



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## **Administrative Conference Recommendation 2024-3**

### **Senate-Confirmed Officials and Administrative Adjudication**

#### **Committee on Adjudication**

#### **Approved Recommendation | June 13, 2024**

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 some administrative judges, are appointed by a department head.<sup>1</sup> 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—work with career civil servants and other officials to structure systems of administrative adjudication and oversee their operation, ensuring some measure of political accountability.

PAS officials often participate indirectly and directly in administrative adjudication. Indirectly, they may establish agency subunits and positions responsible for adjudicating cases. They may appoint and supervise adjudicators,<sup>2</sup> and they may appoint and supervise, or oversee the appointment and supervision of, other adjudicative personnel. PAS officials may coordinate with the President and Congress to help ensure that adjudicative subunits have the resources they

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<sup>1</sup> See *Lucia v. SEC*, 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.”

<sup>2</sup> 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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need to adjudicate cases in a fair, accurate, consistent, efficient, and timely manner.<sup>3</sup> PAS officials may also establish rules of procedure and practice to structure administrative adjudication,<sup>4</sup> and they may develop substantive rules that supply the law in adjudications.

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

While Congress has for some programs determined by statute whether, when, and how PAS officials participate directly in the adjudication of cases, for many programs Congress has given agencies the discretion to develop procedures and practices that are effective and appropriate for the specific programs they administer. This Recommendation provides a framework to help agencies develop effective procedures and practices, when required or appropriate, for direct participation by PAS officials in the adjudication of individual cases.

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<sup>3</sup> 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).

<sup>4</sup> 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).

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

<sup>6</sup> 594 U.S. 1 (2021).



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

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

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

Second, there is relatively high turnover in PAS positions, and PAS officials almost always serve in their positions for a shorter time than career civil servants. Thus, PAS officials may lack preexisting relationships with agency employees, knowledge of agency processes, and the specialized adjudicative expertise that career adjudicators develop as a result of their work and experience in this area.

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<sup>7</sup> 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).

<sup>8</sup> See Matthew A. Gluth, Jeremy S. Graboyes & Jennifer L. Selin, *Participation of Senate-Confirmed Officials in Administrative Adjudication* 40–42 (June 9, 2024) (report to the Admin. Conf. of the U.S.).



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

Fourth, unlike career adjudicators, who are often appointed based on prior adjudicative or litigation experience,<sup>11</sup> PAS officials are often appointed for other reasons such as prior experience in a particular industry or familiarity with a particular policy domain. PAS officials may have better access to substantive, subject-matter expertise than other agency decision makers, which may improve the quality of policies developed through case-by-case adjudication. On the other hand, they may lack experience or familiarity with the procedural aspects of administrative adjudication.

Fifth, PAS officials often sit atop agency hierarchies, and 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. Such

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<sup>9</sup> 5 U.S.C. § 2301.

<sup>10</sup> See Gluth, Graboyes & Selin, *supra* note 8 at 45–50.

<sup>11</sup> 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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responsibilities can provide PAS officials with a unique opportunity to coordinate policymaking within and across programs, promote consistent decision making, and gain better awareness of the adjudicative and regulatory systems for which they are statutorily responsible. On the other hand, because PAS officials often face many competing demands on their time, they may have less practical capacity to devote to the adjudication of individual cases than other officials whose primary function is to adjudicate cases.<sup>12</sup> Additionally, some have raised concerns in certain contexts that the combination of adjudication and enforcement functions (investigation and prosecution) in a single official may affect the integrity of agency proceedings and that the combination of adjudication and rulemaking functions in a single official may encourage the resolution of important legal and policy issues through case-by-case adjudication, even when general rulemaking offers a better mechanism for resolving such issues.<sup>13</sup>

Considering these and other characteristics, and consistent with statutory and regulatory requirements, agencies must determine whether participation by PAS officials in the adjudication of cases provides an effective mechanism for directing and supervising systems of administrative adjudication and, if it does, what procedures and practices will permit PAS officials to adjudicate cases in a manner that best promotes fairness, accuracy, consistency, efficiency, and timeliness. The Conference 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*;<sup>14</sup> Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*;<sup>15</sup> Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*;<sup>16</sup> Recommendation 2020-3, *Agency Appellate Systems*;<sup>17</sup> and Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*.<sup>18</sup>

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<sup>12</sup> See Gluth, Graboyes & Selin, *supra* note 8, at 52–56.

<sup>13</sup> See *id.*

<sup>14</sup> 38 Fed. Reg. 19,783 (July 23, 1973).

<sup>15</sup> 48 Fed. Reg. 57,461 (Dec. 30, 1983).

<sup>16</sup> 84 Fed. Reg. 2139 (Feb. 6, 2019).

<sup>17</sup> 86 Fed. Reg. 6618 (Jan. 22, 2021).

<sup>18</sup> 88 Fed. Reg. 2312 (Jan. 13, 2023).



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Recognizing that agencies must consider applicable constitutional and statutory requirements and the unique characteristics of the programs they administer, this Recommendation builds on these earlier recommendations but focuses exclusively on identifying best practices to help agencies determine whether, when, and how PAS officials should participate directly in the adjudication 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**

1. When a statute authorizes a PAS official or 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, should exercise their retained statutory authority to conduct initial proceedings ordinarily only if:
  - a. A matter is exceptionally significant or broadly consequential, and they have the capacity personally to receive and evaluate evidence and arguments and issue a decision in a fair, accurate, consistent, efficient, and timely manner; or
  - b. There are unlikely to be disputed issues of fact, the matter to be decided does not require taking much evidence, and resolution of the matter turns on qualitative judgments of a broad nature.
2. When a statute authorizes a PAS official or a collegial body of PAS officials to adjudicate matters arising under the statute or review lower-level decisions rendered by other adjudicators, and such authority is delegable as a constitutional and statutory matter, the agency should determine in which types of cases it would be beneficial for a PAS official or collegial body of PAS officials to review lower-level decisions rendered by other adjudicators and in which it would be more appropriate to delegate final



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decision-making authority to a non-PAS official (e.g., an agency “Judicial Officer”) or a collegial body of non-PAS officials (e.g., a final appellate board). If a PAS official or collegial body of PAS officials delegates final decision-making authority to other officials, they should adopt mechanisms to ensure adequate direction and supervision of decision makers exercising delegated authority. Circumstances in which it may be beneficial for an agency to provide for review by a PAS official or a collegial body of PAS officials include:

- a. Cases that involve legal or factual issues that are exceptionally significant or broadly consequential;
  - b. Cases that involve a novel or important question of law, policy, or discretion, such that direct participation by one or more PAS officials would promote centralized or politically accountable coordination of policymaking; and
  - c. When participation by one or more PAS officials in the adjudication of individual cases would promote consistent decision making by agency adjudicators.
3. When it would be beneficial to provide for review by a PAS official or a collegial body of PAS officials, 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 lower-level decisions.* This option 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 non-PAS official, such as an agency “Judicial Officer,” or an appellate board and retaining authority to exercise second-level administrative review in exceptional circumstances.* This option may be appropriate when caseloads are relatively high and individual cases only occasionally raise novel or important questions of law, policy, or discretion or have significant consequences beyond the parties to the case.





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- c. *Delegating final review authority to another PAS official.* This option may be appropriate, for example, when individuals, by virtue of holding another PAS position, 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 PAS Officials**

4. An agency ordinarily should provide that a decision subject to review by a PAS official or a collegial body of PAS officials becomes final and binding after a specified number of days unless, as applicable:
  - a. A party or other interested person files a petition for review, if a statute entitles a party or other interested person to such review;
  - b. A PAS official or collegial body of PAS officials exercises discretion to review the decision upon petition by a party or other interested person;
  - c. A PAS official or collegial body of PAS officials exercises discretion to review the lower-level decision upon referral by the adjudicator or appellate board (as a body or through its chief executive or administrative officer) that issued the decision;
  - d. A PAS official or collegial body of PAS officials exercises discretion to review the decision upon request by a federal official who oversees a program impacted by a decision, or his or her delegate; or
  - e. A PAS official or collegial body of PAS officials exercises discretion to review the decision sua sponte.





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5. When a PAS official or collegial body of PAS officials serves as a first-level reviewer, an agency should develop a policy for determining the circumstances in which such review may be exercised. Review may be warranted if there is a reasonable probability that:
  - a. The adjudicator who issued the lower-level decision committed a prejudicial procedural error or abuse of discretion;
  - b. The lower-level decision includes an erroneous finding of material fact;
  - c. The adjudicator who issued the lower-level decision erroneously interpreted the law or agency policy;
  - d. The case presents a novel or important issue of law, policy, or discretion; or
  - e. The lower-level decision presents a recurring issue or an issue that agency adjudicators have decided in different ways, and the PAS official or officials can resolve the issue more accurately and efficiently through precedential decision making.
6. When a PAS official or collegial body of PAS officials serves as a second-level reviewer, an agency should determine the circumstances in which such review may be warranted. To avoid multilevel review of purely factual issues, the agency should limit second-level review by a PAS official or collegial body of PAS officials to circumstances in which there is a reasonable probability that:
  - a. The case presents a novel or important issue of law, policy, or discretion; or
  - b. The first-level reviewer erroneously interpreted the law or agency policy.
7. When agency rules permit parties or other interested persons to file a petition requesting that a PAS official or a collegial body of PAS officials review a lower-level decision and review is discretionary, the agency should require that petitioners explain in the petition why such review is warranted with reference to the grounds for review identified in Paragraph 5 or 6, as applicable. Agency rules should permit other parties or interested persons to respond to the petition or file a cross-petition.
8. An agency should provide that if a PAS official or collegial body of PAS officials, or a delegate, does not exercise discretion to grant a petition for review within a set time period, the petition is deemed denied.



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9. In determining whether to provide for interlocutory review by a PAS official or collegial body of PAS officials of rulings by agency adjudicators, an agency should evaluate whether such review can be conducted in a fair, accurate, consistent, efficient, and timely manner, considering the best practices identified in Recommendation 71-1, *Interlocutory Appeal Procedures*.
10. When a PAS official or collegial body of PAS officials exercises discretion to review a lower-level decision (e.g., by granting a petition or accepting a referral), the agency should:
  - a. Notify the parties;
  - b. Provide a brief statement of the grounds for review; and
  - c. Provide the parties a reasonable time to submit written arguments.

### **PAS Official Review Process**

11. A PAS official or collegial body of PAS officials who reviews a lower-level decision ordinarily should limit consideration to the evidence and legal issues considered by the adjudicator who issued that decision. The PAS official or collegial body of PAS officials should consider new evidence and legal issues, if at all, only if (a) the proponent of new evidence or a new legal issue shows that it is material to the outcome of the case and that, despite due diligence, it was not available when the record closed, or (b) consideration of a new legal issue is necessary to clarify or establish agency law or policy. In situation (a), the PAS official or collegial body of PAS officials should determine whether it would be more effective to consider the new evidence or legal issue or instead to remand the case to another adjudicator for further development and consideration.
12. An agency should provide a PAS official or collegial body of PAS officials discretion to permit oral argument on their own initiative or upon a party's request if doing so would assist the PAS official(s) in deciding the matter.
13. In cases when a PAS official or collegial body of PAS officials will decide a novel or important question of law, policy, or discretion, the agency should provide the PAS official(s) discretion to solicit arguments from interested members of the public, for



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example by inviting amicus participation, accepting submission of written comments, or holding a public hearing to receive oral comments.

### **Integrity of the Decision-Making Process**

14. To promote impartiality and the appearance of impartiality, each agency at which PAS officials participate in the adjudication of individual cases should have a process for determining if participation by a particular PAS official in a case would violate government-wide or agency-specific ethics standards and hence require recusal. Agencies should also have a process for determining if participation would raise other significant concerns, and if so, determine whether and in what circumstances PAS officials should recuse themselves from participating in a case based on those concerns.

### **Coordination of Policymaking and Decision Making by Agency Adjudicators**

15. An agency ordinarily should treat decisions of PAS officials as precedential if they address novel or important issues of law, policy, or discretion, or if they resolve recurring issues or issues that other agency adjudicators have decided in different ways. Unless the agency treats all decisions of PAS officials as precedential, in determining whether and under what circumstances to treat such 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 PAS officials to determine whether issues raised repeatedly indicate that the agency, its adjudicators, or the public may benefit from rulemaking or development of guidance.

### **Adjudicative Support for PAS Officials**

17. When a PAS official or collegial body of PAS officials adjudicates individual cases, agencies should assign or delegate case-related functions to non-PAS officials, when appropriate, including:
  - a. Performing routine tasks such as managing dockets and case filings;



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managing proceedings, including the submission of materials and the scheduling of oral arguments;

- b. Responding to routine motions;
- c. 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;
- d. Conducting the preliminary review of lower-level decisions, evidence, and arguments;
- e. Conducting the preliminary evaluation of petitions for review and petitions for reconsideration;
- f. Identifying unappealed decisions that may warrant review by a PAS official or collegial body of PAS officials;
- g. Encouraging settlement and approving settlement agreements;
- h. Conducting legal and policy research;
- i. Recommending case dispositions;
- j. Preparing draft decisions and orders for review and signature by a PAS official or collegial body of PAS officials;
- k. Transmitting decisions and orders to parties and making them publicly available; and
- l. Staying decisions and orders pending reconsideration by a PAS official or collegial body of PAS officials or judicial review.

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

- a. Adjudicators and staff who serve at an earlier level of adjudication;
- b. Full-time appeals counsel;
- c. Advisors to a PAS official;
- d. The chief legal officer or personnel under his or her supervision; and



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e. A Clerk or Executive Secretary or personnel supervised by such officials.

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

### **Transparency**

19. Each agency should provide updated access on its website to decisions issued by PAS officials, whether or not designated as precedential, and associated supporting materials. In posting decisions, the agency should redact identifying details to the extent required to prevent an unwarranted invasion of personal privacy and any information that implicates sensitive or legally protected interests involving, among other things, national security, law enforcement, confidential business information, personal privacy, or minors. In indexing decisions on its website, the agency should clearly indicate which decisions are issued by PAS officials.
20. Each agency ordinarily should presume that oral arguments and other review proceedings before PAS officials 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 de, *Public Access to Agency Adjudicative Proceedings*.

### **Development and Publication of Procedures for Adjudication by PAS Officials**

21. Each agency should publish procedural regulations governing the participation of PAS officials 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 officials. In addition to those matters identified in Paragraph 2 of Recommendation 2020-3, *Agency Appellate Systems*, such regulations should address, as applicable:



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- a. Whether and, if so, which PAS officials may participate directly in the adjudication of cases;
- b. The level(s) of adjudication (e.g., hearing level, first-level appellate review, second-level appellate review) at which a PAS official or collegial body of PAS officials have or may assume jurisdiction of a case (see Paragraphs 1–3);
- c. Events that trigger participation by a PAS official or collegial body of PAS officials (see Paragraph 4);
- d. An exclusive, nonexclusive, or illustrative list of circumstances in which a PAS official or collegial body of PAS officials will or may review a decision or assume jurisdiction of a case, if assumption of jurisdiction or review is discretionary (see Paragraphs 5–6);
- e. The availability, timing, and procedures for filing a petition for review by a PAS official or collegial body of PAS officials, including any opportunity for interlocutory review, and whether filing a petition is a mandatory prerequisite to judicial review (see Paragraphs 7 and 9);
- f. The actions the agency may 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 8);
- g. The form, contents, and timing of notice provided to the parties to a case when proceedings before a PAS official or collegial body of PAS officials are initiated (see Paragraphs 9–10);
- h. The record for decision making by a PAS official or collegial body of PAS officials and the opportunity, if any, to submit new evidence or raise new legal issues (see Paragraph 11);
- i. Opportunities for oral argument (see Paragraph 12);
- j. Opportunities for public participation (see Paragraph 13);
- k. The process for determining if participation by a PAS official in a case would violate government-wide or agency-specific ethics standards (see Paragraph 14);







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reasons, provide for direct participation by [presidentially appointed, Senate-confirmed (PAS)] officials in the adjudication of individual cases under specific programs.” Our answer is yes.

Elsewhere, we have made the case for why the “standard model” for agency adjudication does and should include agency-head final decisionmaking authority. *See* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141 (2019). In our view, agency-head review is valuable because it assists the agency to make precedential policy, to increase consistency in adjudicative outcomes, to gain greater awareness of how a regulatory system is functioning, and to make the agency’s adjudicatory efforts more politically accountable.

Regardless of whether one is convinced by our normative arguments, agency-head review is likely now a constitutional requirement. If the Supreme Court did not so conclude in *United States v. Arthrex*, 594 U.S. 1 (2021), it came quite close. And the Court is bound to expressly embrace that constitutional rule in the near future. Accordingly, it would be wise for every agency—and Congress, where statutory fixes are required—to ensure some form of direct review by the agency head.

As agencies (and Congress) revisit adjudication systems in light of this constitutional requirement, two parts of the Recommendation are worth underscoring.

First, a constitutional requirement of agency-head final decisionmaking authority does not mean the agency head must review every decision in every case. Especially in higher-volume adjudication systems, agencies should design appellate systems to conduct such review, including the issuance of precedential decisions where appropriate. *See generally* Christopher J. Walker, Melissa Wasserman & Matthew Lee Wiener, *Precedential Decision Making in Agency Adjudication* (Dec. 6, 2022) (report to the Admin. Conf. of the U.S.); Christopher J. Walker & Matthew Lee Wiener, *Agency Appellate Systems* (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.). In our view, such delegation of final decisionmaking authority would be constitutional under the Supreme Court’s evolving approach to separation of powers so long as the agency head preserves the authority to intervene and issue a final decision when necessary.



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Second, it is critical, as the Recommendation advises, that “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).” Although the Administrative Procedure Act allows the agency head to preside over an evidentiary hearing, that is not—and should not be—the norm. The standard model for agency adjudication has two key structural features: the possibility of a final decision by a politically accountable agency head, as noted above, and an initial hearing and decision by a decisionally independent, tenure-protected agency adjudicator. *See* Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication*, 103 TEX. L. REV. (forthcoming 2025).

This standard model enables a specific method for political control of agency adjudication, which is both transparent and circumscribed. Importantly, it ensures that an impartial agency adjudicator compiles the administrative record and makes the initial findings and decision. In a world where the Constitution requires political control of final agency adjudication decisions, it becomes all the more important that the hearing-level adjudicator bases the initial decision on the law and a matter’s individual facts—and not out of a fear of being fired or otherwise punished for not sharing the politics or policy preferences of the agency head.

**Separate Statement for Administrative Conference Recommendation 2024-3 by Public Member John Duffy, joined by Public Members Jennifer B. Dickey, Jennifer L. Mascott, and Kate Todd**

*Filed June 27, 2024*

I respectfully dissent from the promulgation of this Recommendation. The Recommendation instructs agencies that, in many common circumstances, they “should” delegate adjudicative power downward into the bureaucracy—i.e., away from officers appointed by the President with the advice and consent of the Senate (“PAS officials”) and toward agency officials not so appointed (“non-PAS” officials). To make matters worse, the Recommendation tells agencies that they “should” limit review by PAS officials so that the lower-level officials



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will often have the last word in adjudicating many issues, including important factual determinations.

The overall tenor of the Recommendation is, in my view, entirely too much in favor of pushing responsibility away from top agency officials (whose appointment process is controlled by the democratically accountable President and Senators) and toward a far less accountable set of lower-level officials in the bureaucracy. The Recommendation thereby encourages top officials to shun responsibility for the decisions of their agencies. In my view, a body such as ACUS—which is statutorily charged with helping formulate recommendations for action “by proper authorities” for ensuring that “Federal responsibilities may be carried out expeditiously in the public interest” (5 U.S.C. § 591(1))—should be encouraging responsibility, not irresponsibility, at the very highest levels of government.

The Recommendation’s encouragement of the downward diffusion of power is particularly evident in six paragraphs. First, paragraph 1 tells agencies that they “ordinarily should delegate” to lower-level officials initial adjudicatory responsibilities, including the crucial functions of “evaluating evidence” and “issuing a decision.” Agencies may well be able lawfully to delegate powers downward into the bureaucracy, but it merely encourages the shirking of responsibility at the top to tell agencies that they “should”—indeed, “should ordinarily”—delegate so as to empower an unaccountable or tenuously accountable bureaucracy.

To make matters worse, paragraph 1 goes further to recommend that top-level PAS officials “should” exercise initial adjudicative authority “only if” a case presents one of two uncommon circumstances, namely, (i) where the matter is “exceptionally significant or broadly consequential” or (ii) “[t]here are unlikely to be disputed issues of fact.” Thus, the suggested limit on top agency officials engaging in crucial adjudicatory functions such as “evaluating evidence” should be limited, outside of “exceptionally significant or broadly consequential” circumstances, to those cases where there’s very little adjudication of evidence to do. That’s not merely permitting higher officials to shun responsibility. It’s telling those officials that they “should” do so and that any attempts to take back adjudicatory power from the bureaucratic depths “should” occur “only” in highly unusual and exceptional times.



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Second, paragraph 2 continues the pro-delegation push by encouraging agencies to enact policies that, in some class of cases, would “delegate final decision-making authority to a non-PAS official (e.g., an agency “Judicial Officer”) or a collegial body of non-PAS officials (e.g., a final appellate board).” I think the class of such cases should be the null set. In fact, legally it *is* the null set. Even where agency rules appear to delegate “final” decisional power to lower-level officials, such delegations can be undone at any time and in any case. Procedural agency rules (i.e., those governing “agency organization, procedure, or practice”) can be repealed in the blink of an eye—without either notice-and-comment rulemaking or a 30-day waiting period to take effect. *See* 5 U.S.C. § 553(c) & (d). Thus, even if an agency previously enacted rules purporting to delegate “final” authority to non-PAS officers, such a delegation is an illusion because, under the Constitution, some PAS officer must “have the discretion to review decisions” so that “the President remains responsible for the exercise of executive power.” *United States v. Arthrex*, 594 U.S. 1, 27 (2021). Agencies that follow this ACUS Recommendation and purport to delegate final power down into the bureaucracy are merely misleading the public by disguising the lines of ultimate authority that must remain in the control of PAS officers.

Third, paragraph 5 suffers from a different flaw than the one in paragraphs 1 and 2. While paragraphs 1 and 2 encourage agencies to delegate responsibility downward, paragraph 5 is insufficiently aggressive in instructing agencies when, if power is delegated, review by high-level officers should occur. The Recommendation states that agencies should promulgate policies concerning where such high-level review “may be exercised” and that review “may be warranted” in several circumstances. In my view, the permissive word “may” is precisely wrong. The paragraph should be phrased in terms of “should” and not merely “may.”

A quick review of the circumstances where the Recommendation tells agencies that review “may be warranted” demonstrates the point. Where a “lower-level decision includes an erroneous finding of material fact” or “erroneously interpreted the law or agency policy,” the higher-level PAS officers in the agency really should intervene and correct the lower-level decision. This ACUS recommendation tells high level agency officers that they “may” want to review such decisions, but it’s not really necessary to do so. The paragraph is thus consistent



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with the overall thrust of the Recommendation to push power down into the bureaucracy and to diffuse responsibility, but it's also utterly inconsistent with a Constitution designed to foster transparency, responsibility and accountability at the highest levels of the Executive Branch.

Fourth, paragraph 6 continues the theme of encouraging agencies to curtail higher-level review and responsibility. Where PAS officers serve as “second-level” reviewers, this paragraph encourages agencies once again to promulgate policies concerning circumstances in which review “may be warranted,” and it then tells agencies that they “should” limit second-level review of factual issues to two narrow sets of circumstances: (i) where “[t]he case presents a novel or important issue of law, policy, or discretion,” and (ii) where “[t]he first-level reviewer erroneously interpreted the law or agency policy.” Importantly, neither of those two circumstances involve incorrect factual determinations.

Thus, in a garden-variety case in which the lower-level decision does not get the law or policy wrong, but the supervising PAS officers believes the lower-level decision may be wildly wrong on the facts, this paragraph recommends that agencies “should limit” the review in order to “avoid multilevel review of purely factual issues.” For a party aggrieved by a lower-level decision that poorly adjudicated the facts, this paragraph encourages supervising PAS officers to tell the aggrieved party “too bad—the buck stops at the lower-level official.”

Fifth, while paragraph 11 has a meritorious general goal of preventing parties from withholding evidence and arguments from a lower-level adjudicator where power is delegated downward, it is too restrictive in the set of circumstances in which new matters might be considered by the higher-level official. The first sentence of the paragraph 11 states the unobjectionable principle that higher-level officials engaging in review of a lower-level decision “ordinarily should limit consideration to the evidence and legal issues considered by the adjudicator who issued that decision.” That’s “ordinarily” a good rule, but the next sentence purports to limit exceptions to the ordinary rule to two circumstances “only.” Indeed, the sentence emphasizes exceptions begrudgingly, stating that PAS officials should consider new evidence and legal issues “if at all” only in the two circumstances set forth. Once again, the tenor of the Recommendation is to restrict the power of higher-level officers to limited categories.



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That's the wrong approach. Higher-level officers should be told in clear terms that they bear ultimate responsibility for their agencies' actions and that they should engage in all the review they deem necessary in order to make sure that they are comfortable bearing that responsibility.

Sixth, paragraph 17 closes out the pro-delegation theme of the Recommendation by advising that, even where PAS officers do adjudicate individual cases, agencies "should" delegate certain case-related functions to non-PAS officials. Some of those case-related functions are truly mechanical, such as "[t]ransmitting decisions and orders to parties and making them publicly available," but many are much more important, such as "[c]onducting legal and policy research," "[r]ecommending case dispositions," and "[p]reparing draft decisions and orders for review and signature by a PAS official or collegial body of PAS officials." Research into law and policy and the subsequent drafting of decisions are crucial functions of adjudication, and the high-level PAS officers in an agency should be afforded the time and resources to perform those functions. They should not be relegated merely to supplying the "signature" to validate decisions researched and drafted by others.

President Harry Truman famously had a sign on his desk reading: "The buck stops here!" See <https://www.trumanlibrary.gov/education/trivia/buck-stops-here-sign> (setting forth images of Truman's wooden desk sign). That principle is not merely folksy wisdom; it has constitutional dimension. As the Supreme Court recently reaffirmed in *United States v. Arthrex*, the Take Care Clause and other features of Article II require that the President be "responsible for the actions of the Executive Branch" and that he "cannot delegate [that] ultimate responsibility or the active obligation to supervise that goes with it." 594 U.S. 1, 11 (2021) (internal quotations omitted). A corollary of that principle is that, as the *Arthrex* decision confirms, high-level PAS officers cannot be relieved of "responsibility for the final decisions" of the subordinate officers under their supervision. *Id.* at 15. In short, the tenor of the *Arthrex* decision is to prevent the diffusion of responsibility deep into the bureaucracy. For decisions within an Executive agency, the buck has to stop with the PAS officers and, ultimately, with the President who has to bear ultimate responsibility.



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The thrust of this ACUS Recommendation is the exact reverse of those principles. High-level PAS officers are encouraged to push down adjudicatory responsibility and then to limit their review of the resulting lower-level decisions. That's a charter for the diffusion of power in the depths of the bureaucracy, and the very opposite of responsible administration within the Executive Branch.

### **Separate Statement for Administrative Conference Recommendation 2024-3 by Public Member Jennifer L. Mascott**

*Filed June 28, 2024*

I signed onto the concerns raised by Professor John Duffy and joined by Kate Todd and Jenn Dickey because the Appointments Clause requirements of Article II of the U.S. Constitution are an important constraint ensuring that government officials exercise authority in a way that is accountable back to elected officials and ultimately the American public. Therefore, under the Appointments Clause, “officers of the United States” who exercise that authority must be selected by the President subject to Senate consent or by the President alone, a department head, or a court of law. U.S. Const. art. II, section 2, clause 2 (“He . . . shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the 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.”).

This ACUS recommendation inverts that hierarchy by recommending that decisions be pushed lower into the administrative bureaucracy rather than ensuring that appointed officials must take responsibility for the outcomes of executive adjudication. Today the United States Supreme Court recognized the importance of this democratic accountability structure by removing certain decisions from adjudicators within the Securities and Exchange Commission, noting that common-law securities fraud claims must be resolved by Article III courts with jury trial protections. *See SEC v. Jarkesy*, \_\_ S. Ct. \_\_ (2024). In instances where common law





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judicial authority is being exercised in adjudication, the Article III presidentially appointed judicial, and jury system, must resolve those claims at the federal level. In instances of executive adjudication, ultimately the President must take responsibility for final outcomes by supervising officers whose nomination and appointment he oversees and directs. Congress further has a role by constitutionally being required to create the offices those decisionmakers fill.

Therefore, I respectfully dissent from the June 2024 ACUS Recommendation addressing the Participation of Senate-Confirmed Officials in Administrative Adjudication.