



## Participation of Senate-Confirmed Officials in Administrative Adjudication

### Committee on Adjudication

#### Draft Recommendation for Committee | May 1, 2024

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.<sup>1</sup> 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 civil servants and other officials to structure systems of administrative adjudication  
 9 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,<sup>2</sup> and they may appoint and supervise, or oversee  
 13 the appointment and supervision of, other adjudicative personnel. PAS officials may coordinate

<sup>1</sup> 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).

<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).

Commented [JB1]: PAS is not a synonym for principal officer. Many inferior officers are appointed that way because PAS is the default appointment process for all officers of the United States. In my view, and the view of some others, there is only one principal officer in each department, except independent agencies, the heads of which may all be principal officers. I’m not sure how this relates to Arthrex, but again, PAS does not mean principal officer, in fact most PAS officials are not principal officers, the vast majority I would argue.

Commented [MG2R1]: Add footnote to acknowledge the constitutional issues under Arthrex — consider framing like Matt W did, “we have faith in agencies to navigate those questions themselves, and if they decide PAS involvement is appropriate, here is a blueprint”

Commented [RW3]: 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.

Commented [MG4R3]: Perhaps be more clear as to who the actors are and how we differentiate between them — PAS officials, career officials, the agency as a historical and evolving entity.

Commented [MG5R3]: Roxanne: Needs to be written for both career and political officials because you need both to change policy

Commented [JB6]: Only Agency Heads can appoint if you take Lucia to govern all adjudicators.

Commented [MG7R6]: Jeremy: Drop a footnote re Lucia.



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

Commented [RW8]: Suggested edit.

Commented [RW9]: Given references in line above to president and Congress, should "politically responsive" be added to the list of adjectives?

19 Additionally, PAS officials may participate directly in administrative adjudication,  
20 serving as the final, executive-branch decision maker in cases arising under the statutes they  
21 administer.<sup>5</sup> 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*,<sup>6</sup> the Supreme Court held that a statute providing for  
24 the administrative resolution of certain patent disputes violated the Constitution because it did  
25 not explicitly authorize a PAS official in the executive branch to review decisions rendered by  
26 adjudicators who are not PAS officials. The Court remedied the defect by holding that the  
27 statutory restraint on the ability of one or more PAS officials to review decisions issued by the  
28 United States Patent and Trademark Office's Patent Trial and Appeal Board was unenforceable  
29 as applied to a PAS official, the Director of the Patent and Trademark Office.

Commented [JB10]: General question—doesn't Arthrex mean that there must be a PAS official involved in all adjudications?

30 This Recommendation does not address whether Congress or agencies should, for  
31 constitutional or other reasons, provide for direct participation by PAS officials in the  
32 adjudication of individual cases under specific programs. Of course, Congress and agencies must

<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> 141 S. Ct. 1970 (2021).



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33 pay careful attention to such questions and ensure that laws, rules, and policies comport with  
34 applicable legal requirements.

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

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

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

52 Second, there is relatively high turnover in PAS positions, and PAS officials almost  
53 always serve in their positions for a shorter time than career civil servants. By serving in their  
54 positions only for a relatively short time, PAS officials may lack preexisting relationships with  
55 agency employees, knowledge of agency processes, and the specialized adjudicative expertise

Commented [RW11]: Don't political appointees almost always have shorter tenure than career officials." P.4, line 59 refers to prevalence of turnover and vacancies.

<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* 58–61 (Apr. 12, 2024) (draft report to the Admin. Conf. of the U.S.).



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56 that career adjudicators develop as a result of their work and experience in this area. On the other  
57 hand, their relatively short tenure may make PAS officials better equipped to address politically  
58 sensitive matters that may arise in the course of adjudicating individual cases.

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

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

Commented [MG12]: Adam: Seems too suggestive, possibly indicating that PAS officials are not hired based on ability, knowledge, and skills.

Commented [JB13]: Once confirmed, why would they be more responsive to Congress? Do we have empirical evidence of this, statistical or anecdotal?

Commented [MG14R13]: Russell: Consider instead tying it closer to confirmation hearings.

Commented [MG15R13]: Nadine: Consider citing to report where we get this statement.

<sup>9</sup> 5 U.S.C. § 2301.

<sup>10</sup> See Matthew A. Gluth, Jeremy S. Graboyes & Jennifer L. Selin, Participation of Senate-Confirmed Officials in Administrative Adjudication 45–46 (Apr. 12, 2024) (draft report to the Admin. Conf. of the U.S.).

<sup>11</sup> See Matthew A. Gluth, Jeremy S. Graboyes & Jennifer L. Selin, Participation of Senate-Confirmed Officials in Administrative Adjudication 56–57 (Apr. 12, 2024) (draft report to the Admin. Conf. of the U.S.).

<sup>12</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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77 they may lack experience or familiarity with the procedural aspects of administrative  
78 adjudication.

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.<sup>13</sup>  
83 This can provide PAS officials with a unique opportunity to coordinate policymaking within and  
84 across programs, promote consistent decision making, and gain better awareness of the  
85 adjudicative and regulatory systems for which they are statutorily responsible. On the other hand,  
86 PAS officials—who often have many statutory responsibilities and may oversee large  
87 programs—may lack the practical capacity to decide cases in a fair, accurate, consistent,  
88 efficient, and timely manner. The combination of adjudicative with non-adjudicative functions  
89 (e.g., investigation, prosecution, rulemaking) in a single decision maker may raise concerns  
90 about the integrity of agency proceedings and the effectiveness of agency policymaking.<sup>14</sup>

91 Considering these and other characteristics, and consistent with statutory and regulatory  
92 requirements, agencies must determine whether participation by a PAS official(s) in the  
93 adjudication of cases provides an effective mechanism for directing and supervising a system of  
94 administrative adjudication and, if it does, what procedures and practices will permit the PAS  
95 official(s) to adjudicate cases in a manner that best promotes fairness, accuracy, consistency,  
96 efficiency, and timeliness. The Conference has addressed some of these issues in previous  
97 recommendations, most notably in Recommendation 68-8, *Delegation of Final Decisional*  
98 *Authority Subject to Discretionary Review by the Agency*;<sup>15</sup> Recommendation 83-3, *Agency*  
99 *Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure*

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<sup>13</sup> See Matthew Gluth, Jeremy S. Graboyes & Jennifer L. Selin, Participation of Senate-Confirmed Officials in Administrative Adjudication 46–48 (Apr. 12, 2024) (draft report to the Admin. Conf. of the U.S.).

<sup>14</sup> See Matthew Gluth, Jeremy S. Graboyes & Jennifer L. Selin, Participation of Senate-Confirmed Officials in Administrative Adjudication 62–63 (Apr. 12, 2024) (draft report to the Admin. Conf. of the U.S.).

<sup>15</sup> 38 Fed. Reg. 19,783 (July 23, 1973).



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100 Act;<sup>16</sup> Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*;<sup>17</sup>  
101 Recommendation 2020-3, *Agency Appellate Systems*;<sup>18</sup> and Recommendation 2022-4,  
102 *Precedential Decision Making in Agency Adjudication*.<sup>19</sup> Recognizing that agencies must  
103 consider applicable constitutional and statutory requirements and the unique characteristics of  
104 the programs they administer, this Recommendation builds on these earlier recommendations but  
105 focuses exclusively on identifying best practices to help agencies determine whether, when, and  
106 how PAS official(s) should participate directly in the adjudication of individual cases.

### RECOMMENDATION

#### **Determining Whether and When an Officer(s) Appointed by the President With the Advice and Consent of the Senate—a PAS Official(s)— Will Participate in the Adjudication of Cases**

- 107 1. When a statute authorizes a PAS official or collegial body of PAS officials to adjudicate  
108 matters arising under the statute, and such authority is delegable as a constitutional and  
109 statutory matter, the agency ordinarily should delegate to one or more non-PAS  
110 adjudicators responsibility for conducting initial proceedings (i.e., receiving and  
111 evaluating evidence and arguments and issuing a decision). PAS officials, individually or  
112 as a collegial body, who retain authority to conduct initial proceedings should exercise  
113 such authority only if a matter is exceptionally significant, broadly consequential, or  
114 politically sensitive, and they have the capacity to personally receive and evaluate  
115 evidence and arguments and issue a decision in a fair, accurate, consistent, efficient, and  
116 timely manner.
- 117 2. When a statute authorizes a PAS official or a collegial body of PAS officials to  
118 adjudicate matters arising under the statute or review decisions rendered by other

Commented [RW16]: 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 . . . ."

<sup>16</sup> 48 Fed. Reg. 57,461 (Dec. 30, 1983).

<sup>17</sup> 84 Fed. Reg. 2139 (Feb. 6, 2019).

<sup>18</sup> 86 Fed. Reg. 6618 (Jan. 22, 2021).

<sup>19</sup> 88 Fed. Reg. 2312 (Jan. 13, 2023).



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- 119 adjudicators, and such authority is delegable as a constitutional and statutory matter, the  
120 agency should determine in which types of cases it would be beneficial for a PAS official  
121 or collegial body of PAS officials to review decisions rendered by lower-level  
122 adjudicators or whether it would be more appropriate to delegate final decision-making  
123 authority to a non-PAS official (e.g., a Judicial Officer) or a collegial body of non-PAS  
124 officials (e.g., a final appellate board). Circumstances in which it may be beneficial for an  
125 agency to provide for review by a PAS official(s) include:
- 126 a. Cases that involve legal or factual issues that are exceptionally significant,  
127 broadly consequential, or politically sensitive;
  - 128 b. Cases that involve a novel or important question of law, policy, or discretion,  
129 such that direct participation by the PAS official(s) would promote centralized  
130 or politically accountable coordination of policymaking; and
  - 131 c. When participation by the PAS official(s) in the adjudication of individual  
132 cases would promote consistent decision making by lower-level adjudicators.
- 133 3. When it would be beneficial to provide for review by a PAS official(s), the agency  
134 should, consistent with constitutional and statutory requirements, determine the  
135 appropriate structure for such review. Structural options include:
- 136 a. *Providing the only opportunity for administrative review of decisions*  
137 *rendered by lower-level adjudicators.* Participation by PAS officials in “first-  
138 level” review may be appropriate when caseloads are relatively low and  
139 individual cases frequently raise novel or important questions of law, policy,  
140 or discretion.
  - 141 b. *Delegating first-level review authority to a judicial officer or appellate board*  
142 *and retaining authority to exercise second-level administrative review in*  
143 *exceptional circumstances.* Participation by PAS officials in “second-level”  
144 review may be appropriate when caseloads are relatively high and individual  
145 cases infrequently raise novel or important questions of law, policy, or  
146 discretion or have significant consequences beyond the parties to the case.

Commented [RW17]: Is the discussion here about individual cases or categories of cases? Rather than “should determine whether,” perhaps “determine in which types of cases”?

Commented [RW18]: How is “judicial officer” defined—“adjudicator”?

Commented [JB19]: Isn't it contrary to Arthrex to delegate final decisionmaking authority to a non-PAS official?

Commented [RW20]: Same point: “When a case involves” or “Cases that involve . . . ?”

Commented [RW21]: “b” says “When a case” but c and d seem to refer to categories.



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- 147 c. *Delegating final review authority to another PAS office.* This option may be  
148 appropriate, for example, when individuals who hold the other office, by  
149 virtue of holding that office, have greater access to subject-matter expertise or  
150 greater capacity to adjudicate cases in a fair, accurate, consistent, efficient,  
151 and timely manner.
- 152 d. *For collegial bodies of PAS officials, delegating first-level review authority to*  
153 *a single member or panel, and retaining authority for the collegial body as a*  
154 *whole to exercise second-level (and final) administrative review.* This option  
155 may be appropriate when a collegial body manages a relatively high caseload  
156 and most individual cases do not raise novel or important questions of law,  
157 policy, or discretion or have significant consequences beyond the parties to  
158 the case.

### Initiating Review by a PAS Official(s)

- 159 4. [An] agency ordinarily should provide that a decision subject to review by a PAS  
160 official(s) becomes final and binding after a specified number of days unless, as  
161 applicable:
- 162 a. A party or other interested person files a petition for review, if a statute  
163 entitles a party or other interested person to review by the PAS official(s);
- 164 b. The PAS official(s) exercises discretion to review the decision upon petition  
165 by a party or other interested person;
- 166 c. The PAS official(s) exercises discretion to review the decision upon referral  
167 by a lower-level adjudicator or appellate board (as a body or through its chief  
168 executive or administrative officer);
- 169 d. The PAS official(s) exercises discretion to review the decision upon request  
170 by a federal official who oversees a program impacted by a decision, or his or  
171 her delegate; or
- 172 e. The PAS official(s) exercises discretion to review the decision on his or her  
173 own motion.

Commented [MG22]: Nadine: 4-6 says agencies should think carefully about situations in which it would be appropriate for PAS to get involved. What can they do? And differences between petitions vs. own motion.





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- 174 f.
- 175 5. When a PAS official(s) serves as a first-level reviewer, an agency should determine the
- 176 circumstances in which review by the PAS official(s) may be warranted. Such
- 177 circumstances may include, as appropriate:
- 178 a. The lower-level adjudicator committed a prejudicial procedural error or abuse
- 179 of discretion;
- 180 b. The lower-level decision includes an erroneous or clearly erroneous finding or
- 181 conclusion of material fact;
- 182 c. The lower-level adjudicator erroneously interpreted the law or agency policy;
- 183 d. The case presents a novel or important issue of law, policy, or discretion; and
- 184 e. The lower-level decision presents a recurring issue or an issue that lower-level
- 185 adjudicators have decided in different ways, and the PAS official(s) can
- 186 resolve the issue more accurately and efficiently through precedential decision
- 187 making.
- 188 6. When a PAS official(s) serves as a second-level reviewer, an agency should determine
- 189 the circumstances in which review by the PAS official(s) may be warranted. To avoid
- 190 multilevel review of purely factual issues, the agency should limit second-level review by
- 191 a PAS official(s) to circumstances in which there is a reasonable probability that:
- 192 a. The case presents a novel or important issue of law, policy, or discretion, or
- 193 b. The first-level reviewer erroneously interpreted the law or agency policy.
- 194 7. When agency rules permit parties or other interested persons to file a petition requesting
- 195 that a PAS official(s) review a decision of a lower-level adjudicator, and review is
- 196 discretionary, the agency should require that petitioners explain in the petition why
- 197 review by the PAS official(s) is warranted with reference to the grounds for review
- 198 identified in Paragraph 6 or 7, as applicable. Agency rules should permit other parties or
- 199 interested persons to respond to the petition or file a counterpetition.
- 200 8. An agency should provide that if a PAS official(s) or his or her delegate does not exercise
- 201 discretion to grant a petition for review within a set time period, the petition is deemed
- 202 denied.

Commented [MG23]: Jeff: Separate paragraph?

Commented [JB24]: Arthrex again.

Commented [RW25]: Who/what are the permitters—officials managing a particular case or agency policy? In other words: “When \_\_\_?\_ permits other interested persons . . . .”



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

### PAS Official(s) Review Process

- 212 11. A PAS official(s) who reviews the decision of a lower-level adjudicator ordinarily should  
213 limit his or her consideration to the evidence and legal issues considered by the lower-  
214 level adjudicator. The PAS official(s) should consider new evidence and legal issues, if at  
215 all, only if the proponent of new evidence or a new legal issue shows that it is material to  
216 the outcome of the case and that, despite his or her due diligence, it was not available  
217 when the record closed. In such situations, the PAS official(s) should determine whether  
218 it would be more effective for the PAS official(s) to consider the new evidence or legal  
219 issue or instead to remand the case to a lower-level adjudicator for further development  
220 and consideration.
- 221 12. An agency should provide the PAS official(s) discretion to permit oral argument on his or  
222 her own initiative or upon a party's request if doing so would assist the PAS official(s) in  
223 deciding the matter.
- 224 13. In cases when a PAS official(s) will decide a novel or important question of law, policy,  
225 or discretion, the agency should provide the PAS official(s) discretion to solicit  
226 arguments from interested members of the public, for example by inviting amicus  
227 participation, accepting submission of written comments, or holding a public hearing to  
228 receive oral comments.

Commented [MG26]: Jeff: Mesh 10 and 11.

Commented [MG27R26]: Roxanne: Use sub-bullet points instead of separate paragraphs.

Commented [MG28R26]: Roxanne: Core idea is to let the parties know what they should be briefing.

Commented [MG29R26]: Jeremy, I've wrestled with this a bit in an attempt to combine and condense like Jeff wanted, but I think this is the most efficient way to present paragraphs 10 and 11. I could do it "When a PAS official grants a petition, exercises discretion ..." followed by Roxanne's bullet points for the three things that are done (notice, statement, time for response), but notice would only apply to nonpetitioning parties, statement in that case would be the petition, and parties would not include the petitioning party in the petition scenario, so all those modifiers would make it more complex to combine I think. Let me know if you disagree, but tempted to offer pushback from the COS on this one.

Commented [RW30]: Save a little space.

Commented [MG31]: Reorganize and/or move.

Commented [MG32R31]: The Committee on Style created a new section to identify additional considerations for review, which now includes consideration of new evidence and argument as well as potential for oral argument. The Committee on Style rewrote the paragraph on new evidence and argument to parallel the paragraph on oral hearings.



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### Integrity of the Decision Making Process

- 229 14. Each agency at which PAS officials participate in the adjudication of individual cases  
230 should establish a process for considering whether participation by a particular PAS  
231 official in a case would violate government-wide or agency-specific ethics laws and  
232 regulations and should determine whether and, if so, in what circumstances PAS officials  
233 should recuse themselves from participating in a case.

Commented [MG33]: Figure out a better place to put recusal issues. Look for other ethics considerations, or consider a standalone section.

Commented [MG34R33]: Committee on Style did not identify additional ethical considerations and so created a new section on recusal.

### Coordination of Policymaking and Decision Making by Lower-Level Adjudicators

- 234 15. An agency ordinarily should treat the decision of a PAS official(s) as precedential if it  
235 addresses a novel or important issue of law, policy, or discretion, or if it resolves a  
236 recurring issue or an issue that lower-level adjudicators have decided in different ways.  
237 Unless the agency treats all decision of a PAS official(s) as precedential, in determining  
238 whether to treat other decisions as precedential, the agency should consider the factors  
239 listed in Paragraph 2 of Recommendation 2022-4, *Precedential Decision Making in*  
240 *Agency Adjudication*.
- 241 16. Each agency periodically should review petitions for review and decisions rendered by a  
242 PAS official(s) to determine whether issues raised repeatedly indicate a need for notice-  
243 and-comment rulemaking or the development of guidance for lower-level adjudicators.

### Adjudicative Support for a PAS Official(s)

- 244 17. When a PAS official(s) serves as an adjudicator, agencies should delegate routine  
245 functions that do not require personal attention by the PAS official(s), including, when  
246 appropriate:
- 247 a. Conducting the initial evaluation of petitions for review and petitions for  
248 reconsideration;
  - 249 b. Dismissing, denying, and granting petitions for review in routine  
250 circumstances when such action is clearly warranted, for example when a

Commented [RW35]: 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/benefiting from some oversight—docket management, settlement negotiations, legal and policy research (for cases?)



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- 251 petition is untimely, a party requests to withdraw a petition, or the parties to a  
252 proceeding agree to a settlement;
- 253 c. Identifying unappealed decisions that may warrant review by the PAS  
254 official(s);
- 255 d. Managing dockets and case filings;
- 256 e. Managing proceedings, including the submission of materials and the  
257 scheduling of oral arguments;
- 258 f. Responding to routine motions;
- 259 g. Encouraging settlement and approving settlement agreements;
- 260 h. Conducting the initial review of lower-level decisions, evidence, and  
261 arguments;
- 262 i. Conducting legal and policy research;
- 263 j. Recommending case dispositions;
- 264 k. Preparing draft decisions and orders for review and signature by a PAS  
265 official(s);
- 266 l. Transmitting decisions and orders to parties and making them publicly  
267 available; and
- 268 m. Staying decisions and orders pending judicial review or reconsideration by the  
269 PAS official(s).
- 270 18. When a PAS official(s) serves as an adjudicator, the agency should determine which  
271 office or official(s) is best suited to perform each delegated function in a fair accurate,  
272 consistent, efficient, and timely manner. Options include:
- 273 a. Lower-level adjudicators and staff;
- 274 b. Full-time appeals counsel;
- 275 c. Advisors to a PAS official(s);
- 276 d. The chief legal officer or personnel under his or her supervision; and
- 277 e. A Clerk or Executive Secretary or personnel under his or her supervision.



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

Commented [JB36]: Written as if it applies generally, beyond PAS adjudication.

### Transparency

281 19. Each agency should provide updated access on its website to decisions issued by a PAS  
282 official(s), whether or not designated as precedential, and associated supporting  
283 materials. In publishing decisions, the agency should clearly indicate which decisions are  
284 precedential. The agency should also redact any information that is sensitive or otherwise  
285 protected from disclosure, and redact identifying details to the extent required to prevent  
286 an unwarranted invasion of personal privacy. In indexing decisions, the agency should  
287 clearly indicate which decisions are issued by a PAS official(s).

Commented [RW37]: 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 . . . .”

288 20. Each agency ordinarily should presume that oral arguments and other review proceedings  
289 before a PAS official(s) are open to public observation. Agencies may choose to close  
290 such proceedings, in whole or in part, to the extent consistent with applicable law and if  
291 there is substantial justification to do so, as described in Recommendation 2021-6, *Public*  
292 *Access to Agency Adjudicative Proceedings*.

### Development and Publication of Procedures for Adjudication by PAS Official(s)

293 21. Each agency should promulgate and publish procedural regulations governing the  
294 participation of PAS official(s) in the adjudication of individual cases in the *Federal*  
295 *Register* and codify them in the *Code of Federal Regulations*. These regulations should  
296 cover all significant procedural matters pertaining to adjudication by PAS official(s). In  
297 addition to those matters identified in Paragraph 2 of Recommendation 2020-3, *Agency*  
298 *Appellate Systems*, such regulations should address, as applicable:

299 a. Whether and, if so, which PAS official(s) may participate directly in the  
300 adjudication of cases;



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- 301           b. The level(s) of adjudication (e.g., hearing level, first-level appellate review,  
302           second-level appellate review) at which the PAS official(s) has or may assume  
303           jurisdiction of a case (see Paragraphs 1–3);
- 304           c. Events that trigger participation by the PAS official(s) (see Paragraph 4);
- 305           d. An exclusive, nonexclusive, or illustrative list of circumstances in which the  
306           PAS official(s) will or may review a decision or assume jurisdiction of a case,  
307           if assumption of jurisdiction or review is discretionary (see Paragraph 5);
- 308           e. The availability, timing, and procedures for filing a petition for consideration  
309           by the PAS official(s), including any opportunity for interlocutory review, and  
310           whether filing a petition is a mandatory prerequisite to judicial review (see  
311           Paragraphs 6 and 8);
- 312           f. The actions the agency will take upon receiving a petition (e.g., grant, deny, or  
313           dismiss it), and whether the agency’s failure to act on a petition within a set  
314           period of time constitutes denial of the petition (see Paragraph 7);
- 315           g. The form, contents, and timing of notice provided to the parties to a case when  
316           proceedings before the PAS official(s) are initiated (see Paragraphs 9–10);
- 317           h. The record for decision making by the PAS official(s) and the opportunity, if  
318           any, to submit new evidence or raise new legal issues (see Paragraph 11);
- 319           i. Opportunities for public participation (see Paragraph 12);
- 320           j. Opportunities for oral argument (see Paragraph 13);
- 321           k. The process for considering whether participation by a PAS official in a case  
322           would violate government-wide or agency-specific ethics laws and  
323           regulations, and any standards for recusal (see Paragraph 14);
- 324           l. The treatment of decisions by a PAS official(s) as precedential (see Paragraph  
325           15);
- 326           m. Any significant delegations of authority to lower-level adjudicators; appellate  
327           boards; staff attorneys; clerks and executive secretaries; other support  
328           personnel; and in the case of multimember agencies, members individually or  
329           panels consisting of fewer than all members (see Paragraphs 17–19);



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- 330                   n. Any delegations of review authority or alternative review procedures in effect  
331                   when a PAS position is vacant or a collegial body of PAS officials lacks a  
332                   quorum; and  
333                   o. The public availability of decisions issued by a PAS official(s) and supporting  
334                   materials, and public access to proceedings before a PAS official(s) (see  
335                   Paragraphs 20–21).
- 336   22. An agency should provide updated access on its website to the regulations described in  
337       Paragraph 22 and all other relevant sources of procedural rules and related guidance  
338       documents and explanatory materials.