

Comment from Senior Fellow Russell Wheeler on *Participation of Senate-Confirmed Officials in Administrative Adjudication*
April 16, 2024

P L Comment

I have a variety of hastily assembled (and sometimes pedantic) comments, but they don't at all reflect any lessened appreciation for this well-written, artful, recommendation, about potentially touchy subjects.

I regret I have not had the time to read the report but wonder if some of the specific recommendations could be grounded by examples drawn from the case studies

1 8 Would it help to clarify to whom is this recommendation directed? Text here says, "PAS officials . . . structure systems of adjudication" (Also p. 2, line 31: PAS officials . . . establish" adjudication units.)

But most of the text is directed to "agency officials" or "the agency"? Do those terms include PAS's? Page 4, line 68 says for programs not statutorily dictated, "agency officials must determine whether, when, and how PAS officials participate directly in the adjudication of cases." A cynic might read this to say that "bureaucrats need to figure out how to cabin their political bosses," which I realize is not the intention but perhaps all the more reason to be clear about the object of the text.

1 10 After "and" perhaps "personal characteristics of"—less "structural attributes" be read to refer to officials.

2 15 "almost always" rather than "often"? Don't political appointees almost always have shorter tenure than career officials." P.4, line 59 refers to prevalence of turnover and vacancies.

2 33 "try to ensure".

2 34 Given references in line above to president and Congress, should "politically responsive" be added to the list of adjectives?

3 37 Query whether drafters might consider melding points in this paragraph (benefits of direct participation) with those in the next (drawbacks of same), to illuminate tensions. For example: "PAS officials may have better access to subject-matter expertise than other agency decision makers, which may improve the quality of policies developed through case-by-case adjudication. On the other hand, they may lack the specialized expertise that agency adjudicators who are not political appointees develop over the course of their careers."

Participation can educate PASs, but they may lack adjudicatory abilities given other responsibilities.

Participation may help them coordinate policy making, but combining functions may compromise integrity

Etc.

6 98 With deference, this is an awkward sentence with which to introduce the first of the recommendations. If it is necessary again to define PAS, couldn't it be done in the boldface above—"Determining Whether and When an Officer Appointed by the President after Senate Confirmation—a PAS Official(s) Will

Then 98 can read "When a statute authorizes a PAS official or a collegial body"

6 111 Is the discussion here about individual cases or categories of cases? Rather than "should determine whether," perhaps "determine in which types of cases"?

114 How is "judicial officer" defined—"adjudicator"?

117 Same point: "When a case involves" or "Cases that involve?"

7 119 "b" says "When a case" but c and d seem to refer to categories.

7 123 c could be read as "in service training at the parties' expense," which isn't the intention. Perhaps instead of "provide greater awareness" instead "allow the PAS to assess how"

8 166 Save a few words with "person to PAS review of lower-level adjudicator's decision ~~by a PAS official(s)~~ as a matter"

9 187 (and 195) Who/what are the permitters—officials managing a particular case or agency policy? In other words: "When ? permits other interested persons"

10 206 and 209 Save a little space with "~~When a~~ A PAS who grants a petition for review, ~~he or she~~ ordinarily should. . . ."

11 240 Is "the burden of personal decision" a term of art? Does it mean don't use any personal assistant or simply don't delegate?

11 244ff I read the list to purport to contain only ministerial tasks that need no involvement by the principal decision maker, but some seem more than ministerial or at least needing/benefitting from some oversight—docket management, settlement negotiations, legal and policy research (for cases?)

13 281ff Should text say these steps are not limited to PAS decisions—e.g., "should take same precautions with PAS decisions as with others, including redacting"