



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

~~Participation of Senate-Confirmed Officials
in Administrative Adjudication~~

Senate-Confirmed Officials and Administrative Adjudication

Committee on Adjudication

Proposed Recommendation for Plenary | June 13, 2024

Commented [CoA1]: Proposed Amendment from the Committee on Adjudication:

The Committee voted to replace the original title of this Recommendation (*Participation of Senate-Confirmed Officials in Administrative Adjudication*).

Commented [CA2]: Proposed Amendment from Council #1:

This proposed amendment would remove the explanation of the term “Department” as used in the Appointments Clause given developing case law since *Free Enterprise Fund*.

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

10 PAS officials often participate indirectly and directly in administrative adjudication.
11 Indirectly, they may establish agency subunits and positions responsible for adjudicating cases.
12 They may appoint and supervise adjudicators,² and they may appoint and supervise, or oversee

¹ See *Lucia v. United States*, 585 U.S. 237 (2018). Under the Constitution’s Appointments Clause, art. II § 2, cl. 2, “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.” ~~The Supreme Court has interpreted the term “Department” in this context to mean “a freestanding component of the Executive Branch, not subordinate to or contained within any other such component.”~~ *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 511 (2010).

² See *Lucia*, 585 U.S. at 251 (holding that administrative law judges employed by the Securities and Exchange Commission are “Officers of the United States” and must be appointed in accordance with the Appointments Clause).



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13 the appointment and supervision of, other adjudicative personnel. PAS officials may coordinate
14 with the President and Congress to help ensure that adjudicative subunits have the resources they
15 need to adjudicate cases in a fair, accurate, consistent, efficient, timely, and politically responsive
16 manner.³ PAS officials may also establish rules of procedure and practice to structure
17 administrative adjudication,⁴ and they may develop substantive rules that supply the law in
18 adjudications.

19 Additionally, PAS officials may participate directly in administrative adjudication,
20 serving as the final, executive-branch decision makers⁵ in cases arising under the statutes they
21 administer.⁵ Although questions regarding whether, when, and how PAS officials participate
22 directly in the adjudication of cases are not new, they have gained new salience in recent years.
23 Most notably, in *United States v. Arthrex*,⁶ the Supreme Court held that a statute providing for
24 the administrative resolution of certain patent disputes violated the Appointments Clause by
25 vesting final decisional authority in adjudicators in the U.S. Patent and Trademark Office's
26 Patent Trial and Appeal Board, whose members are neither PAS officials nor subject to at-will
27 removal. The Court remedied the violation by holding unenforceable ~~the statutory restraint~~
28 any statutory prohibition on the authority of a PAS official, the Director of the Patent and Trademark
29 Office, to review the Board's decisions.

30 While Congress has, for some programs, determined by statute whether, when, and how
31 PAS officials participate directly in the adjudication of cases, for many programs, Congress has
32 given agencies the discretion to develop procedures and practices that are effective and

³ 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).

⁴ 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).

⁵ See Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021).

⁶ 141 S. Ct. 1970 594 U.S. 1 (2021).

Commented [CA3]: Proposed Amendment from Council #2:

The Council believes the phrase "any statutory prohibition" more accurately describes the statute at issue in *Arthrex*.



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33 appropriate for the specific programs they administer. This Recommendation provides a
34 framework to help agencies develop effective procedures and practices, when required or
35 appropriate, for direct participation by PAS officials in the adjudication of individual cases.

36 It does not address whether Congress or agencies should, for constitutional or other
37 reasons, provide for direct participation by PAS officials in the adjudication of individual cases
38 under specific programs. Nor does this recommendation address the broader question of whether
39 and when agencies should develop policies through rulemaking, adjudication, setting
40 enforcement priorities, or other means. Of course, Congress and agencies must pay careful
41 attention to such questions and ensure that laws, rules, and policies comport with applicable legal
42 requirements.

43 To develop effective and appropriate procedures and practices, agencies must consider, in
44 addition to applicable constitutional and statutory requirements, the characteristics of PAS
45 officials and the potential consequences of such characteristics for fair, accurate, consistent,
46 efficient, and timely adjudication. While there is wide variation among PAS positions and PAS
47 officials, at least five characteristics commonly distinguish PAS positions and officials from
48 other agency positions and officials, especially career civil servants.

49 First, as the Administrative Conference has previously noted, there are often numerous
50 vacancies in PAS positions.⁷ Frequent vacancies exist for several reasons, including delays
51 related to the appointments process. When adjudicative functions are assigned to PAS positions,
52 vacancies in those positions can affect the timeliness of adjudication. At some agencies, for
53 example, vacancies or the lack of a quorum have resulted in long delays.⁸

54 Second, there is relatively high turnover in PAS positions, and PAS officials almost
55 always serve in their positions for a shorter time than career civil servants. Thus PAS officials

⁷ 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).

⁸ See Matthew A. Gluth, Jeremy S. Graboyes & Jennifer L. Selin, Participation of Senate-Confirmed Officials in Administrative Adjudication [58-6140-42](#) (Apr/June 9, 2024) (draft report to the Admin. Conf. of the U.S.).



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56 may lack preexisting relationships with agency employees, knowledge of agency processes, and
57 the specialized adjudicative expertise that career adjudicators develop as a result of their work
58 and experience in this area.

59 Third, unlike civil servants who are hired without regard to political affiliation, activity,
60 or beliefs,⁹ PAS officials are often nominated by the President at least in part *because* of their
61 political affiliation, activity, or beliefs. PAS officials are also subject to removal by the President,
62 although a statute may impose for-cause or other limitations on removal. Unlike officials
63 appointed by a department head or the President alone, however, PAS officials are also
64 confirmed by the Senate, which may make them more attentive to Congress than career agency
65 officials.¹⁰ On the one hand, such exposure to politics may help ensure that agency decision
66 making, including the development of policy through case-by-case adjudication, remains
67 publicly accountable. And given their relationships with the President, other political appointees,
68 and Congress, PAS officials may be well equipped to address systemic problems, identified
69 through the adjudication of cases, that require intra- or interbranch coordination. On the other
70 hand, the involvement of political appointees in administrative adjudication may raise concerns
71 about the impartiality and objectivity of agency decision making.¹¹

72 Fourth, unlike career adjudicators, who are often appointed based on prior adjudicative or
73 litigation experience,¹² PAS officials are often appointed for other reasons such as prior
74 experience in a particular industry or familiarity with a particular policy domain. PAS officials
75 may have better access to substantive, subject-matter expertise than other agency decision
76 makers, which may improve the quality of policies developed through case-by-case adjudication.
77 On the other hand, they may lack experience or familiarity with the procedural aspects of
78 administrative adjudication.

⁹ 5 U.S.C. § 2301.

¹⁰ See Gluth, Graboyes & Selin, *supra* note 8, at 45–4650.

¹¹ See *id.* Gluth, Graboyes & Selin, *supra* note 8 at 5645–5750.

¹² See Admin. Conf. of the U.S., Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*, 84 Fed. Reg. 38,930 (Aug. 8, 2019).



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79 Fifth, PAS officials often sit atop agency hierarchies, and statutes often assign PAS
80 officials, especially the heads of cabinet departments, a broad range of responsibilities,
81 potentially including the administration of multiple programs and, under any given program,
82 multiple functions (e.g., rulemaking, investigation, prosecution) in addition to adjudication.¹³
83 Such responsibilities can provide PAS officials with a unique opportunity to coordinate
84 policymaking within and across programs, promote consistent decision making, and gain better
85 awareness of the adjudicative and regulatory systems for which they are statutorily responsible.
86 On the other hand, ~~because PAS officials often face many competing demands on their time,~~
87 ~~they may have less practical capacity to devote to the adjudication of individual cases than other~~
88 ~~officials whose primary function is to adjudicate cases. PAS officials may lack the capacity to~~
89 ~~decide cases in a fair, accurate, consistent, efficient, and timely manner. Additionally, some have~~
90 ~~raised concerns in certain contexts that the combination of adjudication and enforcement~~
91 ~~functions (investigation and prosecution) in a single official may affect the integrity of agency~~
92 ~~proceedings. Some have also raised concerns in certain contexts that the combination of~~
93 ~~adjudication and rulemaking functions in a single official may encourage the resolution of~~
94 ~~important legal and policy issues through case-by-case adjudication, even when general~~
95 ~~rulemaking offers a better mechanism for resolving such issues. The combination of adjudicative~~
96 ~~and non-adjudicative functions (e.g., investigation, prosecution, rulemaking) in a single decision~~
97 ~~maker may also raise concerns about the integrity of agency proceedings and the effectiveness of~~
98 ~~agency policymaking.~~¹⁴

99 Considering these and other characteristics, and consistent with statutory and regulatory
100 requirements, agencies must determine whether participation by PAS officials in the adjudication
101 of cases provides an effective mechanism for directing and supervising systems of administrative
102 adjudication and, if it does, what procedures and practices will permit PAS officials to adjudicate
103 cases in a manner that best promotes fairness, accuracy, consistency, efficiency, and timeliness.
104 The Conference has addressed some of these issues in previous recommendations, most notably

¹³ See Gluth, Graboyes & Selin, *supra* note 8, at 46–48.

¹⁴ See ~~id.~~ Gluth, Graboyes & Selin, *supra* note 8, at 6252–6356.

Commented [CA4]: Proposed Amendment from Council #3:

The proposed amendments are intended to clarify the nature and extent of such concerns.



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105 in Recommendation 68-8, *Delegation of Final Decisional Authority Subject to Discretionary*
106 *Review by the Agency*;¹⁵ Recommendation 83-3, *Agency Structures for Review of Decisions of*
107 *Presiding Officers Under the Administrative Procedure Act*;¹⁶ Recommendation 2018-4, *Recusal*
108 *Rules for Administrative Adjudicators*;¹⁷ Recommendation 2020-3, *Agency Appellate Systems*;¹⁸
109 and Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*.¹⁹
110 Recognizing that agencies must consider applicable constitutional and statutory requirements and
111 the unique characteristics of the programs they administer, this Recommendation builds on these
112 earlier recommendations but focuses exclusively on identifying best practices to help agencies
113 determine whether, when, and how PAS officials should participate directly in the adjudication
114 of individual cases.

RECOMMENDATION

Determining Whether and When Officers Appointed by the President With the Advice and Consent of the Senate—PAS Officials—Should Participate in the Adjudication of Cases

115 1. When a statute authorizes a PAS official or collegial body of PAS officials to adjudicate
116 matters arising under the statute, and such authority is delegable as a constitutional and
117 statutory matter, the agency ordinarily should delegate to one or more non-PAS
118 adjudicators responsibility for conducting initial proceedings (i.e., receiving and
119 evaluating evidence and arguments and issuing a decision). PAS officials, individually or
120 as a collegial body, who retain statutory authority to conduct initial proceedings
121 ordinarily should exercise such authority only if:

¹⁵ 38 Fed. Reg. 19,783 (July 23, 1973).

¹⁶ 48 Fed. Reg. 57,461 (Dec. 30, 1983).

¹⁷ 84 Fed. Reg. 2139 (Feb. 6, 2019).

¹⁸ 86 Fed. Reg. 6618 (Jan. 22, 2021).

¹⁹ 88 Fed. Reg. 2312 (Jan. 13, 2023).



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- 122 a. ~~A~~ matter is exceptionally significant or broadly consequential, and they have
123 the capacity ~~personally to personally~~ receive and evaluate evidence and
124 arguments and issue a decision in a fair, accurate, consistent, efficient, and
125 timely manner; or
126 ~~b.~~ There are no disputed issues of fact, the matter to be decided does not require
127 taking much evidence, and resolution of the matter turns on qualitative
128 judgments of a broad nature.

Commented [CA5]: Proposed Amendment from Council #4

- 129 2. When a statute authorizes a PAS official or a collegial body of PAS officials to
130 adjudicate matters arising under the statute or review lower-level decisions rendered by
131 other adjudicators, and such authority is delegable as a constitutional and statutory
132 matter, the agency should determine in which types of cases it would be beneficial for a
133 PAS official or collegial body of PAS officials to review lower-level decisions rendered
134 by other adjudicators and in which it would be more appropriate to delegate final
135 decision-making authority to a non-PAS official (e.g., an agency “Judicial Officer”) or a
136 collegial body of non-PAS officials (e.g., a final appellate board). ~~If a PAS official or~~
137 ~~collegial body of PAS officials delegates final decision-making authority to lower-level~~
138 ~~officials, they should adopt alternative mechanisms to ensure adequate direction and~~
139 ~~supervision of decision makers exercising delegated authority.~~ Circumstances in which it
140 may be beneficial for an agency to provide for review by a PAS official or a collegial
141 body of PAS officials include:

Commented [CA6]: Proposed Amendment from Council #5:

The proposed amendment would clarify, consistent with the Supreme Court’s Appointments Clause jurisprudence, that inferior officers must be “directed and supervised at some level” by PAS officials.

- 142 a. Cases that involve legal or factual issues that are exceptionally significant or
143 broadly consequential;
144 b. Cases that involve a novel or important question of law, policy, or discretion,
145 such that direct participation by one or more PAS officials would promote
146 centralized or politically accountable coordination of policymaking; and
147 c. When participation by one or more PAS officials in the adjudication of
148 individual cases would promote consistent decision making by agency
149 adjudicators.



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- 150 3. When it would be beneficial to provide for review by a PAS official or a collegial body
151 of PAS officials, the agency should, consistent with constitutional and statutory
152 requirements, determine the appropriate structure for such review. Structural options
153 include:
- 154 a. *Providing the only opportunity for administrative review of lower-level*
155 *decisions.* This option may be appropriate when caseloads are relatively low
156 and individual cases frequently raise novel or important questions of law,
157 policy, or discretion.
 - 158 b. *Delegating first-level review authority to a non-PAS official, such as an*
159 *agency “Judicial Officer,” or appellate board and retaining authority to*
160 *exercise second-level administrative review in exceptional circumstances.*
161 This option may be appropriate when caseloads are relatively high and
162 individual cases only occasionally raise novel or important questions of law,
163 policy, or discretion or have significant consequences beyond the parties to
164 the case.
 - 165 c. *Delegating final review authority to another PAS official.* This option may be
166 appropriate, for example, when individuals, by virtue of holding another PAS
167 position, have greater access to subject-matter expertise or greater capacity to
168 adjudicate cases in a fair, accurate, consistent, efficient, and timely manner.
 - 169 d. *For collegial bodies of PAS officials, delegating first-level review authority to*
170 *a single member or panel, and retaining authority for the collegial body as a*
171 *whole to exercise second-level (and final) administrative review.* This option
172 may be appropriate when a collegial body manages a relatively high caseload
173 and most individual cases do not raise novel or important questions of law,
174 policy, or discretion or have significant consequences beyond the parties to
175 the case.



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Initiating Review by PAS Officials

- 176 4. An agency ordinarily should provide that a decision subject to review by a PAS official
177 or a collegial body of PAS officials becomes final and binding after a specified number
178 of days unless, as applicable:
- 179 a. A party or other interested person files a petition for review, if a statute
180 entitles a party or other interested person to such review;
 - 181 b. A PAS official or collegial body of PAS officials exercises discretion to
182 review the decision upon petition by a party or other interested person;
 - 183 c. A PAS official or collegial body of PAS officials exercises discretion to
184 review the lower-level decision upon referral by the adjudicator or appellate
185 board (as a body or through its chief executive or administrative officer) that
186 issued the decision;
 - 187 d. A PAS official or collegial body of PAS officials exercises discretion to
188 review the decision upon request by a federal official who oversees a program
189 impacted by a decision, or his or her delegate; or
 - 190 e. A PAS official or collegial body of PAS officials exercises discretion to
191 review the decision sua sponte.
- 192 5. When a PAS official or collegial body of PAS officials serves as a first-level reviewer, an
193 agency should develop a policy for determining the circumstances in which such review
194 may be exercised. Review may be warranted if there is a reasonable probability that:
- 195 a. The adjudicator who issued the lower-level decision committed a prejudicial
196 procedural error or abuse of discretion;
 - 197 b. The lower-level decision includes an erroneous finding of material fact;
 - 198 c. The adjudicator who issued the lower-level decision erroneously interpreted
199 the law or agency policy;
 - 200 d. The case presents a novel or important issue of law, policy, or discretion; or
 - 201 e. The lower-level decision presents a recurring issue or an issue that agency
202 adjudicators have decided in different ways, and the PAS official or officials



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- 203 can resolve the issue more accurately and efficiently through precedential
204 decision making.
- 205 6. When a PAS official or collegial body of PAS officials serves as a second-level reviewer,
206 an agency should determine the circumstances in which such review may be warranted.
207 To avoid multilevel review of purely factual issues, the agency should limit second-level
208 review by a PAS official or collegial body of PAS officials to circumstances in which
209 there is a reasonable probability that:
- 210 a. The case presents a novel or important issue of law, policy, or discretion, or
 - 211 b. The first-level reviewer erroneously interpreted the law or agency policy.
- 212 7. When agency rules permit parties or other interested persons to file a petition requesting
213 that a PAS official or a collegial body of PAS officials review a lower-level decision and
214 review is discretionary, the agency should require that petitioners explain in the petition
215 why such review is warranted with reference to the grounds for review identified in
216 Paragraph 5 or 6, as applicable. Agency rules should permit other parties or interested
217 persons to respond to the petition or file a cross-petition.
- 218 8. An agency should provide that if a PAS official or collegial body of PAS officials, or a
219 delegate, does not exercise discretion to grant a petition for review within a set time
220 period, the petition is deemed denied.
- 221 9. In determining whether to provide for interlocutory review by a PAS official or collegial
222 body of PAS officials of rulings by agency adjudicators, an agency should evaluate
223 whether such review can be conducted in a fair, accurate, consistent, efficient, and timely
224 manner, considering the best practices identified in Recommendation 71-1, *Interlocutory*
225 *Appeal Procedures*.
- 226 10. When a PAS official or collegial body of PAS officials exercises discretion to review a
227 lower-level decision (e.g., by granting a petition or accepting a referral), the agency
228 should:
- 229 a. Notify the parties;
 - 230 b. Provide a brief statement of the grounds for review; and
 - 231 c. Provide the parties a reasonable time to submit written arguments.



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PAS Official Review Process

- 232 11. A PAS official or collegial body of PAS officials who reviews a lower-level decision
233 ordinarily should limit consideration to the evidence and legal issues considered by the
234 adjudicator who issued that decision. The PAS official or collegial body of PAS officials
235 should consider new evidence and legal issues, if at all, only if (a) the proponent of new
236 evidence or a new legal issue shows that it is material to the outcome of the case and that,
237 despite his or her due diligence, it was not available when the record closed, or (b)
238 consideration of a new legal issue is necessary to clarify agency law or policy. In such
239 situations, the PAS official or collegial body of PAS officials should determine whether it
240 would be more effective to consider the new evidence or legal issue or instead to remand
241 the case to another adjudicator for further development and consideration.
- 242 12. An agency should provide a PAS official or collegial body of PAS officials discretion to
243 permit oral argument on his or her their own initiative or upon a party's request if doing
244 so would assist the PAS official(s) in deciding the matter.
- 245 13. In cases when a PAS official or collegial body of PAS officials will decide a novel or
246 important question of law, policy, or discretion, the agency should provide the PAS
247 official(s) discretion to solicit arguments from interested members of the public, for
248 example by inviting amicus participation, accepting submission of written comments, or
249 holding a public hearing to receive oral comments.

Integrity of the Decision-Making Process

- 250 14. To promote impartiality and the appearance of impartiality in adjudication, Each each
251 agency at which PAS officials participate in the adjudication of individual cases should
252 establish a process for considering whether participation by a particular PAS official in a
253 case would violate government-wide or agency-specific ethics standards and should
254 determine whether and, if so, in what circumstances PAS officials should recuse
255 themselves from participating in a case.

Commented [CA7]: Proposed Amendment from Council #6

Commented [CA8]: Proposed Amendment from Council #7
(see associated amendment at paragraph 21(k))



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Coordination of Policymaking and Decision Making by Agency Adjudicators

- 256 15. An agency ordinarily should treat decisions of PAS officials as precedential if they
257 address novel or important issues of law, policy, or discretion, or if they resolve recurring
258 issues or issues that other agency adjudicators have decided in different ways. Unless the
259 agency treats all decisions of PAS officials as precedential, in determining whether and
260 under what circumstances to treat such decisions as precedential, the agency should
261 consider the factors listed in Paragraph 2 of Recommendation 2022-4, *Precedential*
262 *Decision Making in Agency Adjudication*.
- 263 16. Each agency **periodically** should review **periodically** petitions for review and decisions
264 rendered by PAS officials to determine whether issues raised repeatedly indicate that the
265 agency, its adjudicators, or the public may benefit from ~~notice-and-comment~~ rulemaking
266 or development of guidance.

Adjudicative Support for PAS Officials

- 267 17. When a PAS official or collegial body of PAS officials adjudicates individual cases,
268 agencies should assign or delegate case-related functions to non-PAS officials, when
269 appropriate, including:
- 270 a. Performing routine tasks such as managing dockets and case filings;
271 managing proceedings, including the submission of materials and the
272 scheduling of oral arguments;
 - 273 b. Responding to routine motions;
 - 274 c. Dismissing, denying, and granting petitions for review in routine
275 circumstances when such action is clearly warranted, for example when a
276 petition is untimely, a party requests to withdraw a petition, or the parties to a
277 proceeding agree to a settlement;
 - 278 d. Conducting the preliminary review of lower-level decisions, evidence, and
279 arguments;
 - 280 e. Conducting the preliminary evaluation of petitions for review and petitions for
281 reconsideration;

Commented [CA9]: Proposed Amendment from Council #8.

This amendment would remove “notice-and-comment” because presumably an agency might resolve issues raised repeatedly in petitions and decisions through rules that are *not* required to undergo notice and comment (e.g., rules of practice or procedure).



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- 282 f. Identifying unappealed decisions that may warrant review by a PAS official or
283 collegial body of PAS officials;
284 g. Encouraging settlement and approving settlement agreements;
285 h. Conducting legal and policy research;
286 i. Recommending case dispositions;
287 j. Preparing draft decisions and orders for review and signature by a PAS
288 official or collegial body of PAS officials;
289 k. Transmitting decisions and orders to parties and making them publicly
290 available; and
291 l. Staying decisions and orders pending ~~judicial review or~~ reconsideration by a
292 PAS official or collegial body of PAS officials ~~or judicial review~~.

293 18. When a PAS official or collegial body of PAS officials adjudicates individual cases, the
294 agency should determine which offices or officials are best suited to perform assigned or
295 delegated functions such as those in paragraph 17 in a fair, accurate, consistent, efficient,
296 and timely manner. Possibilities include:

- 297 a. Adjudicators and staff who serve at an earlier level of adjudication;
298 b. Full-time appeals counsel;
299 c. Advisors to a PAS official;
300 d. The chief legal officer or personnel under his or her supervision; and
301 e. A Clerk or Executive Secretary or personnel supervised by such officials.

302 In making such determinations, the agency should ensure adequate separation between
303 personnel who support a PAS official or collegial body of PAS officials in an
304 adjudicative capacity and those who support the PAS official(s) in an investigative or
305 prosecutorial capacity.

Transparency

- 306 19. Each agency should provide updated access on its website to decisions issued by PAS
307 officials, whether or not designated as precedential, and associated supporting materials.
308 In publishing decisions, the agency should redact identifying details to the extent required



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- 309 to prevent an unwarranted invasion of personal privacy and any information that
310 implicates sensitive or legally protected interests involving, among other things, national
311 security, law enforcement, confidential business information, personal privacy, or minors.
312 In indexing decisions on its website, the agency should clearly indicate which decisions
313 are issued by PAS officials.
- 314 20. Each agency ordinarily should presume that oral arguments and other review proceedings
315 before PAS officials are open to public observation. Agencies may choose to close such
316 proceedings, in whole or in part, to the extent consistent with applicable law and if there
317 is substantial justification to do so, as described in Recommendation 2021-6, *Public*
318 *Access to Agency Adjudicative Proceedings*.

Development and Publication of Procedures for Adjudication by PAS Officials

- 319 21. Each agency should promulgate and publish procedural regulations governing the
320 participation of PAS officials in the adjudication of individual cases in the *Federal*
321 *Register* and codify them in the *Code of Federal Regulations*. These regulations should
322 cover all significant procedural matters pertaining to adjudication by PAS officials. In
323 addition to those matters identified in Paragraph 2 of Recommendation 2020-3, *Agency*
324 *Appellate Systems*, such regulations should address, as applicable:
- 325 a. Whether and, if so, which PAS officials may participate directly in the
326 adjudication of cases;
 - 327 b. The level(s) of adjudication (e.g., hearing level, first-level appellate review,
328 second-level appellate review) at which a PAS official or collegial body of
329 PAS officials have or may assume jurisdiction of a case (see Paragraphs 1–3);
 - 330 c. Events that trigger participation by a PAS official or collegial body of PAS
331 officials (see Paragraph 4);
 - 332 d. An exclusive, nonexclusive, or illustrative list of circumstances in which a
333 PAS official or collegial body of PAS officials will or may review a decision
334 or assume jurisdiction of a case, if assumption of jurisdiction or review is
335 discretionary (see Paragraphs 5–6);



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- 336 e. The availability, timing, and procedures for filing a petition for review by a
337 PAS official or collegial body of PAS officials, including any opportunity for
338 interlocutory review, and whether filing a petition is a mandatory prerequisite
339 to judicial review (see Paragraphs 7 and 9);
- 340 f. The actions the agency ~~will~~ may take upon receiving a petition (e.g., grant,
341 deny, or dismiss it), and whether the agency's failure to act on a petition
342 within a set period of time constitutes denial of the petition (see Paragraph 8);
- 343 g. The form, contents, and timing of notice provided to the parties to a case when
344 proceedings before a PAS official or collegial body of PAS officials are
345 initiated (see Paragraphs 9–10);
- 346 h. The record for decision making by a PAS official or collegial body of PAS
347 officials and the opportunity, if any, to submit new evidence or raise new legal
348 issues (see Paragraph 11);
- 349 i. Opportunities for oral argument (see Paragraph 12);
- 350 j. Opportunities for public participation (see Paragraph 13);
- 351 k. The process for considering whether participation by a PAS official in a case
352 would violate government-wide or agency-specific ethics standards, including
353 any relevant recusal standards and, if so, in what circumstances PAS officials
354 should recuse themselves from participating in a case (see Paragraph 14);
- 355 l. The treatment of decisions by PAS officials as precedential (see Paragraph
356 15);
- 357 m. Any significant delegations of authority to agency adjudicators; appellate
358 boards; staff attorneys; clerks and executive secretaries; other support
359 personnel; and, in the case of collegial bodies of PAS officials, members who
360 serve individually or in panels consisting of fewer than all members (see
361 Paragraphs 17–18);
- 362 n. Any delegations of review authority or alternative review procedures in effect
363 when a PAS position is vacant or a collegial body of PAS officials lacks a
364 quorum; and

Commented [CA10]: Proposed Amendment from Council #7 (see associated amendment at paragraph 14).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 365 o. The public availability of decisions issued by PAS officials and supporting
366 materials, and public access to proceedings before PAS officials (see
367 Paragraphs 19–20).
- 368 22. An agency should provide updated access on its website to the regulations described in
369 Paragraph 21 and all other relevant sources of procedural rules and related guidance
370 documents and explanatory materials.