS official(s) reviews the decision of a lower-level adjudicator, he or she ordinarily should limit his or her consideration to the evidence and legal issues

- considered by the lower-level adjudicator. The PAS official(s) should consider new evidence and arguments, if at all, only if the proponent of new evidence or a new legal issue shows that it is material to the outcome of the case and that, despite his or her due diligence, it was not available when the record closed. In such contexts, the PAS official(s) should determine whether it would be more effective for the PAS official(s) to consider the new evidence or legal issue or instead to remand the case to a lower-level adjudicator for further development and consideration.
12. An agency should provide the PAS official(s) discretion to permit oral argument on his or her own initiative or upon a party's request if doing so would assist the PAS official(s) in deciding a matter in a fair, accurate, consistent, efficient, and timely matter.
 13. In cases when a PAS official(s) will decide a novel or important question of law, policy, or discretion, the agency should consider soliciting arguments from interested members of the public, for example by inviting amicus participation, accepting submission of written comments, or holding a public hearing to receive oral comments.
 14. Each agency at which PAS officials participate in the adjudication of individual cases should establish a process for considering whether participation by a particular PAS official in a case would violate government-wide or agency-specific ethics laws and regulations and should determine whether and, if so, in what circumstances PAS officials should recuse themselves from participating in a case.

Coordination of Policymaking

15. An agency ordinarily should treat the decision of a PAS official(s) as precedential if it addresses a novel or important issue of law, policy, or discretion, or if it resolves a recurring issue or an issue that lower-level adjudicators have decided in different ways. Unless the agency treats all decision of a PAS official(s) as precedential, in determining whether to treat other decisions as precedential, the agency should consider the factors listed in Paragraph 2 of Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*.
16. Each agency periodically should review petitions for review and decisions rendered by a PAS official(s) to determine whether issues raised repeatedly indicate a need for notice-and-comment rulemaking or other general policymaking by the agency.

Adjudicative Support for a PAS Official(s)

17. A PAS official(s) should assume the burden of personal decision for any case in which he or she participates.

18. Agencies should delegate routine functions that do not require personal attention by a PAS official(s), including, when appropriate:

- a. Conducting the initial evaluation of petitions for review and petitions for reconsideration;
- b. Dismissing, denying, and granting petitions for review in routine circumstances when such action is clearly warranted, for example when a petition is untimely, a party requests to withdraw a petition, or the parties to a proceeding agree to a settlement;
- c. Identifying unappealed decisions that may warrant review by the PAS official(s);
- d. Managing dockets and case filings;
- e. Managing proceedings, including the submission of materials and the scheduling of oral arguments;
- f. Responding to routine motions;
- g. Encouraging settlement and approving settlement agreements;
- h. Conducting the initial review of lower-level decisions, evidence, and arguments;
- i. Conducting legal and policy research;
- j. Recommending case dispositions;
- k. Drafting decisions and orders for review and signature by a PAS official(s);
- l. Transmitting decisions and orders to parties and making them publicly available; and
- m. Staying decisions and orders pending judicial review or reconsideration by the PAS official(s).

19. For each delegated function, the agency should determine the office or official(s) best suited to perform it in a fair, accurate, consistent, efficient, and timely manner.

Options include:

- a. Lower-level adjudicators and staff;

- b. Full-time appeals counsel;
- c. Advisors to a PAS official(s);
- d. The chief legal officer or personnel under his or her supervision; and
- e. A Clerk or Executive Secretary or personnel under his or her supervision.

In making such determinations, the agency should ensure adequate separation between personnel who support a PAS official(s) in an adjudicative capacity and those who support the PAS official(s) in an investigative or prosecutorial capacity.

Transparency

- 20. Each agency should provide updated access on its website to decisions issued by a PAS official(s), whether or not designated as precedential, and associated supporting materials. In publishing decisions, the agency should clearly indicate which decisions are precedential. The agency should also redact any information that is sensitive or otherwise protected from disclosure, and redact identifying details to the extent required to prevent an unwarranted invasion of personal privacy. In indexing decisions, the agency should clearly indicate which decisions are issued by a PAS official(s).
- 21. Each agency ordinarily should presume that oral arguments and other review proceedings before a PAS official(s) are open to public observation. Agencies may choose to close such proceedings, in whole or in part, to the extent consistent with applicable law and if there is substantial justification to do so, as described in Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*.

Development and Publication of Procedures for Adjudication by PAS Official(s)

- 22. Each agency should promulgate and publish procedural regulations governing the participation of PAS official(s) in the adjudication of individual cases in the *Federal Register* and codify them in the *Code of Federal Regulations*. These regulations should cover all significant procedural matters pertaining to adjudication by PAS official(s). In addition to those matters identified in Paragraph 2 of Recommendation 2020-3, *Agency Appellate Systems*, such regulations should address, as applicable:
 - a. The level(s) of adjudication (e.g., hearing level, first-level appellate review, second-level appellate review) at which the PAS official(s) has or may assume jurisdiction of a case (see Paragraphs 1–3);
 - b. Events that trigger participation by the PAS official(s) (see Paragraph 4);
 - c. An exclusive, nonexclusive, or illustrative list of circumstances in which the PAS official(s) will or may review a decision or assume jurisdiction of a case,

- if assumption of jurisdiction or review is discretionary (see Paragraph 5);
- d. The availability, timing, and procedures for filing a petition for consideration by the PAS official(s), including any opportunity for interlocutory review, and whether filing a petition is a mandatory prerequisite to judicial review (see Paragraphs 6 and 8);
 - e. The actions the agency will take upon receiving a petition (e.g., grant, deny, or dismiss it), and whether the agency's failure to act on a petition within a set period of time constitutes denial of the petition (see Paragraph 7);
 - f. The form, contents, and timing of notice provided to the parties to a case when proceedings before the PAS official(s) are initiated (see Paragraphs 9–10);
 - g. The record for decision making by the PAS official(s) and the opportunity, if any, to submit new evidence or raise new legal issues (see Paragraph 11);
 - h. Opportunities for public participation (see Paragraph 12);
 - i. Opportunities for oral argument (see Paragraph 13);
 - j. The process for considering whether participation by a PAS official in a case would violate government-wide or agency-specific ethics laws and regulations, and any standards for recusal (see Paragraph 14);
 - k. The treatment of decisions by a PAS official(s) as precedential (see Paragraph 15);
 - l. Any significant delegations of authority to lower-level adjudicators; appellate boards; staff attorneys; clerks and executive secretaries; other support personnel; and in the case of multimember agencies, members individually or panels consisting of fewer than all members (see Paragraphs 17–19);
 - m. Any delegations of review authority or alternative review procedures in effect when a PAS position is vacant or a collegial body of PAS officials lacks a quorum; and
 - n. The public availability of decisions issued by a PAS official(s) and supporting materials, and public access to proceedings before a PAS official(s) (see Paragraphs 20–21).
23. An agency should provide updated access on its website to the regulations described in Paragraph 22 and all other relevant sources of procedural rules and related guidance documents and explanatory materials.