



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Updates in Federal Agency Adjudication

January 2024

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.

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APPOINTMENT AND REMOVAL

Raper v. Commissioner of Social Security (Jan. 3). The Eleventh Circuit held that there is no Appointments Clause violation when an earlier decision made by an unconstitutionally appointed ALJ is vacated on the merits and remanded to the same ALJ, who is now constitutionally appointed. Disagreeing with the Fourth and Ninth Circuits, which reached the opposite conclusion, the Eleventh Circuit reasoned that the District Court’s merits-based vacatur of the ALJ’s first decision “eliminated the taint of the unconstitutional appointment.” When the first decision was vacated, it became void with no legal effect, meaning the ALJ “started fresh” and “the entire second administrative adjudication was conducted by a constitutionally appointed ALJ.”

CONGRESSIONAL AFFAIRS

Congressional Constituent Service Inquiries (ACUS). ACUS is examining how agencies receive, process, and respond to congressional inquiries made on



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behalf of constituents who need assistance accessing federal programs or navigating adjudicative and other similar administrative processes. The project will identify best practices for agencies to promote quality, efficiency, and timeliness in agency procedures for responding to such inquiries. Among other topics, the project will address the body of law governing agency responses to congressional constituent service inquiries; the extent to which agencies have developed procedures for receiving, processing, and responding to such inquiries; and the scope, content, internal dissemination, and public availability of these procedures where adopted. Sean Kealey (Boston University) is serving as consultant.

JUDICIAL REVIEW

Loper Bright Enterprises v. Raimondo (U.S. Supreme Court). Oral arguments were heard on January 17 in tandem with those in Relentless, Inc. v. Department of Commerce. Both cases present the same question: whether the Court should overrule Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984), or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency. Although these cases do not involve agency interpretations of statutes announced in adjudicative orders, the Court's forthcoming decision may affect whether and when reviewing courts must defer to such interpretations.

MANAGEMENT AND OPERATIONS

Revised Filing Fees (DHS, Jan. 31). The Department of Homeland Security issued a final rule adjusting the fees for certain immigration and naturalization benefit requests charged by the U.S. Citizenship and Immigration Services. The final rule also expands fee exemptions for humanitarian filings and adoptive families.

Decisional Disparities in Administrative Programs (ACUS). ACUS is accepting proposals from individuals interested in serving as a consultant to study unwarranted disparities in enforcement and adjudication decisions under federal administrative programs. Submissions are due by February 23.

PROCEDURAL RULES

Copyright Claims Board Smaller Claims Procedures (USCO, Jan. 16). The U.S. Copyright Office adopted a final rule amending procedures for "smaller claims"



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proceedings before the Copyright Claims Board, in which total damages sought do not exceed \$5,000 exclusive of attorneys' fees and costs.

Public Participation in Agency Adjudication (ACUS). ACUS launched a project to identify best practices for public participation in agency adjudicative proceedings. Among other topics, the project will address circumstances in which public participation may be appropriate; options for public participation (e.g., written comments, oral presentations, intervention, amicus briefing); methods for facilitating public participation (e.g., notice, managing oral and written comments, technology use); and agencies' use of information obtained through public engagement efforts. Michael Sant'Ambrogio (MSU Law) is serving as consultant.

REPRESENTATION

Study of the Patent Pro Bono Programs (USPTO, Dec. 29). The Unleashing American Innovators Act required the Director of the United States Patent and Trademark Office to complete a study of the patent pro bono programs, which provide financially under-resourced inventors and small businesses with free legal counsel to assist with preparing, filing, and prosecuting patent applications. The results of the study were reported to Congress, finding, among other things, that the regional patent pro bono programs effectively expand access to the patent system to historically underserved communities and include a significant number of non-attorney advocates (registered patent agents) who support the program.

Nonlawyer Assistance and Representation (ACUS). ACUS has launched a project to study representation and other forms of assistance provided by nonlawyers to participants in federal agency adjudication.

Model Rules of Representative Conduct (ACUS). Following the adoption of Recommendation 2021-9, Regulation of Representatives in Agency Adjudicative Proceedings, Chair Foiss convened a working group of public- and private-sector representatives to develop model rules of representative conduct. The model rules will help federal agencies amend or develop their own rules consistent with the best practices identified in Recommendation 2021-9. The working group is divided into four subcommittees: Qualifications, Conduct, Enforcement, and Transparency. The Qualifications and Conduct Subcommittees have completed their work, and the Enforcement and Transparency Subcommittees had a joint meeting on February 1.