



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Updates in Federal Agency Adjudication

July 2022

ACUS is an independent federal agency within the executive branch that develops recommendations to improve administrative processes, including adjudication, and arranges for the interchange of information to carry out its mission. The ACUS Office of the Chairman issues monthly *Updates* to share adjudication-related developments with agencies, Congress, and the public. For additional resources, visit www.acus.gov/adjudication.

This resource is for informational purposes only. Except as noted, these updates do not represent the position of ACUS or the federal government. New developments, feedback, and corrections are welcome at info@acus.gov.

IN THIS ISSUE

Accessibility
Administrative Review
Issue Exhaustion
Procedural Rules
Program Management
Technology

ACCESSIBILITY

[Identifying and Reducing Burdens in Administrative Processes](#) (ACUS).

ACUS launched a study of best practices for identifying and reducing unnecessary burdens that members of the public face when they engage with administrative programs or participate in administrative processes such as adjudication.

[Online Process in Agency Adjudication](#) (ACUS). ACUS launched a study to identify best practices for developing online processes by which participants in agency adjudications, including private parties and representatives can file forms, evidence, and briefs; view case materials and status information; receive notices and orders; and perform other tasks required for participation in adjudication.



ADMINISTRATIVE REVIEW

Post-*Arthrex* Developments at the Patent Trial and Appeal Board. The Supreme Court last year held in [United States v. Arthrex](#) that the Constitution’s Appointments Clause requires that PTAB decisions be reviewable by a principal officer (e.g., the Director of the U.S. Patent and Trademark Office). There have been several recent developments related to this decision:

- Senators Patrick Leahy (D-VT), John Cornyn (R-TX), and Thom Tillis (R-NC) introduced the [PTAB Reform Act](#), which would, among other things, provide a statutory structure for review of PTAB decisions by the USPTO Director and prohibit ex parte communications between PTAB judges and officials who have authority to supervise or discipline them.
- The USPTO is [seeking comments](#) on PTAB practices as part of an effort to formalize post-*Arthrex* processes for USPTO Director review and precedential opinion panels. An [interim process](#) for Director review is currently in place.
- In light of issues in *Arthrex*, the House Judiciary Committee’s Subcommittee on Courts, Intellectual Property, and the Internet held a [hearing](#) on the “implications of adjudicating [patent validity] in an agency setting.” A Government Accountability Office official [testified](#) about GAO’s ongoing review of the PTAB and “the independence of its judges.” An earlier [hearing](#) addressed the decade-old PTAB’s impact on innovation and small businesses.

[Precedential Decision Making in Agency Adjudication](#) (ACUS). An ongoing ACUS project will identify best practices on agencies’ use of precedential decisions. Consultants for the project are Christopher Walker (University of Michigan Law School), Melissa Feeney Wasserman (Texas Law), and Matthew Wiener (ACUS).

ISSUE EXHAUSTION

[Edd Potter Coal Co. v. OWCP](#) (4th Cir., June 30). The Fourth Circuit held that a party forfeited an Appointments Clause challenge after failing to raise the issue during an initial hearing and on administrative review, as required by agency rules.

[Morris v. McDonough](#) (Fed. Cir., July 18). The Federal Circuit held that a party forfeited a due process challenge that it did not raise in a nonadversarial veterans’ benefits proceeding. The court distinguished due process issues, which are case-specific and often remediable by agencies, from structural constitutional challenges, which are not. The Supreme Court held in [Carr v. Saul](#) (2021) that issue exhaustion



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

principles did not bar judicial consideration of an Appointments Clause challenge that a party did not raise in a nonadversarial social security proceeding.

PROCEDURAL RULES

[Black Lung Benefits Improvement Act \(S.4511\)](#). Senator Robert Casey (D-PA), along with several cosponsors, reintroduced a bill to, among other things, help miners access legal representation and reduce case processing times. A [companion bill](#) was introduced in the House in March.

[End of VA Rapid Appeals Modernization Program Pilot \(VA, July 20\)](#). The Department of Veterans Affairs is winding down its Rapid Appeals Modernization pilot program, which the agency put in place before full implementation of the Veterans Appeals Improvement and Modernization Act of 2017. Claimants have 90 days to notify VA if they believe they submitted a timely election into the program that has not yet been processed by VA.

[ACUS Invites Public Comments on a Potential Small Claims Patent Court](#). ACUS is gathering information on issues associated with and options for designing a small claims patent court as part of an [ongoing study](#) for USPTO. The period for public comment has been extended through August 26.

PROGRAM MANAGEMENT

Fiscal Year 2023 Appropriations Bills. House and Senate committee reports for appropriations bills explain proposed funding for several agencies that conduct adjudication. Highlights include:

- **Social Security Administration.** [House](#) and [Senate](#) reports recommend that SSA increase staffing to reduce case backlogs and take steps to reduce administrative complexities (e.g., digitizing paper forms, automating manual processes, simplifying electronic portals).
- **U.S. Citizenship and Immigration Services.** The [House](#) report states the bill would provide funding to increase asylum operations as USCIS [assumes](#) adjudication of asylum cases of individuals in expedited removal proceedings.
- **Executive Office for Immigration Review.** The [House](#) report states the bill would provide additional funding for EOIR's Adjudicatory Expansion Initiative, which seeks to reduce case backlogs through measures such as hiring of additional immigration judges and support personnel. The report



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

also recommends increased funding for technical innovations, including the Virtual Court Initiative and multi-agency Unified Immigration Portal.

- **Department of Veterans Affairs.** The [House](#) report recommends directing funds toward backlog reduction and digitization of veterans' records.

GAO Report on Social Security Administration Case Prioritization

(July 19). GAO found discrepancies between how different SSA hearing offices designate certain “critical” cases for priority adjudication. SSA designates critical cases for priority processing after determining that a claimant’s health or financial condition meets certain criteria set forth in an agency policy manual.

Preventing Personal Conflicts of Interest in Federal Acquisition Act

(H.R. 8325). Carolyn Maloney (D-NY) introduced legislation that would, among other things, put measures in place to prevent personal conflicts of interest by contractor employees performing “services supporting the regulatory, policymaking, and adjudicative functions” for or on behalf of an agency.

Repeal of Enforcement and Adjudication Procedures (HHS, July 25). The Health and Human Services Department rescinded procedural rules issued to implement a 2019 executive order on agency enforcement and adjudication.

Resumption of In-Person Hearings. Agencies continue to announce when they will resume in-person hearings. Recent announcements include the [Trademark Trial and Appeal Board](#) (August 8) and [U.S. International Trade Commission](#) (September 29). The Federal Mine Safety and Health Review Commission [established new procedures](#) on July 11 for administrative law judges to apply when determining whether to hold hearings in person, remotely, or via a hybrid process. The order also set forth safety requirements for attending in-person hearings.