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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

PARTICIPATION OF SENATE-CONFIRMED OFFICIALS IN ADMINISTRATIVE ADJUDICATION

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Acronyms

ACUS	Administrative Conference of the United States
ALJ	Administrative Law Judge
APA	Administrative Procedure Act
APJ	Administrative Patent Judge
ARB	Administrative Review Board (Department of Labor)
ATJ	Administrative Trademark Judge
BRB	Benefits Review Board (Department of Labor)
BVA	Board of Veterans Appeals
CAVC	Court of Appeals for Veterans Claims
CBCA	Civilian Board of Contract Appeals (General Services Administration)
CFTC	Commodity Futures Trading Commission
CGCCA	Coast Guard Court of Criminal Appeals
DEA	Drug Enforcement Administration
DHS	Department of Homeland Security
DOC	Department of Commerce
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOS	Department of State
DOT	Department of Transportation
EEOC	Equal Employment Opportunity Commission
EOIR	Executive Office for Immigration Review
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FCC	Federal Communications Commission
FMSHRC	Federal Mine Safety and Health Review Commission
FTC	Federal Trade Commission
GSA	General Services Administration
HHS	Department of Health and Human Services
IBIA	Interior Board of Indian Appeals
IJ	Immigration Judge
IRS	Internal Revenue Service
ITC	International Trade Commission
MSPB	Merit Systems Protection Board
NLRB	National Labor Relations Board
NRC	Nuclear Regulatory Commission
OGE	Office of Government Ethics
OSHA	Occupational Safety and Health Administration
OSHRC	Occupational Safety and Health Review Commission
PTAB	Patent Trial and Appeal Board
PAS	Presidentially Appointed, Senate-Confirmed
SEC	Securities and Exchange Commission
SSA	Social Security Administration

USDA	Department of Agriculture
USPS	U.S. Postal Service
USPTO	U.S. Patent and Trademark Office
VA	Department of Veterans Affairs
VBA	Veterans Benefits Administration

Introduction

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 many other administrative judges, are appointed by a department head.[1] 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—structure systems of administrative adjudication and oversee their operation, ensuring some measure of political accountability.

There is wide variation in the structural attributes of PAS positions and officials, but certain attributes distinguish all or many PAS positions and officials from other agency officials, especially civil servants. First, as the Administrative Conference of the United States (ACUS) has previously noted, there are often numerous vacancies in PAS positions. These pervasive vacancies exist for several reasons, including delays related to the presidential-nomination and Senate-confirmation process.[2] Relatedly, there is relatively high turnover in PAS positions, and PAS officials often serve in their positions for a shorter time than career civil servants. Third, unlike career civil servants who are hired "on the basis of relative ability, knowledge, and skills" and retained "on the basis of the adequacy of their performance" without regard to political affiliation, activity, or beliefs,[3] PAS officials are often nominated by the President *because* of their political affiliation, activities, or beliefs. PAS officials are also subject to removal by the President, although a statute may impose for-cause limitations on removal. Unlike officials appointed by the President alone, however, PAS officials are also confirmed by the Senate, which may make them more responsive to Congress than other agency officials. Fourth, unlike career civil servants, PAS officials may lack preexisting knowledge of agency processes or relationships with agency employees, and they often lack prior adjudicative experience. Fifth, organizationally, PAS officials often sit atop agency hierarchies. And finally, 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.

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[1] *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 be 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).

[2] *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).

[3] 5 U.S.C. § 2301.

PAS officials participate directly and indirectly in administrative adjudication. Indirectly, they establish agency subunits and positions responsible for adjudicating cases, and they appoint and supervise, or oversee the appointment and supervision of, adjudicative personnel.[4] PAS officials may coordinate with the President and Congress to ensure that adjudicative subunits have the resources they need to adjudicate cases in a fair, accurate, consistent, efficient, and timely manner.[5] PAS officials also establish rules of procedure and practice to structure adjudication,[6] and they develop substantive rules that supply the law in adjudications.

PAS officials may also participate directly in administrative adjudication, serving as the final, executive-branch decision maker in cases arising under the statutes they administer.[7] Direct participation by PAS officials can serve a number of objectives. First, it can provide a means for coordinating policymaking and ensuring that agencies' policies are politically accountable. Second, 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. Third, by participating directly in the adjudication of cases, PAS officials can gain better awareness of the adjudicative and regulatory systems for which they are statutorily responsible. Relatedly, given their relationships with the President, other political appointees, and Congress, PAS officials may also be well equipped to address systemic problems requiring intra- or interbranch coordination. Fourth, direct participation by PAS officials may promote consistent decision-making by agency adjudicators. Finally, PAS officials may be especially well equipped to address politically sensitive matters that arise in the course of adjudicating individual cases.

At the same time, there may be concerns associated with the direct participation of PAS officials in the adjudication of cases. First, as a practical matter, PAS officials—who often have many statutory responsibilities and may oversee large programs—may lack the capacity to decide cases in a fair, accurate, consistent, efficient, and timely manner. Second, the combination of certain functions (e.g., investigation, prosecution, rulemaking) in a single decision maker may raise concerns about the integrity of agency proceedings or the effectiveness of agency policymaking. Third, PAS officials may lack the specialized expertise that adjudicators who are not political appointees develop over the course of their careers. And finally, many PAS positions are characterized by high turnover and frequent vacancies, which can also affect fairness,

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[4] *See* Admin. Conf. of the U.S., Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021).

[5] *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).

[6] *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).

[7] *See* Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021).

accuracy, inter-decisional consistency, efficiency, and timeliness. (At some agencies, vacancies or the lack of a quorum have resulted in long delays.)

Congress has, for some programs, determined by statute whether, when, and how PAS officials participate directly in the adjudication of cases. Such determinations gained new salience after *United States v. Arthrex*,[8] in which the Supreme Court held that one congressional choice—divesting any PAS official of authority to review decisions of the Patent Trial and Appeal Board—violated the Appointments Clause of the Constitution.[9] Opinions in previously decided cases also shape how Congress structures administrative adjudication.[10]

For other programs, executive-branch officials must determine whether, when, and how PAS officials participate directly in the adjudication of cases. They must consider constitutional and statutory requirements, the potential advantages and disadvantages of direct participation by PAS officials, and the performance of mechanisms for indirect participation. When an agency determines that one or more PAS officials should participate directly in the adjudication of individual cases, it must determine the procedures and organizational structure that will permit the PAS official(s) to adjudicate cases in a fair, accurate, consistent, efficient, and timely manner.

ACUS has addressed some of these issues in previous recommendations, most notably in Recommendation 68-8, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*;[11] Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*;[12] Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*;[13] Recommendation 2020-3, *Agency Appellate Systems*;[14] and Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*.[15]

Unlike these earlier recommendations, this report focuses exclusively on direct participation by PAS officials(s) in the adjudication of individual cases. Part I describes the objectives and scope of this project, defines certain key terms, and explains the methodology we used to answer our research questions. Part II provides necessary background for considering whether, when, how, and how often PAS officials participate in the adjudication of cases, including prior ACUS recommendations and research, constitutional principles, statutory requirements, and policy considerations. Part III examines who—Congress or agencies—should determine how PAS officials participate in administrative adjudication. Part IV considers a wide range of options for structuring direct participation by PAS officials, drawing heavily on current and historical agency practices. Part V addresses how agencies develop and communicate policies regarding direct participation by PAS officials in their adjudicative systems. Part VI

[8] 141 S. Ct. 1970 (2021).
[9] U.S. Const., art. II, § 2.
[10] *See, e.g.*, Lucia v. United States, 585 U.S. 237 (2018); Edmond v. United States, 520 U.S. 651 (1997); Wiener v. United States, 357 U.S. 349 (1958).
[11] 38 Fed. Reg. 19,783 (July 23, 1973).
[12] 48 Fed. Reg. 57,461 (Dec. 30, 1983).
[13] 84 Fed. Reg. 2139 (Feb. 6, 2019).
[14] 86 Fed. Reg. 6618 (Jan. 22, 2021).
[15] 88 Fed. Reg. 2312 (Jan. 13, 2023).

examines transparency, including the public availability of proceedings, decisions, and supporting materials. Finally, Part VII explores how agencies balance PAS officials' participation in the adjudication of cases with other managerial considerations. We conclude our report with a set of recommended best practices for consideration by ACUS.

I. Objectives, Scope, Definitions, and Methodology

A. Objectives and Scope

This report examines, as a legal and practical matter, whether, when, how, and how often Senate-confirmed officials participate in the adjudication of cases across a range of federal administrative programs. For agencies that have decided to provide or are considering providing for participation by Senate-confirmed officials in the adjudication of individual cases, the project will identify principles and practicalities that agencies should consider in structuring such participation and recommend best practices for developing and communicating relevant policies regarding such participation.

Although this report provides background on constitutional and policy principles underlying whether other Senate-confirmed officials participate in the adjudication of individual cases, the principles and practicalities identified by this project will not address whether agencies should, for constitutional or other reasons, provide for participation by Senate-confirmed officials in specific programs.

B. Definitions

This report examines the participation of Senate-confirmed officials in administrative adjudication. This section begins by defining "Senate-confirmed officials," "administrative adjudication," and "participation."

1. Senate-Confirmed Officials

The Supreme Court in *Edmond v. United States*[16] and *United States v. Arthrex*[17] emphasized the constitutional imperative that exercise of executive power through adjudication by inferior officers be subject to the direction and supervision of a "principal officer in the Executive Branch."[18] Because principal officers must as a constitutional matter be appointed by the President by and with the advice and consent of the Senate,[19] we focus our inquiry on executive-branch positions filled through that process. By focusing on the manner in which an individual is appointed to a position rather than the functions the officeholder performs, we avoid

[16] 520 U.S. 651 (1997).
[17] 141 S. Ct. 1970 (2021).
[18] Edmond v. United States, 520 U.S. 651, 663 (1997); United States v. Arthrex, 141 S. Ct. 1970 (2021).
[19] U.S. Const. Art. II, § 2, cl. 2; Edmond v. United States, 520 U.S. 651, 659 (1997); United States v. Arthrex, 141 S. Ct. 1970 (2021).

having to determine which functions, as a constitutional matter, must be performed by a principal officer.

PAS officials exist in all three branches of government. Although it is clear in many cases whether a PAS position is part of the executive branch, in other cases the executive-branch status of a position may be less clear.[20] For purposes of this report, we consider a PAS position to be part of the executive branch if an officeholder is subject to removal by the President (at will or for cause). This definition includes members of many independent boards and commissions as well as the judges of certain Article I courts, including the Court of Appeals for Veterans Claims (CAVC) and the Tax Court. This is consistent with the approach of the Court in *Arthrex*, which characterized CAVC as "an Executive Branch entity."[21]

A note on usage: Unless otherwise noted, the term "PAS officials" as used in this report refers only to PAS officials *in the executive branch*.

2. Administrative Adjudication

The Administrative Procedure Act (APA) defines administrative "adjudication" broadly as "any agency process for the formulation of an order" and an "order" as any agency action that is not a "rule."[22] Like most researchers, we address a narrower set of processes, namely those that result in "a decision by government officials made through an administrative process to resolve a claim or dispute between a private party and the government or between two private parties arising out of a government program."[23]

This definition includes licensing[24] but excludes "policy implementation" decisions[25] and agency processes for receiving and reviewing complaints of legal wrongdoing from members of the public.[26] It also excludes particularized proceedings that the APA classifies as rulemaking, i.e., "the approval or prescription for the future of rates, wages, corporate or financial structures

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[20] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986).
[21] United States v. Arthrex, 141 S. Ct. 1970 (2021).
[22] 5 U.S.C. § 551(7).
[23] MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 8–9 (2019).
[24] 5 U.S.C. § 551(6).
[25] Examples of policy implementation decisions include:

> priority setting, maintaining databases, allocating funds between programs, closing a post office, approving state Medicaid rate adjustments, administering grant-in-aid programs managed by states, managing public institutions such as hospitals or prisons, conducting environmental impact assessments, making decisions involving multiple uses of public lands, designating . . . public lands as national monuments or prohibiting mineral extraction, siting airports or power plants, and protecting habitats of endangered species.

MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 8–9 (2019).
[26] Complaints may lead, of course, to the initiation of administrative enforcement actions, which is adjudication for our purposes.

or reorganizations thereof, prices, facilities, appliances, services or allowances thereof or of valuations costs, or accounting, or practices bearing on any of the foregoing."[27]

Administrative adjudication, as we define it here, exhibits enormous diversity. Substantively, some adjudications are conducted to determine whether an applicant is eligible for a benefit, license, permit, grant, loan, patent, visa, certification, or other entitlement. Some adjudications are conducted to determine whether a regulated entity has violated the law and, if so, what consequences attach. Some adjudications involve conflicting claims by multiple private parties.

The consequences for the private parties, the government, and the general public vary widely. Some adjudications involve relatively low stakes, for example, while others implicate important liberty or property interests or may have significant consequences for nonparties.

Procedurally, administrative adjudications follow processes situated anywhere on a spectrum between adversarial and inquisitorial. They may resemble judicial proceedings, be distinctly bureaucratic in nature, or exist somewhere between those two poles. The processes used at different stages or levels of an overall adjudication process often vary considerably from one another.[28] All processes—formal and informal—and all stages of those processes are encompassed in the definition of "adjudication" used in this report.

Institutionally, in some programs, adjudication is the sole or predominant function of an agency. In other programs, adjudication is only one aspect of an agency's broader workload. Programs also vary enormously in terms of volume. Some adjudication systems process millions of cases each year; others may decide only a handful of cases.

3. Participation

In this report, we distinguish "direct" from "indirect" participation by PAS officials. "Direct participation" refers to a role in deciding individual cases. When the NLRB reviews a case decided by an administrative law judge, for example, Board members participate directly in the adjudication of that case. So too does the Attorney General participate directly in a case when he or she directs the Board of Immigration Appeals to refer a case to him or her for review.

"Indirect participation" refers to other mechanisms by which PAS officials direct and supervise administrative adjudication, including the establishment of binding procedural rules, the use of substantive rulemaking to resolve questions that might otherwise be decided through case-by-case adjudication,[29] the appointment and removal of adjudicators and other managerial

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[27] 5 U.S.C. § 551(4).

[28] *Compare* Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94314 (Dec. 23, 2016), *with* 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).

[29] *See, e.g.*, Jerry L. Mashaw, *Organizing Adjudication: Reflections on the Prospect for Artisans in the Age of Robots*, 39 U.C.L.A. L. REV. 1055, 1059–61 (1992); Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 1010–11 (1991).

controls (e.g., performance evaluation, case assignment),[30] the delegation of review authority to other officials,[31] and the establishment of quality assurance systems.[32]

Of course, these two forms of participation are interrelated. When agencies construct their adjudicative processes, they integrate both direct and indirect PAS participation to create a cohesive whole that helps satisfy constitutional and statutory requirements, responds to the agencies' unique policy environments and resources, and helps facilitate core adjudicative values such as full and adequate participation by interested parties, transparency of procedure, and effciency. Put another way, agencies must strike a balance between administrative management and individualized justice determining whether, when and how often PAS officials directly or indirectly participate in adjudication.

C. Methodology

In preparing this report, we relied on primary and second sources that document whether, when, how, and how often PAS officials in the executive branch participate in the adjudication of individual cases and otherwise direct and supervise administrative adjudication. We conducted a detailed review of records from all branches of the federal government and publications in a variety of disciplines, including law, public administration, public policy, and political science. Our review of the literature was designed to provide context for our analysis of the role that PAS officials play in administrative adjudication. While wide-ranging, our examination is not intended to be a comprehensive literature on the subject.

In addition to a review of the relevant literature, we conducted detailed case studies of the following 24 programs. The case studies are available as appendixes to this report.

Program	Agency(ies)	App.
Air and water pollution enforcement	EPA	A
Airplane certification	DOT (FAA)	B
Animal health protection enforcement	USDA	C
Broadcast station licensing	FCC	D
Civilian contract disputes	GSA (CBCA)	E
Consumer protection enforcement	FTC	F

[30] *See* Admin. Conf. of the U.S., Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); *see also* Jeffrey S. Lubbers, *Selection, Supervision, and Oversight of Adjudicators*, *in* A GUIDE TO FEDERAL AGENCY ADJUDICATION 101–09 (Jeremy S. Graboyes ed., 3d ed. 2023).
[31] *See* Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983); *see also* Christopher J. Walker & Matthew L. Wiener, *Agency Appellate Review*, *in* A GUIDE TO FEDERAL AGENCY ADJUDICATION 312–315 (Jeremy S. Graboyes ed., 3d ed. 2023).
[32] *See* Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 38 Fed. Reg. 16,840 (June 27, 1973); *see also* Austin Peters, Gerald K. Ray, David Marcus & Daniel E. Ho, *Quality Assurance*, *in* A GUIDE TO FEDERAL AGENCY ADJUDICATION 383–399 (Jeremy S. Graboyes ed., 3d ed. 2023).

Controlled pharmaceuticals registration	DOJ (DEA)	G
Federal employee adverse actions	MSPB	H
Federal employment discrimination	EEOC	I
Immigrant and nonimmigrant visas	DOS	J
Immigration-related employment discrimination	DOJ (EOIR)	K
Immigration removal	DHS, DOJ (EOIR)	L
Indian affairs appeals	DOI	M
Longshore and harbor workers' compensation	DOL	N
Occupational safety and health	DOL (OSHA), OSHRC	O
Old-age, survivors, and disability insurance	SSA	P
Patentability	DOC (USPTO)	Q
Payment of prevailing wage rates by federal contractors	DOL	R
Securities fraud enforcement	SEC	S
Tax deficiency cases	IRS, Tax Court	T
Trademark registration	DOC (USPTO)	U
Unfair labor practices	NLRB	V
Unfair practices in import trade	ITC	W
Veterans disability compensation	VA, CAVC	X

In selecting cases, we followed contemporary best practices in qualitative analysis and sought a representative sample of adjudicative systems that contained useful variation on a variety of important dimensions. When considering programs for inclusion in our study, we aimed to include a mix of programs that, among other characteristics: (1) are administered by executive departments and independent agencies,[33] (2) are administered by single-headed and multimember agencies,[34] (3) decide high and low volumes of cases, (4) use formal and informal procedures,[35] and (5) rely or do not rely on adjudication as an important vehicle for policymaking.[36]

Additionally, we aimed to include several programs in which PAS officials regularly participate in the adjudication of individual cases and other programs in which PAS officials rarely or never participate in the adjudication of cases.[37] We also aimed to include several

[33] *See* JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 34–51 (2018) (distinguishing executive departments from independent agencies); *see also* 5 U.S.C. § 501 (defining the "Executive departments").

[34] *See* JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 34–56 (2018) (describing single-headed executive departments, single-headed "administrations," and multimember bodies).

[35] *Compare* 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), *with* 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).

[36] *See* Christopher J. Walker, Melissa Wasserman & Matthew Lee Wiener, Precedential Decision Making in Agency Adjudication 19–20 (Dec. 6, 2022) (report to the Admin. Conf. of the U.S.).

[37] *See* Christopher J. Walker & Matthew Lee Wiener, Agency Appellate Systems 7–9 (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.).

programs that have recently amended their roles governing PAS-official participation, as well as programs that continue to rely on longstanding policies. In sum, our case selection strategy had the primary objective of exploring variance across a number of dimensions.

As with our review of the literature, we stress that our case studies are not comprehensive treatises. Instead, they are simple narrative accounts of the historical development of the role that PAS officials play in adjudicating cases under different programs. These accounts provide qualitative context for considering whether, when, how, and how often PAS officials across the executive branch participate in the adjudication of individual cases.

To provide additional qualitative background, we also considered, in a more limited fashion, the experience of a variety of programs administered by other agencies, including the Federal Mine Safety and Health Review Commission (FMSHRC), U.S. Postal Service (USPS), Nuclear Regulatory Commission (NRC), and Department of Health and Human Services (HHS).

II. Background

This Part provides background for considering whether, when, how, and how often PAS officials participate in the adjudication of individual cases. The first section examines a number of prior ACUS recommendations and research. The second section examines constitutional questions, including structural requirements and potential due process concerns. The third section analyzes policy considerations, focusing in particular on the consequences of characteristics common among PAS officials.

A. Prior ACUS Recommendations and Research

Although this project is the first ACUS inquiry focused exclusively on the role that PAS officials play in administrative adjudication, it is far from the first project to consider the subject. ACUS has adopted six general recommendations on agency appellate review, all of which consider, to varying degrees, the participation of PAS officials in the adjudication of individual cases. They are:

(1) Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*[38]
(2) Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*[39]
(3) Recommendation 86-4, *The Split-Enforcement Model for Agency Adjudication*[40]
(4) Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*[41]
(5) Recommendation 2020-3, *Agency Appellate Systems*[42]

[38] 38 Fed. Reg. 19,783 (July 23, 1973).
[39] 48 Fed. Reg. 57,461 (Dec. 30, 1983).
[40] 51 Fed. Reg. 46986 (Dec. 30, 1986).
[41] 84 Fed. Reg. 2139 (Feb. 6, 2019).
[42] 86 Fed. Reg. 6618 (Jan. 22, 2021).

(6) Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*[43]

Other research reports for ACUS bearing generally on the subject includes:

(a) Russell Weaver, *Organization of Adjudicative Offices in Executive Departments and Agencies* (1993)[44]
(b) Michael Sant'Ambrogio & Adam Zimmerman, *Aggregate Agency Adjudication* (2016)[45]
(c) Kent Barnett et al, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight and Removal* (2018)[46]
(d) Michael Asimow, *Federal Administrative Adjudication Outside the Administrative Procedure Act* (2019)[47]
(e) Michael Asimow, *Greenlighting Administrative Prosecution: Checks and Balances on Charging Decisions* (2022)[48]

ACUS has also issued many recommendations that address, explicitly or implicitly, the role of PAS officials in adjudicating cases at particular agencies or in particular programs.[49]

Finally, ACUS has commissioned studies and adopted several recommendations that address strategies other than personal participation in the adjudication of individual cases—including the adoption of substantive and procedural rules, the issuance of administrative manuals and staff instructions, managerial controls, and quality assurance systems—that PAS officials use to direct and supervise administrative adjudication.

1. Recommendation 68-6, Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency

In one of its first statements, ACUS encouraged "every agency having a substantial caseload of formal adjudications" to consider establishing intermediate appellate boards or adopting procedures "for according administrative finality to presiding officers' decisions, with

[43] 88 Fed. Reg. 2312 (Jan. 13, 2023).
[44] Russell L. Weaver, *Organization of Adjudicative Offices in Executive Departments and Agencies*, 1993 ACUS 547 (1993). The report was subsequently published as Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251 (1996). The report did not result in the adoption of a recommendation by ACUS.
[45] The report was subsequently published as Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634 (2017). The report informed an ACUS recommendation, which does not address participation by PAS officials in administrative adjudication. *See* Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016).
[46] The report was subsequently published as Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1 (2018). The report did not result in the adoption of a recommendation by ACUS.
[47] This book-length study built on Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).
[48] The report was subsequently published as Michael Asimow, *Greenlighting Administrative Prosecution*, 75 ADMIN. L. REV. 227 (2023). The report did not result in the adoption of a recommendation by ACUS.
[49] *See infra* Part II.A.11.

discretionary authority in the agency to affirm summarily or to review, in whole or in part, the decisions of such boards or officers." ACUS offered three justifications for these structures. First, they would "make more efficient use of the time and energies of agency members and their staffs." Second, these structures would "improve the quality of decision without sacrificing procedural fairness." Third, they would "help eliminate delay in the administrative process."[50]

2. Recommendation 83-3, Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act

Fifteen years later, ACUS issued its most comprehensive evaluation of "agency head review." (Of note, that recommendation was limited to programs in which adjudication is subject to the APA's formal adjudication provisions.) Informed by a report by Ronald Cass,[51] the recommendation explained that, in selecting among possible review structures, agencies should keep four basic precepts in mind:

> First, efficiency is generally served by spreading the review load over a number of reviewers adequate to keep review time low relative to initial decision time. Application of this precent requires attention to three variables: the total relevant adjudicatory caseload, the difficulty of the cases, and the number of reviewers.
>
> Second, efficiency also is served by minimizing repetition; the same matter seldom should be put in issue more than once. This cautions against *de novo* review, instead favoring more limited review of issues properly committed to a subordinate.
>
> Third, accuracy depends on matching the skills of the reviewer to the issues presented. Officials integrated into the agency's policymaking apparatus should review decisions that significantly involve policy issues while officials trained in factfinding should review decisions presenting fact issues. Furthermore, the level of the reviewer should match the magnitude of the issue. Agency heads with numerous other responsibilities should be insulated from routine cases, but attempts to force resolution of major policy issues at lower levels seems misguided except when those issues can readily be addressed by rulemaking. Similarly, individual reviewers easily can address relatively simple issues, whether of fact or policy, while more complex questions may call for collegial consideration.
>
> Fourth, acceptability generally requires that *some* review by a higher agency authority be available at the instance of the aggrieved party, at least in cases of great impact on individual parties. Inspection of a substantial penalty and removal of a valuable government benefit are obvious candidates for review as of right.[52]

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[50] 38 Fed. Reg. 19,783 (July 23, 1973).
[51] The report was subsequently published as Ronald A. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 BOSTON U. L. REV. 1 (1986).
[52] 48 Fed. Reg. 57,461 (Dec. 30, 1983).

Efficiency (including timeliness), accuracy (including decisional accuracy and interdecisional consistency), and acceptability continue to represent consensus values throughout ACUS's body of adjudication-related recommendations,[53] and these principles described in Recommendation 83-3 continue to present a useful framework for consideration. Other consensus values might be added as well, including procedural fairness, impartiality, political accountability, and transparency.

The recommendation urged Congress not to "prescribe detailed review structures" and to instead grant agency heads (i.e., the authorities to whom the law assigns responsibility for administering a program) sufficient flexibility to allocate review functions appropriately. It further recommended that Congress authorize agency heads to: (1) review initial decisions of presiding officers on a discretionary basis, and (2) delegate review authority "on an *ad hoc* basis or with respect to any or all classes of decisions to a subordinate official or board of officials either with possibility for further review by the agency head in his [or her] discretion or without further administrative review."

"Only in the rarest circumstances," ACUS recommended, "should Congress require agency heads to review decisions personally. ACUS offered an (apparently exclusive) list of two such circumstances:

(1) In the case of a single-headed agency, "the subject matter at issue is of such importance that attention at the very highest level is imperative."

(2) In the case of a multimember agency, "the subject matter at issue is of special importance, the cases comprising the relevant class of decisions are few in number, and the agency either has no other significant non-adjudicatory functions or has few such functions and has a sufficient number of members adequately to perform review and other tasks."

Instead, ACUS suggested that most formal adjudication be delegated to presiding officers and that "any authority [the agency head] retains to grant further review should normally be exercisable only in his [or her] discretion on a showing that important policy issues are presented or that the delegate erroneously interpreted agency policy." ACUS cautioned that "[m]ultilevel review of purely factual issues should be avoided."

ACUS offered a nonexclusive list of alternatives to agency-head review for "routine cases," including delegation to individual delegates, the establishment of appellate review boards, and, for multimember agencies, delegation to a panel of members.

3. Recommendation 86-4, The Split-Enforcement Model for Agency Adjudication

When Congress creates a program, it often assigns responsibility for overseeing all aspects of the program's administration to a single PAS official or a board or commission made

[53] *See, e.g.*, 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).

up of PAS officials. This model combines rulemaking, adjudication, investigation, and prosecution in a single agency. Separation of functions in such programs is usually achieved "through internal barriers within the agency which separate and insulate those employees who judge from those who investigate and prosecute." But as ACUS recognized: "The chains of command . . . come together at the top in the person of the head or heads of the agency who, through subordinates, are responsible for all . . . functions."[54]

Some have criticized such combinations of functions on the grounds that "it is impossible to achieve evenhanded justice when enforcement and adjudicative functions are lodged in the same agency."[55] For a few programs, Congress has created separate agencies—one responsible for rulemaking, investigation, and prosecution and another responsible only for adjudication. Examples include occupational safety and health, mine safety and health, and airmen certification programs. This is called the "split-enforcement model."

Unable to conclude based on its study "whether this model achieves greater fairness in adjudication," ACUS ultimately took "no position on whether the split-enforcement model is preferable to a structure in which responsibilities for rulemaking, enforcement and adjudication are combined within a single agency."[56]

4. Organization of Adjudicative Offices in Executive Departments and Agencies (1993)

In 1993, ACUS published a report by Russell Weaver that analyzed the adjudicative systems at 12 agencies, seven using ALJs and five with non-ALJ systems. Although the bulk of the study focused on the procedures and management of hearing-level components, it also examined agency appeal procedures.[57]

Weaver classified appeal procedures into four types: (1) judicial officer systems, (2) review board systems (with final review authority), (3) review board systems (subject to further discretionary review by the agency head), and (4) direct agency-head review. He compared these structures and evaluated their benefits and costs.

Weaver also examined in depth the question: "is political review really needed?" As described below,[58] he identified four potential advantages of review by a PAS official or other political appointee, namely that it would enable the official to (1) coordinate agency policymaking, (2) gain and act on systemic awareness, (3) make difficult (especially politically sensitive) decisions, and (4) promote interdecisional consistency. He also identified five potential risks of direct participation by political appointees, namely that (1) parties may lack a meaningful opportunity to participate in proceedings before political appointees; (2) challenges

[54] 51 Fed. Reg. 46,986 (Dec. 30, 1986).
[55] 51 Fed. Reg. 46,986 (Dec. 30, 1986).
[56] 51 Fed. Reg. 46,986 (Dec. 30, 1986).
[57] Russell L. Weaver, Organization of Adjudicative Offices in Executive Departments and Agencies, 1993 ACUS 547 (1993); Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251 (1996).
[58] *See infra* Part IV.A.

may arise during periods of transitions and vacancies in positions subject to politically appointment; (3) interested persons may perceive direct participation by a political appointee as adversely affecting the integrity of the proceedings; (4) direct participation by a political appointee may result in political manipulation of the review process, and (5) access to adjudication as a vehicle for policymaking may disincentivize political appointees from setting policy through notice-and-comment rulemaking.[59]

Although the report did not lead to a formal recommendation adopted by the ACUS Assembly, it is worth considering the recommendations Weaver made in his report to ACUS. It reads, in relevant part:

> It is difficult to formulate a single review system and to apply that system to all agencies. Agencies have differing programs with differing needs. Nevertheless, certain broad conclusions can be made about the desirability of various systems.
>
> In general, agencies should limit the extent to which high-level political appointees are involved in the review process. As previously noted, significant problems result from political review, and such review is generally impractical. Agencies decide too many cases for the agency head to be actively involved in the review process. Moreover, such review has defined drawbacks. By virtue of how the review is conducted, such review can undermine public confidence in the fairness and impartiality of agency decisions.
>
> Political review of adjudicative decisions is appropriate when an agency's adjudications involve major policy questions and the agency wishes to have high-level political appointees "bite" on those questions. But such political review should be accomplished on a discretionary basis. In other words, a review board should initially review the case, and the agency head should get involved only after such review is complete. The initial review sharpens the issues, and lets the political appointee focus on policy issues.[60]

5. Aggregate Agency Adjudication (2016)

In Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, ACUS "recognize[d] aggregation as a useful tool to be employed in appropriate circumstances" to resolve large groups of cases raising common issues of fact or law and "provide[d] guidance and best practices to agencies as they consider whether or how to use or improve their use of aggregation."[61] The recommendation did not specifically address the participation of PAS officials in aggregate adjudication. However, it recognized that aggregation procedures are one of a variety of techniques to resolve claims with common issues, alongside other techniques such

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[59] Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251 (1996).
[60] Russell L. Weaver, *Organization of Adjudication Offices in Executive Departments and Agencies*, 1993 ACUS 547, 676 (1993).
[61] Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016).

as precedential decision making, and recognized the close connection between aggregation and policymaking.[62]

The report by Michael Sant'Ambrogio and Adam Zimmerman underlying the recommendation did address the potential for agency heads to participate in the adjudication of individual cases. Recognizing the need for transparency and legitimacy in aggregate adjudication, Sant'Ambrogio and Zimmerman recommended that agencies "develop provisions permitting interested parties to file amicus briefs, or their equivalent, in aggregate proceedings." They noted that "[a]ppeals to the agency head of initial decisions in such cases should also allow for the possibility of such briefs and oral arguments."[63]

And recognizing the close connection between aggregate adjudication and policymaking, Sant'Ambrogio and Zimmerman recommended that agencies "that utilize aggregation in cases with implications for policymaking should develop lines of communication between their adjudicators and agency personnel . . . involved in related rulemaking." One option for fostering communication was for policymakers to "review the outcomes in aggregated cases." Another was adoption of a procedure by which "participants could appeal a final judgment made during the course of coordinate proceeding, class action or class settlement to the final Article I tribunal, often the head of the agency."[64]

Sant'Ambrogio and Zimmerman noted possible efficiency and political-oversight benefits of agency head review. In terms of efficiency, "the agency head will be able to influence not only the aggregated case on direct review, but future administrative proceedings as well, all with a single decision." In terms of political oversight, aggregate adjudication may have the effect of "increasing the power of agency heads over significant issues that affect large groups of people." And because aggregate adjudication is "more transparent to the political branches, which are rarely concerned with the outcomes of individual adjudications beyond the provision of constituent services by individual representatives," aggregate adjudication "may even increase the ability of the political branches to ensure agency accountability."[65]

6. Recommendation 2018-4, Recusal Rules for Administrative Adjudicators

In this recommendation, ACUS encouraged agencies to adopt rules for recusal applicable to adjudicators who preside over legally required evidentiary hearings and who conduct internal agency appellate review of hearing decisions. The recommendation stated explicitly, however, that such rules should not apply to agency heads. (It noted that agencies might nonetheless take the recommendation into account when determining rules for the recusal of agency heads.) As

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[62] Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016).
[63] Michael Sant'Ambrogio & Adam Zimmerman, Aggregate Agency Adjudication 80 (June 9, 2016) (report to the Admin. Conf. of the U.S.).
[64] Michael Sant'Ambrogio & Adam Zimmerman, Aggregate Agency Adjudication 85 (June 9, 2016) (report to the Admin. Conf. of the U.S.).
[65] Michael Sant'Ambrogio & Adam Zimmerman, Aggregate Agency Adjudication 86 (June 9, 2016) (report to the Admin. Conf. of the U.S.).

discussed later in this report,[66] the underlying report by Louis Virelli, and a subsequent report he produced for ACUS, address the complexity inherent in crafting recusal rules for agency heads.[67]

7. Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal (2018)

In analyzing practices by which agencies supervise non-ALJ adjudicators, Barnett et al. were "initially surprised at the relatively large number of proceedings that the heads of agencies reviewed." They found, however, that most such proceedings "either appeared to be relatively rare" or took place at "agencies that mainly or solely use adjudication." They explained:

> For instance, appeals from the Administrative Office of the U.S. Courts' fair-employment-practices hearings, the [Energy Department's] proceedings concerning improper actions surrounding student financial aid, and the NRC's various nuclear-power hearings are likely not substantial in number. And several of the agencies—such as the Federal Maritime Commission, the MSPB, the NLRB, and the Railroad [Retirement] Board—that permit or mandate appeals to the head(s) of the agency act largely or solely through adjudication, rather than rulemaking.[68]

8. Recommendation 2020-3, Agency Appellate Systems

ACUS revisited best practices for appellate review of hearing-level decisions in a 2020 recommendation. Informed by a report by Christopher Walker and Matthew Wiener,[69] Recommendation 2020-3 identified general best practices for agency appellate systems, regardless of whether, when, or how PAS officials (or other political appointees) participate in such systems. This project builds on that recommendation by focusing on that question.

Most importantly, that recommendation emphasized that the optimal design for a program's appellate system necessarily depends on the objective the system is meant to accomplish. The recommendation identified several possible objectives of an appellate system, including "policymaking, political accountability, management of the hearing-level adjudicative system, organizational effectiveness and systemic awareness, and the reduction of litigation in federal courts." Along with other practical aspects of the adjudicative system—size, resources, etc.—identification (and public disclosure) of the objective of appellate review is a necessary first step toward designing and implementing an effective review system.[70] These factors clearly influence the role, if any, that PAS officials play in different programs.

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[66] *See infra* Part IV.E.
[67] 84 Fed. Reg. 2139 (Feb. 6, 2019).
[68] Kent Barnett, Logan Cornett, Malia Reddick & Russell Wheeler, Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 36 (Sep. 24, 2018) (report to the Admin. Conf. of the U.S.).
[69] Christopher J. Walker & Matthew Lee Wiener, Agency Appellate Systems (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.).
[70] 86 Fed. Reg. 6618 (Jan. 22, 2021).

9. Greenlighting Administrative Prosecution: Checks and Balances on Charging Decisions (2022)

As described above, adjudication and enforcement functions are often combined in a single agency. Although there is often an internal separation of functions between adjudicative staff and enforcement staff, functions are often combined as a statutory matter at the level of the agency head. At several independent regulatory agencies, PAS officials who make up the agency may participate both in the initiation of formal proceedings (i.e., by issuing a charging decision or complaint) and in the review of decisions rendered by presiding officers. Asimow examined the charging practices of independent regulatory agencies that engage both in law enforcement and administrative adjudication.[71]

Responding to concerns about combining functions in this way (e.g., the possibility of confirmation bias or inefficiency), Asimow assessed mechanisms to address such concerns, including delegation of the charging decision to enforcement staff in routine cases, disqualification of agency members who participated in charging decisions, and delegation of the internal agency appeal function to an appellate review board or judicial officer. Asimow noted that delegation of the appeal function could "cover certain classes of cases that are likely to present only factual issues or it could cover all enforcement cases." He noted further that "agency heads could retain discretionary review power over decisions of the intermediate review board or judicial officer in cases presenting important policy issues." Asimow noted that delegations of final decision authority "are quite common in the administrative state" and might benefit certain agencies, particularly those "with substantial caseloads or serious backlogs at the agency head level." Asimow ultimately concluded, however, that the benefits of PAS-official participation in "greenlighting" charging decisions and reviewing appeals outweigh the costs.[72]

10. Recommendation 2022-4, Precedential Decision Making in Agency Adjudication

ACUS considered the use of precedential decision making as a mechanism to ensure consistency, predictability, and uniformity when adjudicating cases in a 2022 Recommendation.[73] The Recommendation notes that precedential decisions can come from an agency head or heads,[74] in addition to adjudicators exercising the agency's authority to review hearing-level decisions, adjudicators who review hearing-level decisions but whose decisions are subject to (usually discretionary) agency-head review, or adjudicators other than the agency head who have statutory authority to issue final decisions.

The report underlying the recommendation—by Christopher Walker, Melissa Wasserman, and Matthew Wiener—discussed these variations in more detail, but noted that when

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[71] Michael Asimow, Greenlighting Administrative Prosecution: Checks and Balances on Charging Decisions (Jan. 21, 2022) (report to the Admin. Conf. of the U.S.).
[72] Michael Asimow, Greenlighting Administrative Prosecution: Checks and Balances on Charging Decisions (Jan. 21, 2022) (report to the Admin. Conf. of the U.S.).
[73] 88 Fed. Reg. 2312 (Jan. 13, 2023).
[74] This Recommendation and its underlying report refer not to PAS officials but only to agency head or heads. The resulting discussion, however, would apply to all PAS officials.

precedential decisions are issued by the agency head following direct review of hearing-level adjudicators' decisions, that review is usually either as of right at the request of a party or at the discretion of the agency head, and that when review is discretionary there often is a statute or more commonly a procedural rule that sets forth a standard or criteria to guide or circumscribe the discretion.[75] The report also details a scenario by which a decision could be designated precedential by an appellate body but still be subject to (usually discretionary) review by the agency head.[76] In these instances, the agency head will usually exercise review authority in only a few cases, and agency rules may say little or nothing about the procedures by which a party may seek agency-head review. The report notes that there is a long history of agency heads—as well as intermediate review bodies—using precedential decisions to establish or further develop policy for the agency as a whole.[77]

11. Agency- and Program-Specific Recommendations

ACUS has issued many recommendations that address the role of PAS officials in adjudicating cases in particular programs. Some recommendations explicitly discuss the role that PAS officials should play in adjudication under these programs. Others are conspicuous in the absence of any such discussion, which may, at least in some cases, suggest a lack of concern with the status quo either as a legal or policy matter.

Program	Year	Recommendation
Social security disability	2013 1990 1987 1978	These recommendations accept the Appeals Council—an appellate body of career adjudicators—as the final decision maker within the executive branch. They address the appropriate role of the Appeals Council in ensuring decisional quality and developing policy but prescribe no role in the adjudication of individual cases for any PAS official (either the Commissioner of Social Security or, before 1994, the Secretary of Health and Human Services).[78]
Asylum and removal	2012 1989 1985	In 1985, ACUS recommended that the Attorney General "should retain the power to review individual [Board of Immigration Appeals] decisions," but "[i]n accordance with current practice, this power should be exercised only in extraordinary circumstances." A 1989 recommendation,

[75] Christopher J. Walker, Melissa Wasserman & Matthew Lee Wiener, Precedential Decision Making in Agency Adjudication 12 (Dec. 6, 2022) (report to the Admin. Conf. of the U.S.)
[76] *Id.* at 13–14.
[77] *Id.* at 19.
[78] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2013-1, *Improving Consistency in Social Security Disability Adjudication*, 78 Fed. Reg. 41352 (July 10, 2013); Admin. Conf. of the U.S., Recommendation 90-4, *Social Security Disability Appeals Process: Supplementary Recommendation*, 55 Fed. Reg. 34213 (Aug. 22, 1990); Admin. Conf. of the U.S., Recommendation 87-7, *A New Role for the Social Security Appeals Council*, 52 Fed. Reg. 49143 (Dec. 30, 1987); Admin. Conf. of the U.S., Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*, 43 Fed. Reg. 27508 (June 26, 1978).

		which encouraged the Attorney General to establish an Asylum Board within the Executive Office for Immigration Review, recommended that the "Attorney General should retain the authority to review decisions of the Asylum Board, upon formal certification or sua sponte." A 2012 recommendation on immigration removal adjudication made no mention of review by the Attorney General.[79]
Immigrant and nonimmigrant visas	1989	Federal law is interpreted to bar the Secretary of State from reviewing consular officers' decisions. ACUS recognized the need for "the creation of a level of centralized administrative review" of visa denials and recommended that the State Department develop and submit to Congress a proposed process for administrative review.[80]
Debarment and suspension	1995	Given the "substantial economic effect" of debarment and suspension of federal contractors, ACUS recommended (1) that proceedings be heard and decided by ALJs, military judges, board of contract appeals judges, or "other hearing officers who are guaranteed similar levels of independence" and (2) that such decisions be reviewed by debarring officials who are "guaranteed sufficient independence to provide due process."[81]
Fair housing	1992	ACUS noted in a footnote to this recommendation that, under HUD regulations, the Secretary "will review [lower-level decisions] only in extraordinary cases."[82]
Export control proceedings	1991	ACUS recommended: "Review by the Secretary [of Commerce] or the Secretary's delegate of staff decisions on classification request or license applications should be available on request of the applicant. To the extent possible, the decision on review at the secretarial level should be in detail sufficient to permit others to evaluate its precedential value. The Commerce Department should publish and index these decisions in an appropriate matter, together with other decisions on requests for classification

[79] Admin. Conf. of the U.S., Recommendation 2012-3, *Immigration Removal Adjudication*, 77 Fed. Reg. 47804 (Aug. 10, 2012); Admin. Conf. of the U.S., Recommendation 89-4, *Asylum Adjudication Procedures*, 54 Fed. Reg. 28970 (July 10, 1989); Admin. Conf. of the U.S., Recommendation 85-4, *Administrative Review in Immigration Proceedings*, 50 Fed. Reg. 52894 (Dec. 27, 1985); *see also* Admin. Conf. of the U.S., Recommendation 71-5, *Procedures of the Immigration and Naturalization Service in Respect to Change-of-Status Applications*, 2 ACUS 32 (1971).

[80] Admin. Conf. of the U.S., Recommendation 89-9, *Processing and Review of Visa Denials*, 54 Fed. Reg. 53496 (Dec. 29, 1989).

[81] Admin. Conf. of the U.S., Recommendation 95-2, *Debarment and Suspension from Federal Programs*, 60 Fed. Reg. 13695 (Mar. 14, 1995).

[82] Admin. Conf. of the U.S., Recommendation 92-3, *Enforcement Procedures Under the Fair Housing Act*, 57 Fed. Reg. 30104 (July 8, 1992).

		and individual license applications that have possible precedential value and any general written guidance on classification issues."[83]
Aviation civil penalties	1991	ACUS noted the possible benefits of the split-enforcement model for adjudicating civil money penalties against pilots and flight engineers.[84]
Antidumping and countervailing duty	1991 1973	In 1973, ACUS recommended best practices for proceedings before the Treasury Department's Assistant Secretary for Enforcement, Tariff and Trade Affairs, and Operations (a PAS official). In 1991, ACUS recommended best practices for consideration by the International Trade Commission (which consists of six PAS officials).[85]
Medicare appeals	1986	ACUS also noted that the Secretary of Health and Human Services may review on his or her own motion decisions of the Provider Reimbursement Review Board, which decides disputes concerning reimbursement under Medicare Part A. ACUS apparently accepted that the Appeals Council, an appellate body of career adjudicators, provided the last level of administrative review of beneficiary appeals involving coverage determinations under Part A.[86]
Federal grant programs	1982	ACUS recommended that, where appropriate, appeal procedure should afford grantees and vested applicants an "impartial decisionmaker," such as "a grant appeals board member, a high level agency official, a person from outside the agency, an [ALJ], or certain other agency personnel from outside the program office." ACUS recommended that agencies accord finality to the appeal decision "unless further review is conducted promptly according to narrowly drawn exceptions and in accordance with preestablished procedures, criteria, and standards of review." It also recommended that "[i]f the decisionmaker is delegated, or asserts, authority to review the validity of agency regulations, the agency head should retain an

[83] Admin. Conf. of the U.S., Recommendation 91-2, *Fair Administrative Procedure and Judicial Review in Commerce Department Export Control Proceedings*, 56 Fed. Reg. 33844 (July 24, 1991).
[84] Admin. Conf. of the U.S., Recommendation 91-8, *Adjudication of Civil Penalties Under the Federal Aviation Act*, 56 Fed. Reg. 67141 (Dec. 30, 1991); *see also* Admin. Conf. of the U.S., Recommendation 90-1, *Civil Money Penalties for Federal Aviation Violations*, 55 Fed. Reg. 34209 (Aug. 22, 1990).
[85] Admin. Conf. of the U.S., Recommendation 91-10, *Administrative Procedures Used in Antidumping and Countervailing Duty Cases*, 56 Fed. Reg. 67144 (Dec. 30, 1991); Admin. Conf. of the U.S., Recommendation 73-4, *Administration of the Antidumping Law by the Department of the Treasury*, 39 Fed. Reg. 4846 (Feb. 7, 1974).
[86] Admin. Conf. of the U.S., Recommendation 86-5, *Medicare Appeals*, 51 Fed. Reg. 46987 (Dec. 30, 1986).

		option for prompt final review of the decision in accordance with applicable procedures."[87]
Taxation	1975	ACUS recommended that, with regard to civil penalties for failure to file a tax return or to pay tax, taxpayers should be given the right to Tax Court review.[88]
Mining claims on public lands	1974	ACUS stated: "Effectively conferring final decision-making authority on the Board of Land Appeals [an appellate body made up of non-PAS adjudicators] risks a bifurcation of the Department's policymaking function. The Department should adopt measures that will reconcile the appropriate adjudicative role of the Board with the Secretary's policymaking responsibility."[89]
Labor certification of immigrants	1973	ACUS apparently accepted that the only opportunity for appellate review of decisions by certifying officers of the Manpower Administration (today the Employment and Training Administration) lay with reviewing officers located in agency regional offices.[90]

To the extent that any general principles can be drawn from these recommendations, it may be said that ACUS has indicated a preference for participation by a PAS official with policymaking authority in cases involving important questions of law or policy or matters that may have significant consequences beyond the parties to a specific case.

12. Other Research and Recommendations

One cannot consider the question of whether, when, and how PAS officials participate in the adjudication of individual cases without also considering other mechanisms by which PAS officials direct and supervise systems of administrative adjudication. ACUS has commissioned studies and adopted many recommendations that address internal administrative law[91] strategies, including the adoption of substantive and procedural rules, the issuance of administrative manuals and staff instructions, managerial controls, and quality assurance systems.

Administrative adjudication typically takes place according to substantive and procedural regulations adopted by agencies. Administrative manuals, staff instructions, and other guidance supplement statutes and regulations. The designation of adjudicative orders and opinions as

[87] Admin. Conf. of the U.S., Recommendation 82-2, *Resolving Disputes Under Federal Grant Programs*, 47 Fed. Reg. 30704 (July 15, 1982).
[88] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 75-7, *Internal Revenue Service Procedures: Civil Penalties*, 41 Fed. Reg. 3984 (Jan. 27, 1976).
[89] Admin. Conf. of the U.S., Recommendation 74-3, *Procedures of the Department of the Interior with Respect to Mining Claims on Public Lands*, 39 Fed. Reg. 23043 (June 26, 1974); *see also* Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1256–59 (1974).
[90] Admin. Conf. of the U.S., Recommendation 73-2, *Labor Certification of Immigrant Aliens*, 38 Fed. Reg. 16840 (June 27, 1973).
[91] *See generally* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 Mich. L. Rev. 1239 (2017).

precedential often has a similar effect. ACUS has addressed the role of such materials in dozens of recommendations.[92]

Alongside appellate review, PAS officials use managerial controls to direct and supervise adjudication.[93] Many such controls were identified in Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*. They include: "[p]rocedures for assessing selecting, and appointing candidates for adjudicator positions"; "[p]lacement of adjudicators within agencies' organizational hierarchies"; "[c]ompensation structure and performance incentives, such as bonuses, nonmonetary awards, and promotions"; "[p]rocedures for assigning cases"; "[a]ssignment, if any, of nonadjudicative duties to adjudicators"; "[s]upervision of adjudicators by higher-level officials"; "[e]valuation of adjudicators, including quantitative and qualitative methods for appraising adjudicators' performances, such as case-processing goals"; and "[d]iscipline and removal of adjudicators."[94]

Recognizing the limitations of agency appellate systems for ensuring decisional quality, especially in high-volume programs, many agencies have adopted quality assurance systems. In such systems, agency personnel review all or, more often, a sample of cases to determine the extent to which adjudicators are complying with relevant policies and deciding cases accurately and consistently. Agencies use data and findings gleaned from such review to, among other things, provide feedback to adjudicators and staff involved in adjudication, target training, identify policies requiring clarification or modification, and identify questions that might be resolved more effectively through rulemaking. ACUS has addressed quality assurance mechanisms twice, first in 1973[95] and most recently in 2021.[96]

As discussed throughout this report, policymaking, precedential decision making, agency appellate systems, managerial controls, quality assurance systems, and other mechanisms can intersect in important ways.

B. Constitutional Principles

Both structural and due process requirements shape how PAS officials participate in the administrative adjudication. As discussed in this section, these requirements can be distilled down into two high-level principles. First, administrative adjudication must be supervised and directed by one or more PAS officials. Second, matters must be adjudicated according to an

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[92] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019).
[93] *See, e.g.*, Recommendation 92-7, *The Federal Administrative Judiciary*, 57 Fed. Reg. 61760 (Dec. 29, 1992).
[94] 86 Fed. Reg. 6622 (Jan. 22, 2021); *see also* Kent Barnett, Logan Cornett, Malia Reddick & Russell Wheeler, Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal (Sep. 24, 2018) (report to the Admin. Conf. of the U.S.).
[95] Admin. Conf. of the U.S., Recommendation 73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 38 Fed. Reg. 16840 (June 27, 1973).
[96] Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022).

impartial application of the relevant law to the relevant facts, following established procedures, without consideration given to other factors.

1. Structural Requirements

The Constitution identifies three powers of the federal government—the legislative, executive, and judicial powers—and assigns them to Congress, the President, and the Article III courts, respectively. Although the Constitution never addresses agencies explicitly, it sets forth certain principles that are understood to constrain the structural choices that Congress and executive branch actors make in designing executive-branch instrumentalities.

Most importantly for this study, the Constitution vests the executive power in the President and directs him or her to "take Care that the Laws be faithfully executed." Recognizing that it would be impossible for the President to personally perform all functions of the federal government, the Constitution permits others to assist him or her but regulates, to a certain extent, the manner of their appointment and supervision.[97]

The Appointments Clause establishes as a default rule that all "Officers of the United States" must be appointed by the President by and with the advice and consent of the Senate.[98] The "Officers of the United States," as interpreted by the Supreme Court, encompass all federal officials who "occupy a 'continuing' position established by law" and "exercise[] significant

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[97] In rare circumstances, the President may have explicit legal authority to adjudicate a particular class of cases. *See, e.g.*, 19 U.S.C. § 1337(j). More often, adjudicative authority is assigned to an executive-branch officer other than the President. In such instances, there may be constitutional limits on the President's authority to countermand a decision rendered by the officer. As Chief Justice Taft wrote in *Myers v. United States*:

> Finding [executive-branch] officers to be negligent and inefficient, the President should have the power to remove them. Of course, there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a *quasi*-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case, he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been, on the whole, intelligently or wisely exercised. Otherwise, he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

272 U.S. 52, 135 (1926). There may also be constitutional or statutory limits on the authority of the President or White House staff to communicate with the officer in the course of an adjudication. *See* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2362–63 (2001); see *also* Memorandum for All White House Staff from Dana Remus, Counsel to the President 4–6 (July 21, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/White-House-Policy-for-Contacts-with-Agencies-and-Departments.pdf. As Emily Bremer has written, "[t]o date, adjudication generally has been viewed as an area of administration that is properly insulated from presidential control." Emily Bremer, *Presidential Adjudication*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4726519.

[98] U.S. Const., art. II, § 2.

authority pursuant to the laws of the United States."[99] (The Constitution does not explicitly regulate the appointment or supervision of non-officers, called "employees,"[100] most of whom are hired and supervised today according to merit system principles.)

This default process for appointing high-level officials is meant to promote accountable governance, on the theory that the President can be held accountable for nominating a bad candidate, and the Senate can be held accountable for confirming a bad candidate or rejecting the nomination of a good one.[101] Its chief drawback is that it is time-consuming, requiring the personal attention of both the President and the Senate.[102] Recognizing that the appointment of all officers might be "inconvenient" when offices "became numerous, and sudden removals necessary,"[103] the Framers permitted Congress by law to vest the appointment of "inferior" officers in the President alone, or in a court of law or a department head, without Senate confirmation.[104] This streamlines the process for appointing lower-level, executive-branch officers while preserving a "chain of dependence" between them and the President.[105]

The line the Court has drawn between "principal" officers, who must be nominated by the President and confirmed by the Senate, and "inferior" officers, who may be appointed through the streamlined process, is "one that is far from clear."[106] In general, however, an "inferior" officer is one who is "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[107]

Courts in many contexts have found the power to take a final action binding on the federal government to constitute "significant authority pursuant to the laws of the United States." Because an adjudication typically results in a binding order, courts have classified many thousands of executive-branch officials with legal authority to issue orders to be "Officers of the United States." This includes administrative law judges (ALJs),[108] administrative patent judges

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[99] Lucia v. United States, 585 U.S. 237, 244 (2018) (quoting United States v. Germaine, 99 U.S. 508, 511–12 (1879), and Buckley v. Valeo, 424 U.S. 1, 126 (1976)).
[100] *Id*.
[101] United States v. Arthrex, 141 S.Ct. 1970, 1979 (2021) (citing Edmond v. United States, 520 U.S. 651, 660 (1997)).
[102] *See* Admin. Conf. of the U.S., Forum: Advice and Consent: Problems and Reform in the Senate Confirmation of Executive-Branch Appointees (Mar. 29, 2022), https://www.acus.gov/meetings-and-events/event/advice-and-consent-problems-and-reform-senate-confirmation-executive.
[103] United States v. Germaine, 99 U.S. 508, 509–510.
[104] U.S. Const., art. II, § 2. Courts have held that a department head may have legal authority to appoint individuals to an inferior-officer position that was not specifically created by statute so long as the department head has legal authority to create the position. *See, e.g.*, Duenas v. Garland, 78 F.4th 1069 (9th Cir. 2023); Varnadore v. Sec'y of Labor, 141 F.3d 625 (6th Cir. 1998). *But see* William Funk, *Is the Environmental Appeals Board Unconstitutional or Unlawful?*, 49 ENV'T L. 737 (2019).
[105] United States v. Arthrex, 141 S.Ct. 1970, 1989–90 (2021) (Gorsuch, J.) (quoting James Madison, 1 Annals of Cong. 499 (1789)). *See generally* Jed H. Shugerman & Jodi L. Short, *Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, 65 B.C. L. REV. 511 (2024).
[106] Morrison v. Olson, 487 U.S. 654, 671 (1988).
[107] United States v. Arthrex, Inc., 141 S.Ct. 1970, 1980 (2021) (quoting Edmond v. United States, 520 U.S. 651, 663 (1997)).
[108] Lucia v. United States, 585 U.S. 237, 249 (2018); *see also* Brooks v. Kijakazi, 60 F.4th 735, 740 (4th Cir. 2023); Calcutt v. FDIC, 37 F.4th 293, 320 (6th Cir. 2022); Fleming v. USDA, 987 F.3d 1093, 1103 (D.C. Cir. 2021).

(APJs),[109] administrative trademark judges (ATJs),[110] immigration judges (IJs) and members of the Board of Immigration Appeals,[111] Copyright Royalty Board judges,[112] judges of the Coast Guard Court of Criminal Appeals,[113] veterans law judges,[114] and special trial judges of the Tax Court.[115] Many other officials who participate in the administrative adjudication of cases likely also qualify as "Officers of the United States" under current caselaw,[116] in particular officials who "preside over adversarial hearings" and "take testimony, conduct trials, rule on the admissibility of evidence, and have power to enforce compliance with discovery orders."[117]

Adjudicators who are "Officers of the United States" must be appointed in a manner consistent with the Appointments Clause. As suggested above, there are two possible options. First, Congress can require that more adjudicator positions be filled through presidential nomination and Senate confirmation.[118] As a practical matter, however, filling several thousand additional positions in this way would require a significant amount of the President's and Senate's limited time, almost certainly resulting in high turnover and frequent vacancies without clear benefits in terms of accountability.[119]

Secondly, policymakers could ensure that non-PAS adjudicators are "directed and supervised" by PAS officials. As a policy matter, there are many ways in which a PAS official might direct and supervise the work of non-PAS adjudicators. A PAS official might review all decisions rendered by lower-level adjudicators or at least reserve discretion to review any decision. Alternatively, a PAS official might rely on managerial controls to direct and supervise adjudicators' work.[120] Such controls might include the development and adoption of substantive and procedural rules binding on adjudicators, designation of decisions as binding precedent,[121] appointment and performance management of adjudicators,[122] assignment of cases to

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[109] United States v. Arthrex, Inc., 141 S.Ct. 1970, 1979–80 (2021).
[110] Piano Factory Grp., Inc. v. Schiedmayer Celesta GmbH, 11 F.4th 1363, 1372 (Fed. Cir. 2021).
[111] Duenas v. Garland, 78 F.4th 1069, 1072–73 (9th Cir. 2023).
[112] Intercollegiate Broadcasting Sys. v. Copyright Royalty Bd., 684 F.3d 1332 (D.C. Cir. 2012).
[113] Edmond v. United States, 520 U.S. 651, 666 (1997).
[114] *See* Prewitt v. McDonough, 36 Vet. App. 1, 11 (2022) (Falvey, J., concurring).
[115] Freytag v. Commissioner, 501 U.S. 868, 881 (1991).
[116] *See generally* Jennifer L. Mascott, *Who Are 'Officers of the United States'?*, 70 STAN. L. REV. 443 (2018); Jennifer Mascott & John F. Duffy, *Executive Decisions After* Arthrex, 2021 S. CT. REV. 225 (2022).
[117] Memorandum from the Solicitor Gen., U.S. Dep't of Justice, to Agency Gen. Counsels, Guidance on Administrative Law Judges after *Lucia v. SEC* (S. Ct.) (July 2018) (quoting *See* Lucia v. United States, 585 U.S. 237, 238 (2018)).
[118] *See The Patent Trial and Appeal Board and the Appointments Clause: Implications of Recent Court Decisions: Hearing Before the Subcomm. on Courts, Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 116th Cong. (2019) (testimony of John F. Duffy).
[119] *See infra* Part II.C.
[120] *See* Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 59–61 (2023).
[121] *See* Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 20230)
[122] *See* Admin. Conf. of the U.S., Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021).

adjudicators,[123] use of quality assurance techniques,[124] and control of resources available to adjudicators.[125]

The Supreme Court has sought to define a constitutional baseline for the direction and supervision of administrative adjudication by PAS officials. In *Edmond v. United States*,[126] the Court held that judges of the Coast Guard Court of Criminal Appeals (CGCCA),[127] then appointed by the Secretary of Transportation, were constitutionally appointed inferior officers. In reaching its holding, the Court emphasized (1) that CGCCA judges were bound by procedural rules established by a PAS official (the Judge Advocate General), (2) that CGCCA judges were subject to removal from their judicial assignments without cause by a PAS official (the Judge Advocate General), and (3) that CGCCA judges' decisions were subject to review and reversal by PAS officials (judges of the Court of Appeals for the Armed Forces[128]).

In *United States v. Arthrex,*[129] on the other hand, the Court held that APJs, appointed by the Secretary of Commerce were not subject to adequate direction and supervision by a PAS official. Like CGCCA judges, APJs are bound by procedural rules established by a PAS official (the Director of the U.S. Patent and Trademark Office). APJs are also subject to several managerial controls. The Director sets their pay, for example, and has statutory authority to decide which cases PTAB panels will decide, assign cases to panels, issue binding guidance, and designate PTAB decisions as binding precedent.[130]

Unlike CGCCA judges, however, APJs are not subject to at-will removal by a PAS official,[131] nor are their decisions subject to review and reversal by a PAS official in the executive branch.[132] Given the absence of two of the three structural features identified in *Edmond*, both the Federal Circuit and the Supreme Court found that APJs exercised significant authority without adequate direction and supervision by a PAS official. To remedy the constitutional defect, the Federal Circuit severed APJs' removal protections.[133] The Supreme Court reversed, holding instead that APJs' decisions were subject to plenary review by the Director.[134]

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[123] *Id*.
[124] *See* Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022).
[125] *See, e.g.*, Nicholas Bednar, *The Public Administration of Justice*, 44 CARDOZO L. REV. 2139 (2023); David K. Hausman, Daniel E. Ho, Mark S. Krass & Anne McDonough, *Executive Control of Agency Adjudication: Capacity, Selection, and Precedential Rulemaking*, 39 J. L. ECON. & ORG. 682 (2022).
[126] 520 U.S. 651 (1997).
[127] The CGCCA hears appeals from decisions of courts-martial.
[128] The Court of Appeals for the Armed Forces is an Article I tribunal within the executive branch.
[129] 141 S. Ct. 1970 (2021).
[130] *Id*. at 1980.
[131] The agency may take an adverse action against an APJ "only for such cause as will promote the efficiency of the [civil] service." 5 U.S.C. § 7513.
[132] By statute, PTAB decisions are reviewable only in the Court of Appeals for the Federal Circuit, an Article III court. 35 U.S.C. § 319.
[133] Arthrex, Inc. v. Smith & Nephew Inc., 941 F.3d 1320, 1337 (Fed. Cir. 2019).
[134] United States v. Arthrex, Inc., 141 S. Ct. 1970, 1987 (2021).

Read in combination, *Edmond* and *Arthrex* raise at least five important questions. First, must one or more PAS officials have statutory authority to render a final order binding on the executive branch in an adjudication, or can Congress divest PAS officials of adjudicative authority so long as a PAS official directs and supervises non-PAS adjudicators' work through other means?[135] The Court's opinion in *Arthrex* suggests that while the power to countermand decisions rendered by non-PAS adjudications is an important means of directing and supervising their work, it may not necessarily be a constitutionally required one. The Court in *Arthrex* seemingly reaffirmed the rule from *Edmond* that there is no "exclusive criterion for distinguishing between principal and inferior officers."[136] And it noted further that judges of the Labor Department's Benefits Review Board (BRB), whose decisions are not subject to review by a PAS official in the executive branch under the statute establishing it, are "potentially distinguishable" from APJs because, unlike APJs, BRB judges "appear to serve at the pleasure of the appointing department head."[137]

Second, can Congress limit a PAS official's authority to review the decisions of non-PAS officials? For example, in reviewing decisions of the Board of Veterans Appeals (of which all members but one are non-PAS officials), judges of the Court of Appeals for Veterans Claims may only hold unlawful and set aside or reverse a factual finding if it is a "material fact adverse to the claimant" and "clearly erroneous."[138] Is such a restriction on the standard or scope of review permissible, or must a statute provide a PAS official with plenary authority to review decisions rendered by non-PAS adjudicators?

Third, assuming a statute gives a PAS official plenary power to issue the final decision of the executive branch and review decisions made by non-PAS adjudicators, can the PAS official limit the issues it will review? For example, may a PAS official restrict his or her review to questions of law or, in a particular case, to arguments raised before a lower-level adjudicator? The APA provides that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision *except as it may limit the issues on notice or by rule*."[139] Many agencies that conduct formal adjudications adopted such rules long ago, and ACUS repeatedly has recommended the adoption of such rules as a best practice.[140] It is highly unlikely that *Arthrex* broadly restricts PAS officials' authority to adopt rules limiting the circumstances in which they will review the decisions of non-PAS officials exercising delegated authority.

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[135] *See* Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 Yale L.J. 1769, 1783 (2023).
[136] United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985 (2021) (quoting Edmond v. United States, 520 U.S. 651, 661 (1997)).
[137] United States v. Arthrex, Inc., 141 S. Ct. 1970, 1984 (2021). The BRB is a statutorily created subunit of the Labor Department that decides appeals under several worker's compensation programs. BRB judges are appointed by the Secretary of Labor. BRB decisions are subject to judicial review in the courts of appeals.
[138] 38 U.S.C. § 7261(4).
[139] 5 U.S.C. § 557(b) (emphasis added).
[140] *See* Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19,783 (July 23, 1973); Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983); *see also* Admin. Conf. of the U.S., Model Adjudication Rules § 410 (2018).

Fourth, assuming a PAS official has statutory authority to render the final decision of the executive branch, may he or she delegate all authority to issue and review decisions to lower-level adjudicators? The Commissioner of Social Security, Secretary of Health and Human Services, and Secretary of Agriculture, for example, have expressly delegated all review authority over certain programs to non-PAS officials. Although some commentators have questioned whether the wholesale delegation of review authority is constitutional,[141] the Court's reasoning in *Arthrex* suggests that such arrangements are acceptable because a PAS official can be held responsible for an inadvisable delegation of final decision-making authority.[142]

The few courts that have addressed the constitutionality of such arrangements since *Arthrex* have upheld them, at least where a PAS official can revoke a delegation of review authority,[143] remove or reassign adjudicators at will,[144] or exercise discretion to not enforce an adjudicator's decision.[145] Most notably, the Federal Circuit held on remand from the Supreme Court in *Arthrex*,: "That the Appointments Clause requires that a [PAS official] have review authority does not mean that a principal officer, once bestowed with such authority, cannot delegate it to other agency officers."[146] And in *In re Palo Alto Networks*, considering the USPTO Director's choice to delegate institution decisions to non-PAS officials, the Federal Circuit held:

> The unambiguous identification of the Director as the politically accountable executive officer responsible for institution decisions maintains the clear "lines of accountability demanded by the Appointments Clause," from the President to the Director, and allows the President to "attribute [any] failings to those whom he can oversee."[147]

Finally, does the temporary absence of a PAS official in a position—or a quorum of PAS officials, in the case of a multimember board or commission—affect whether non-PAS adjudicators are adequately directed and supervised? Courts that have considered the question so far have held that the temporary absence of a PAS officials does not render decision-making by non-PAS adjudication unlawful.[148] Courts have also held that final adjudicative authority is generally delegable and may be performed by an acting official or another official performing the duties of a PAS position.[149]

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[141] *See, e.g.*, Richard J. Pierce, Jr., *Agency Adjudication: It Is Time to Hit the Reset Button*, 28 Geo. Mason. L. Rev. 649–50, 652 (2021).
[142] United States v. Arthrex, Inc., 141 S. Ct. 1970, 1978–79 (2021).
[143] In re Palo Alto Networks, Inc., 44 F.4th 1369 (Fed. Cir. 20222); McConnell v. U.S. Dep't of Agric., 2023 U.S. Dist. LEXIS 162382, at *7–14 (E.D. Tenn. Sep. 13, 2023); *see also* Arthrex, Inc. v. Smith & Nephew, Inc., 35 F.4th 1328 (Fed. Cir. 2022) (finding that the USPTO Director's duty to decide rehearing requests is delegable).
[144] *Id.*; *McConnell*, 2023 U.S. Dist. LEXIS 162382 at *7–14.
[145] Sanofi-Aventis U.S. v. U.S. Dep't of Health & Hum. Sers., 570 F. Supp. 3d 129, 175–83 (D.N.J. 2021), *rev'd on other grounds*, 58 F.4th 696 (3d Cir. 2023).
[146] Arthrex, Inc. v. Smith & Nephew, Inc., 35 F.4th 1328, 1339 (Fed. Cir. 2022) (Moore, C.J.).
[147] *In re Palo Alto Networks, Inc.*, 44 F.4th at 1375 (Dyk, J.) (quoting *Arthrex*, 141 S. Ct. at 1981–82).
[148] *See, e.g.*, McIntosh v. Dep't of Def., 53 F.4th 630 (Fed. Cir. 2022); *Arthrex II*, 35 F.4th at 1332–40.
[149] *See, e.g.*, Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. MICH. J. L. REFORM 103 (2018).

2. Due Process Requirements

The Fifth Amendment provides that no person shall be deprived of liberty or property "without due process of law." Many administrative adjudications involve private interests in liberty or property, and, in such proceedings, agencies must comply with the requirements of constitutional due process.

Constitutional due process says nothing about the participation of PAS officials, as a class, in administrative adjudication. But several due process arguments have been made regarding the means by which PAS officials administer programs involving adjudication and interact with non-PAS adjudicators. For example:

Combination of Functions. When Congress establishes a program, it often assigns to a single PAS official or collegial body of PAS officials responsibility for administering all aspects of the program, including policymaking, investigation, prosecution, and adjudication. Although there is often an internal separation of the adjudicative function from the investigative and prosecutorial functions, separate chains of command often converge at the level of the agency head. Agency heads might even serve concurrently as adjudicators, investigators, and prosecutors. As Michael Asimow examined in a recent report to ACUS, PAS officials at several independent regulatory agencies both "greenlight" the initiation of a formal proceeding before an ALJ and review ALJ decisions on appeal.[150] Some commentators have raised due process concerns about the combination of certain functions.[151] The Supreme Court and lower courts have held as a general matter that Congress does not violate due process when it combines in a single position adjudication with policymaking[152] or investigation and prosecution.[153]

Supervision of Adjudicators. As noted earlier, PAS officials use managerial controls to direct and supervise adjudication by non-PAS officials. Indeed, Supreme Court opinions suggest that some degree of managerial control by PAS officials (or the President) may be constitutionally mandated.[154] At the same time, concerns have been raised that the use or

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[150] Michael Asimow, Greenlighting Administrative Prosecution: Checks and Balances on Charging Decisions (Jan. 21, 2022) (report to the Admin. Conf. of the U.S.); *see also* Michael Asimow, *Greenlighting Administrative Prosecution*, 75 ADMIN. L. REV. 227 (2023).

[151] *See* Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. MICH. J. L. REFORM 103 (2018).

[152] Kisor v. Wilkie, 139 S. Ct. 2400, 2421–22 (2019); City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013).

[153] Withrow v. Larkin, 421 U.S. 35 (1975); AFGE v. Gates, 486 F.3d 1316, 1329 (D.C. Cir. 2007); Pathak v. Dep't of Vet. Affs., 274 F.3d 28, 33 (1st Cir. 2001); Seidman v. Off. of Thrift Supervision, 37 F.3d 911, 924–26 (3d Cir. 1994); Kessel Food Markets, Inc. v. NLRB, 868 F.2d 881, 888 (6th Cir. 1989); Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1105 (D.C. Cir. 1988); Utica Packing Co. v. Block, 781 F.2d 71, 77–78 (6th Cir. 1986); Gibson v. FTC, 682 F.2d 554, 560 (5th Cir. 1982); Air Prods. & Chems., Inc. v. FERC, 650 F.2d 687, 709 (5th Cir. 1981); Porter County Chapter of Izaak Walton League, Inc. v. NRC, 606 F.2d 1363, 1371 (D.C. Cir. 1979); Eisenberg v. Holland Rantos Co., 583 F.2d 100, 104 n.8 (3d Cir. 1978); O'Brien v. DiGrazia, 544 F.2d 543, 546–47 (1st Cir. 1976); United States v. Litton Indus., Inc., 462 F.2d 14, 16–17 (9th Cir. 1972); Kennecott Copper Corp. v. FTC, 467 F.2d 67, 79 (10th Cir. 1972); FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308, 1315 (D.C. Cir. 1968).

[154] United States v. Arthrex, 141 S.Ct. 1970, 1979 (2021) (citing Edmond v. United States, 520 U.S. 651, 660 (1997)).

application of certain managerial controls violates parties' right to due process.[155] A judicial opinion in at least one recent case suggests that courts are unlikely to find that general supervisory structures violate due process, at least in the absence of strong showing of actual prejudice in a particular case.[156]

Attributes common among PAS officials—the political nature of their appointment and position, and their often short tenure in public service—have sometimes also prompted due process challenges in specific cases. In some ways, the activity and visibility of PAS officials may render them more susceptible to due process challenges than other administrative adjudicators. In other ways, however, the due-process calculus may be rather different.[157]

Supervision by the President. One critique of non-ALJ "administrative judges" is that they are not as insulated from political control as ALJs. Some have argued that this lack of insulation raises due process concerns.[158] Like many administrative judges (AJs), PAS officials are generally subject to supervision by a political actor—the President—at least if they are subject to at-will removal by the President. Some may argue that presidential supervision of adjudication by PAS officials raises due process concerns. Kent Barnett has argued that "the due process problem can be justifiably confined to AJs based on differences in agency heads' function, their method of appointment, salience of removal, and necessity." He explains:

> First, agency heads are much more likely to be deciding policy matters finally for the agency, and that policy discretion will be limited by the hearing record. Although AJs and ALJs can make policy in the first instance, their policy decisions are subject to reversal by the agency heads and deputies. The President probably is entitled to oversee the policies via at-will removal authority for matters that are related to core executive power, such as foreign affairs and defense. Second, the President's nomination of agency heads may be less troubling than AJs because the Senate must confirm the nomination, and the agency head may balance the views of the President with those of the confirming Senate that may differ. Similarly, agency heads' at-will removal may be less troubling than AJs because their removal has a much stronger salience than low-level agency employees like AJs. Agency heads likely have their own political capital and relationships on Capitol Hill and in the press, which permit them to create political backlash for the President for questionable removals. The third

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[155] *See, e.g.*, Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023 (2016); Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 49 (2020).

[156] *See, e.g.*, Mobility Workx, LLC v. Unified Patents, LLC, 15 F.4th 1146, 1156 (Fed. Cir. 2021); *see also* Marcello v. Bonds, 349 U.S. 302 (1955). For a general discussion of the Court's interpretation of the interaction between the Take Care Clause and the Due Process Clause, see Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1701–19 (2020).

[157] Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1679–80 (2016); *see also* Kent Barnett, Logan Cornett, Malia Reddick & Russell Wheeler, Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 14 (Sep. 24, 2018) (report to the Admin. Conf. of the U.S.).

[158] *See generally* Emily Bremer, *Presidential Adjudication*, 110 VA. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4726519.

> distinction may be the most important: agency heads' appointment and removal (and any accompanying downsides) are required by the Appointment and the Take Care Clauses. If executive agencies' ability to adjudication is beyond peradventure despite these constraints, then agencies [sic] heads' appointment and removal cannot alone create a constitutional defect. The same kind of necessity or compulsion does not apply to AJs, who can be appointed in other ways (such AJs are or, as I have suggested elsewhere, should be) and removed only for cause (as ALJs are).[159]

Public Statements on Disputed Matters. As discussed in the next section, the President often nominates individuals for PAS positions whose policy preferences align with his or her own preferences. One signal of likely policy alignment is prior political activity, such as public statements and advocacy. The substance of prior political activity may relate, in some instances, to disputed matters that come before an agency for adjudication. While a PAS official is in office, he or she as part of his or her policymaking or supervisory role may also make public statements or advocate for particular policies or actions. There have been several high-profile instances in which a party has alleged that, as a result of or as evidenced by prior political activity, a PAS official has prejudged disputed facts or is biased against a party and therefore cannot fairly and impartially adjudicate its case. A PAS official's public statement on a disputed matter can, in some instances, amount to prejudgment, in which case participation by that official may violate a party's right to due process.[160]

Tenure in Public Service. As discussed in the next section, PAS officials often serve only a limited time in their positions. They often come to government from the private sector and expect to return to the private sector after public service. A PAS official's private sector activity is often related to the program he or she directs and supervises. Participation by a PAS official in a case involving a previous or future employer, client, or associate—or perhaps a competitor to a previous or future employer, client, or associate—may raise questions about possible conflicts of interest. Whether participation amounts to a violation of due process will depend on the facts of the case.

C. Statutory Requirements

This section examines statutory requirements related to direct and indirect participation by PAS officials in administrative adjudication. It addresses: (1) the APA, (2) agency- and program-specific statutes, and (3) transparency statutes.

1. Administrative Procedure Act

The APA established minimum default rules for agency action. One rule specifies that "[s]o far as the orderly conduct of public business permits, an interested person may appear

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[159] Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1679–80 (2016).
[160] *See, e.g.*, Cinderella Career Finishing Sch. v. FTC, 425 F.2d 583 (D.C. Cir. 1970); *see also* Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 57 U. CHI. L. REV. 481 (1990).

before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding."[161] The *Attorney General's Manual on the Administrative Act* interpreted this provision to mean that "any person should be given an opportunity to confer or discuss with responsible officers or employees of the agency matters in which he is properly interested."[162] Although this provision "would seem to confer a rather broad right on members of the public whose interests would be affected by an agency action to compel relatively high-level agency employees to meet with them," it has never been interpreted that way.[163] As the Attorney General's Manual states:

> [The APA] does not require that every interested person be permitted to follow the chain of command to the head of the agency. It was not intended to require the directors of the Reconstruction Finance Corporation, for example, to confer personally with every applicant for a loan.[164]

More importantly, the APA established the standard[165] (or not-so-standard[166]) model for administrative adjudication. Under that model, the agency, one or more members of the body which comprises the agency, or one or more ALJs may preside at the taking of evidence.[167] ALJs are appointed by the agency head and insulated from agency-head control through a variety of mechanisms regarding, among other matters, their discipline and removal, performance evaluation, compensation, assignment of duties, and assignment of cases.[168] Additionally, ALJs may not be supervised by and are insulated from agency personnel, other than agency heads, who are involved in investigation and prosecution.[169]

The agency is permitted generally to adopt and publish rules governing the authority of presiding officers and practice before the agency. The presiding officer must base his or her decision—whether initial, recommended, or tentative—on an exclusive record, consisting of the transcript of testimony, exhibits, and other filings.[170] Presiding officers may not engage in ex parte communications.[171]

The decision of the presiding officer is subject to review by the agency head—either automatically (in the case of a recommended or tentative decision), upon a party's request (in the

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[161] 5 U.S.C. § 555(b).
[162] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 64 (1946).
[163] MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 44 (2019).
[164] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 64 (1946).
[165] United States v. Arthrex, Inc., 141 S. Ct. 1970, 1984 (2021) (citing Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 157 (2019)).
[166]); Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1 (2023).
[167] 5 U.S.C. § 556(b).
[168] *See generally* Jeffrey S. Lubbers, *Selection, Supervision, and Oversight of Adjudicators*, *in* A GUIDE TO FEDERAL AGENCY ADJUDICATION 101–09 (Jeremy S. Graboyes ed., 3d ed. 2023).
[169] 5 U.S.C. § 554(d).
[170] 5 U.S.C. § 556(d), (e).
[171] 5 U.S.C. § 557(d).

case of an initial decision), or on the agency head's own motion. When reviewing an initial decision, the agency has "all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."[172]

Parties are entitled to a reasonable opportunity to present proposed findings, exceptions, and supporting reasons before the recommendation, initial, or tentative decision and on agency-head review.[173] The decision of the agency head must explain its findings and conclusions on all material issues of fact, law, or discretion.[174] On judicial review, it must be supported by substantial evidence review on the record of the agency hearing,[175] which includes the decision of the presiding officer.[176]

Informed by the recommendations of the Attorney General's Committee on Administrative Procedure (1941),[177] this model represents a congressional attempt to balance multiple objectives, including procedural integrity and political control of policymaking. Procedural integrity is achieved through statutory mechanisms safeguarding presiding officers' decisional independence, while political control of policymaking is achieved through agency-head review. To ensure the latter does not subsume the former, the APA constrains agency-head review in important ways and requires that such review take place transparently. Transparency facilitates external oversight of political appointees' exercise of control by the courts, Congress, the President, and the public.[178]

2. Agency- and Program-Specific Statutes

The APA establishes default rules that Congress may supplement or depart from for specific agencies and programs. Many statutes governing programs in which adjudication is conducted according to the APA's formal-hearing provisions contain such supplements or departures. And of course, as ACUS has examined on several occasions,[179] much agency adjudication is not subject to the formal hearing requirements of the APA.

Agency- and program-specific statutes may specify alternative structures for administrative adjudication and direct and indirect participation by PAS officials. Among the most notable are statutes that seem to exclude any PAS officials from participating directly in the

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[172] 5 U.S.C. § 557.
[173] 5 U.S.C. § 557(b)
[174] 5 U.S.C. § 557(c).
[175] 5 U.S.C. § 706(2)(E).
[176] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
[177] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941).
[178] Emily Bremer, *Presidential Adjudication*, 110 VA. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4726519; Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication* 103 TEX. L. REV. (forthcoming 2024) (manuscript at 16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4563879/
[179] *See* 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); *see generally* MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (2019).

adjudication of cases, such as the statute at issue in *Arthrex*, and those assigning adjudicative authority to PAS officials other than the head of the agency with primary responsibility for administering the program. Additionally, specific statutes might authorize or restrict the delegation of adjudicative functions or constrain how PAS officials may participate directly in the adjudication of individual cases.

3. Transparency Statutes

As noted above, the APA seeks to balance procedural integrity and political control of policymaking through a transparent process for agency-head review. Two generally applicable transparency statutes—the Government in the Sunshine Act and the Freedom of Information Act (FOIA)—are also relevant here.

The Sunshine Act generally requires multimembers to conduct business in open hearings, though there are myriad exceptions to that general rule. The Sunshine Act also permits proceedings to take place by notation voting, a process whereby an agency's members "receive written materials, review the same, and then provide their votes in writing."[180] As a practical matter, however, the Sunshine Act "seldom gives the public a right to access anything other than formal meetings of commissioners, which tend to be somewhat pro forma. It does not play a significant role in granting public access to adjudicative proceedings.[181]

FOIA establishes no requirements specific to PAS officials' participation in administrative adjudication, though it does require that each agency make available for public inspection in an electronic format "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."[182] Although the scope of this provision is debated, it almost certainly covers many written decisions issued by PAS officials in the course of adjudicating individual cases.[183]

D. Policy Considerations

There are potential benefits and costs to assigning administrative functions to PAS officials. In terms of benefits, assigning a function to one or more PAS officials may promote democratic accountability and legitimacy by ensuring that elected officials in two branches of government have a say in selecting the individuals who perform that function. Embedding high-level political appointees within agencies may also improve communication and coordination between bureaucratic and political institutions.[184] On the other hand, there may be costs to politicizing the bureaucracy. (The optimal level of political control over agency decision making

[180] Reeve T. Bull, The Government in the Sunshine Act in the 21st Century 9–10 (Mar. 10, 2024) (report to the Admin. Conf. of the U.S.).
[181] Jeremy Graboyes & Mark Thomson, Public Access to Agency Adjudicative Proceedings 15 (Nov. 22, 2021) (report to the Admin. Conf. of the U.S.).
[182] 5 U.S.C. § 552(a)(2)(A).
[183] *See infra* Part VI.
[184] *See infra* Part II.C.3 and Part II.C.5.

is outside the scope of this study.[185]) And as a practical matter, requiring presidential nomination and Senate confirmation is a costly and time-consuming way to fill high-level positions.[186]

Adjudication serves several objectives in the administration of federal programs. It is concerned primarily with the case-by-case determination of individuals' rights and obligations, of course. But adjudication is also an important component of policy implementation and, in some programs, can be an important vehicle for policy development. In determining the appropriate role for PAS officials in adjudication under an administrative program, policymakers must consider whether PAS participation in the adjudication of individual cases might serve a valuable function in (1) ensuring the accuracy, consistency, fairness, efficiency, and timeliness of adjudication; and (2) ensuring an optimal level of political oversight over policy development and implementation. Policymakers must also consider the potential risks of PAS participation, as well as the comparative advantages and disadvantages of alternatives to PAS participation, such as managerial controls and policymaking by other means.

The potential benefits and costs of a PAS official's participation in the adjudication of individual cases under a program depend on substantive, procedural, and organizational aspects of the program and the task environment in which the program takes place. These factors are necessarily program-specific. At root, however, policymakers must consider whether the PAS official, given his or her other assigned duties, has the capacity, expertise, and incentives to consider and decide cases in an accurate, consistent, fair, impartial, efficient, and timely manner.

In this section, we consider eight characteristics that are common, but not necessarily universal, to PAS officials in the executive branch, and their potential consequences for accurate, consistent, fair, impartial, efficient, and timely adjudication.

(1) It is comparatively time-consuming to appoint PAS officials.
(2) There is comparatively high turnover among PAS officials.
(3) PAS officials are selected and subject to oversight by the President or senior leaders selected by the President.
(4) PAS officials may lack preexisting working relationships with agency officials.
(5) PAS officials are confirmed and subject to oversight by the Senate.
(6) PAS officials are often statutorily assigned a broad range of duties within and across programs.
(7) PAS officials sit atop agency hierarchies.
(8) PAS officials are among the highest earning officials in the executive branch.

1. Time Needed to Appoint PAS Officials

Filling a PAS position in the federal executive branch is a staged process that requires action by multiple actors in the executive and legislative branches. Given competing demands on

[185] *See generally* Matthew C. Stepheson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008).
[186] *See infra* Part II.C.1.

the President's and Senate's time, and the potential for politicization of the confirmation process, it can take a comparatively long time to appoint officials to PAS positions.

First, Presidents must make nominations under time and resource constraints and under increasing scrutiny from Congress, the media, and the public.[187] There are roughly 1200 PAS positions in the federal executive establishment—about one third of all presidentially appointed positions[188]—and filling all of these positions in a way that promotes effective administration and coordination across agencies is a complex endeavor.[189] Indeed, many presidents learn from their initial appointment choices, become better managers of the executive branch over time, and adjust their appointment strategies throughout their tenure in office.[190]

The ability of presidents to find appropriate persons for each PAS position depends not only on presidential capacity, but also on the number, quality, and distribution of potential nominees.[191] Put another way, PAS appointments are part of an economic labor market that depends on presidential demand and on the number of qualified people who are willing to serve in a PAS role (labor supply).[192] Practically, the labor supply is greater in some policy contexts than others. Similarly, the political environment and organization of key stakeholders can influence the number of people available for a PAS position.[193]

When making nominations, presidents are strategic. Presidents tend to prioritize key legal or policy appointments over managerial appointments,[194] and, as a result, the time it has taken for presidents to appoint people to these key positions has been less than other PAS officials.[195] However, presidents tend to delay nominations in accordance with the character of vacant positions and presidential priorities.[196]

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[187] David E. Lewis, *The Personnel Process in the Modern Presidency*, 42 PRES. STUD. Q. 577 (2012).
[188] JENNIFER L. SELIN & DAVID E. LEWIS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (2d ed. 2018).
[189] *See, e.g.*, Bradley H. Patterson & James P. Pfiffner, *The White House Office of Presidential Personnel*, 31 *Pres. Stud. Q.* 415 (2001); THOMAS J. WEKO, THE POLITICIZING PRESIDENCY (1995).
[190] George A. Krause & Anne Joseph O'Connell, *Experiential Learning and Presidential Management and Evidence of the U.S. Federal Bureaucracy: Logic and Evidence from Agency Leadership Appointments*, 60 AM. J. POL. SCI. 914 (2016).
[191] Gary E. Hollibaugh, Jr., *Vacancies, Vetting, and Votes: A Unified Dynamic Model of the Appointments Process*, 27 J. THEORETICAL POL. 206 (2015).
[192] Jennifer L. Selin, *Political Control of Regulatory Authorities*, *in* HANDBOOK OF REGULATORY AUTHORITIES (Martino Maggetti, Fabrizio Di Mascio & Alessandro Natalini eds., 2022).
[193] ROBERT MARANTO, BEYOND A GOVERNMENT OF STRANGERS (2005).
[194] Nicholas R. Bednar & David E. Lewis, *Presidential Investment in the Administrative State*, 118 AM. POL. SCI. REV. 442 (2024).
[195] Gary E. Hollibaugh, Jr. & Lawrence S. Rothenberg, *The When and Why of Nominations: Determinants of Presidential Appointments*, 45 AM. POL. RSCH. 280 (2017). *But see* David E. Lewis & Mark D. Richardson, *The Very Best People: President Trump and the Management of Executive Personnel*, 51 PRES. STUD. Q. 51 (2021) (finding that President Trump was slow to nominate officials to key agency positions).
[196] Christina M. Kinane, *Control without Confirmation: The Politics of Vacancies in Presidential Appointments*, 115 AM. POL. SCI. REV. 599 (2021); Christopher Piper, *Presidential Strategy Amidst the "Broken" Appointments Process*, 52 PRES. STUD. Q. 843 (2022).

Of course, once nominated, PAS officials must be confirmed by the Senate. There is great variation in the amount of time it takes for the Senate to confirm presidential appointments.[197] The importance of the position, characteristics of the appointee, inter-institutional dynamics of the Senate, and political relationship between the Senate and the President all affect the speed of the confirmation process.[198] For example, appointees nominated during the first 90 days of a President's term tend to be confirmed significantly faster than those nominated during a President's second term in office.[199] Additionally, nominees to the offices most important to presidential administration (e.g., Attorney General; Secretary of Defense) tend to be confirmed more quickly.[200] Similarly, the Senate tends to be quicker to confirm PAS positions at the top of an agency's hierarchy than those in lower level positions, such as Deputy or Assistant Secretary.[201]

As a result of delays in both presidential nominations and Senate confirmations, vacancies in PAS positions are common but varied.[202] Empirically, independent regulatory commissions tend to have significantly fewer vacancies in PAS positions than other agencies.[203] This may be a result of statutory design features—many independent regulatory commissions'

[197] Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996*, 43 AM. J. POL. SCI. 1122 (1999).
[198] *E.g.*, Fang-Yi Chiou & Lawrence S. Rothenberg, *Executive Appointments: Duration, Ideology, and Hierarchy*, 26 J. THEO. POL. 496 (2014); Gary E. Hollibaugh, Jr., *The Incompetence Trap: The (Conditional) Irrelevance of Agency Expertise*, 27 J. PUB. ADMIN. RSCH. & THEORY 217 (2015); Gary E. Hollibaugh & Lawrence S. Rothenberg, *The Who, When, and Where of Executive Nominations: Integrating Agency Independence and Appointee Ideology*, 62 AM. J. POL. SCI. 296 (2018); George A. Krause & Jason S. Byers, *Confirmation Dynamics: Differential Vetting in the Appointment of US Federal Agency Leaders*, 84 J. OF POL. 1189 (2022); Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996*, 43 AM. J. POL. SCI. 1122 (1999); Ian Ostrander, *The Logic of Collective Inaction: Senatorial Delay in Executive Nominations*, 60 AM. J. POL. SCI. 1063 (2016).
[199] Matthew Dull, Patrick S. Roberts, Michael S. Keeney & Sang Ok Choi, *Appointee Confirmation and Tenure: The Succession of U.S. Federal Agency Appointees*, 1989-2009, 72 PUB. ADMIN. REV. 902 (2012). *But see* Christopher Piper & David E. Lewis, *Do Vacancies Hurt Federal Agency Performance?* 33 J. OF PUB. ADMIN. RSCH. & THEORY 313 (2023) (noting that, by the fall of President Biden's first year in office, the Senate had confirmed leaders for only 127 of the 800 most important policymaking positions).
[200] Joel D. Aberbach & Bert A. Rockman, *The Appointments Process and the Administrative Presidency*, 39 PRES. STUD. Q. 38 (2009); Fang-Yi Chiou & Lawrence S. Rothenberg, *Executive Appointments: Duration, Ideology, and Hierarchy*, 26 J. THEO. POL. 496 (2014); Glen S. Krutz, Richard Fleisher & Jon R. Bond, *From Abe Fortas to Zoe Barid: Why Some Presidential Nominations Fail in the Senate*, 92 AM. POL. SCI. REV. 871 (1998); Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996*, 43 AM. J. POL. SCI. 1122 (1999).
[201] George A. Krause & Jason S. Byers, *Confirmation Dynamics: Differential Vetting in the Appointment of US Federal Agency Leaders*, 84 J. OF POL. 1189 (2022); Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913 (2009).
[202] William G. Resh, Gary E. Hollibaugh, Jr., Patrick S. Roberts & Matthew M. Dull, *Appointee Vacancies in US Executive Branch Agencies*, 41 J. PUB. POL'Y 653 (2021); *see also* Admin. Conf. of the U.S., Recommendation 2019-7, *Acting Agency Officials and Delegations of Authority*, 84 Fed. Reg. 71352 (Dec. 27, 2019).
[203] Anthony Madonna & Ian Ostrander, *No Vacancy: Holdover Capacity and The Continued Staffing of Major Commissions*, 37 J. PUB. POL'Y 341 (2016).

authorizing statutes contain provisions that permit members of the commission or board to serve until their successor has been appointed and qualified.[204]

There are legal workarounds during periods when PAS positions are vacant, of course, including the appointment of acting officials and the delegation of the duties of PAS positions to lower-level officials.[205] The Federal Vacancies Reform Act of 1998 establishes requirements for temporarily filling vacant PAS positions.[206] While the first assistant to the vacant office is the default acting official under the Act, the President may direct a PAS official or senior agency employee meeting certain criteria to serve as an acting official.[207] Acting officials can provide continuity in leadership and help agencies maintain their workflows, but may be perceived as less accountable than traditional appointments because they have not been confirmed to their jobs and thus.[208] However, not all agencies may use acting officials, as the Vacancies Act only applies to vacancies in executive departments and agencies that are not independent establishments, led by multimember bodies, or Article I courts.[209] Furthermore, under the Vacancies Act, nominees to a position generally may not serve as the acting officer.[210]

Of course, many agencies' authorizing statutes also provide rules concerning vacancies and acting appointments.[211] For example, in the United States Patent and Trademark Office, the Deputy Director is vested the authority to act in the capacity of the Director in the event of a vacancy.[212] In the Consumer Product Safety Commission, the Vice Chairman has the authority to act in case of a vacancy in the office of the Chairman.[213] In total, 64 agency authorizing statutes contain language specifying who may serve in an acting capacity with respect to agency leadership.[214] An additional 38 agency statutes, like the Securities and Exchange Commission's statute, specify that agency leaders may remain in office until their successor is appointed and qualified.[215]

Another legal workaround is the delegation of functions. Instead of relying on an acting official, some agencies will delegate the functions of the vacant position to someone else in the

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[204] *Id*. *See also* JENNIFER L. SELIN & DAVID E. LEWIS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (2d ed. 2018).
[205] *See, e.g.*, Arthrex, Inc. v. Smith & Nephew, Inc., 35 F.4th 1328 (Fed. Cir. 2022), *cert. denied*, 143 S. Ct. 2493 (2023); McIntosh v. Dep't of Def., 53 F. 4th 630, 641 (Fed. Cir. 2022).
[206] Pub. L. No. 105-227, 112 Stat. 2681.
[207] 5 U.S.C. § 3345.
[208] Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613 (2020).
[209] 5 U.S.C. §§ 3345(a); 3349c. Additionally, the Vacancies Act does not apply to the Government Accountability Office. However, in these and other cases, agency authorizing statutes may provide for acting officials.
[210] 5 U.S.C. § 3345(b)(1); NLRB v. SW General, Inc., 137 S.Ct. 929 (2017). However, there are exceptions to this general rule including for nominees who have served for a period of time as first assistant to the position; are currently first assistant (if the position is a PAS position and the nominee was confirmed by the Senate to that position; or if the nominee has previously held the covered position and the President nominated them for reappointment without a break in service. 5 U.S.C. § 3345.
[211] JENNIFER L. SELIN & DAVID E. LEWIS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (2d ed. 2018).
[212] 35 U.S.C. § 3(b)(1).
[213] 15 U.S.C. § 2053(d).
[214] JENNIFER L. SELIN & DAVID E. LEWIS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (2d ed. 2018).
[215] *Id*. *See, e.*g., 15 U.S.C. § 78d(a).

agency.[216] While the Vacancies Act prevents delegation of tasks that are established by statute or regulation to be performed by only the applicable officer,[217] delegation is common across all presidential administrations.[218]

Presidents also periodically use recess appointments to fill PAS positions involved in the adjudication of cases.[219] Historically, recess appointments allowed presidents not only to fill positions that become vacant during Senate recess but also to appoint individuals the Senate may not have been willing to confirm.[220] However, since the Supreme Court's decision in *NLRB v. Noel Canning*, use of recess appointments is restricted to lengthy Senate recesses (not less than 10 days).[221] These recesses are increasingly unlikely to occur, as evolution in senatorial practices mean that the chamber rarely is in recess more than 10 days.[222]

As ACUS has recognized, vacancies in PAS positions "may lead to agency inaction, generate confusion among nonpolitical personnel, and lessen public accountability."[223] Vacancies affect adjudication systems in different ways depending on the different roles that PAS officials play in them. In programs where no PAS official participates in the adjudication of individual cases, the effects of a vacancy may be minimal or indirect. For example, while the Social Security Administration (SSA) has been led by acting officials for more than a third of its 28-year history as an independent agency, the absence of a Senate-confirmed Commissioner has never prevented the agency from adjudicating cases. Of course, the absence of Senate-confirmed leadership may affect adjudication indirectly, such as by affecting the agency's ability to secure adequate funding or needed legislative changes or its willingness to take risks or introduce significant reforms.

In programs where PAS officials play a direct role in adjudicating cases, however, vacancies can significantly impact agencies' ability to decide cases in a timely manner. This is especially true for multi-member agencies with quorum requirements. Vacancies at the Merit Systems Protection Board (MSPB) between January 2017 and March 2022, for example, prevented the agency from acting on about 3,800 petitions for review of administrative judges' decisions.

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[216] Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613 (2020).
[217] 5 U.S.C. § 3348.
[218] Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533 (2020); Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613 (2020).
[219] U.S. CONST. art II, § 2, cl. 3.
[220] Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533 (2020).
[221] NLRB v. Noel Canning, 573 U.S. 513 (2014).
[222] Ryan C. Black, Anthony J. Madonna, Ryan J. Owens, & Michael S. Lynch, *Assessing Congressional Responses to Growing Presidential Powers: The Case of Recess Appointments*, 41 PRES. STUD. Q. 569 (2011); Ian Ostrander, *Powering Down the Presidency: The Rise and Fall of Recess Appointments*, 45 PRES. STUD. Q. 558 (2015).
[223] Admin. Conf. of the U.S., Recommendation 2019-7, *Acting Agency Officials and Delegations of Authority*, 84 Fed. Reg. 71,352 (Dec. 27, 2019).

2. High Turnover and Short Tenure Among PAS Officials

Closely related to, but distinct from, vacancies in PAS positions is turnover.[224] "The single most obvious characteristic of . . . political appointees is their transience."[225] Turnover among PAS officials is relatively high for a variety of reasons, including high levels of stress, new job opportunities (within their agencies, the federal government, or the private sector), difficult relationships with career administrators, political conflict, and overall job dissatisfaction.[226]

However, the diversity in PAS positions means that there is a wide variation in how long PAS officials hold office, with (on average) a quarter serving less than 18 months and a quarter serving almost a full presidential term.[227] In general, the average length of service for a PAS official serving in a position with statutorily fixed terms tends to be longer than the length of service of those without fixed-terms. Additionally, PAS agency heads tend to serve longer than PAS appointees that are lower in an agency's hierarchy, such as deputy or assistant secretaries.[228]

There are several potential consequences of frequent turnover for administrative adjudication. First, turnover represents lost human capital to an agency. High turnover rates, paired with the slow-moving appointment process described earlier, means that PAS positions are frequently vacant.[229] Furthermore, PAS departures can have domino effects within their agencies. Those who work closely with appointees often depart alongside their bosses (voluntarily or otherwise), and, because it can be difficult to successfully recruit administrators when these vacancies exist, agencies may tend to defer other employee searches until management positions within the organization are filled.[230]

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[224] Christopher Piper & David E. Lewis, *Do Vacancies Hurt Federal Agency Performance?* 33 J. OF PUB. ADMIN. RSCH. & THEORY 313 (2023).
[225] HUGH HECLO, A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON 103 (1977).
[226] *E.g.*, Jeff Gill & Richard W. Waterman, *Solidary and Functional Costs: Explaining the Presidential Appointment Contradiction*, 14 J. PUB. ADMIN. RSCH. & THEORY 547 (2004); Philip G. Joyce, *An Analysis of the Factors Affecting the Employment Tenure of Federal Political Executives*, 22 ADMIN. & SOC'Y 127 (1990); George A. Krause & Jason S. Byers, *Proponents, Caretakers, and the Dynamics of Administrative Leadership Turnover in U.S. Executive Agencies*, 76 POL RSCH. Q. 1707 (2023); Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 SO. CAL. L. REV. 913, 918–19 (2009); B. Dan Wood & Miner P. Marchbanks III, *What Determines How Long Political Appointees Serve?* 18 J. PUB. ADMIN. RSCH. & THEORY 375 (2008).
[227] Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989-2009*, 39 PRES. STUD. Q. 432 (2009). *See also* U.S. GEN. ACCT. OFF., GGD-94-115FS, POLITICAL APPOINTEES: TURNOVER RATES IN EXECUTIVE SCHEDULE POSITIONS REQUIRING SENATE CONFIRMATION (1994) (noting that, because of differences in the statutorily prescribed lengths of fixed-term positions, calculating a government-wide turnover rate or median length of service estimate is not meaningful).
[228] Matthew Dull, Patrick S. Roberts, Michael S. Keeney & Sang Ok Choi, *Appointee Confirmation and Tenure: The Succession of U.S. Federal Agency Appointees*, 1989-2009, 72 PUB. ADMIN. REV. 902 (2012).
[229] Given the higher rates of delay and turnover for PAS officials who are not agency heads (e.g., assistant secretaries, heads of bureaus located in executive departments), vacancies may be a particularly acute problem for those programs that rely on these types of PAS officials.
[230] Amanda Rutherford, Jeryl L. Mumpower, Ricardo A. Bello-Gomez & Malisa Griffin, *Understanding Vacancy Time: A Theoretical Framework Informed by Cross-Sector Comparison*, 2 PERSP. ON PUB. MGMT & GOVERNANCE 3 (2019); Kathryn Dunn Tenpas, *White House Staff Turnover in Year One of the Trump Administration: Context, Consequences, and Implications for Governing*, 48 PRES. STUD. Q. 502 (2018).

Any system in which PAS officials participate in the adjudication of individual cases must account for frequent turnover and vacancies among PAS officials. The establishment of boards, commissions, and tribunals at which members have long or staggered terms may mitigate this problem, but quorum requirements can still pose challenges.[231] Additionally, across all administrative programs, "[f]requent turnover typically creates instability within an agency and prevents coherence across the administrative state."[232]

Second, turnover may mean that PAS officials do not serve long enough in their positions to become expert adjudicators.[233] Adjudication is substantively, procedurally, and organizational complex. For adjudication to satisfy core values such as accuracy, consistency, fairness, efficiency, and timeliness, adjudicators must have certain competencies. Those competencies can take years to develop.

Yet, upon entering office, PAS officials have relatively little formal orientation and often hail from different backgrounds than career adjudicators, meaning PAS officials bring fewer years of agency-specific or governmental management experience to their positions.[234] Thus, PAS officials can have a difficult transition period in their agencies as they attempt to learn agency policies and processes and learn to work within an established organization populated by employees they did not hire and only tenuously control.[235] This steep learning curve means that, on average, PAS officials' capacity and effectiveness matures just around the same time they decide to leave office.[236]

Third and related, PAS officials may not serve long enough to become expert at managing adjudication systems. There are important differences between managing public and private sector organizations, and PAS officials' fewer years of public management experience and fewer years of federal government experience overall as compared to career managers can

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[231] E.g., Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021) (detailing variation in quorum requirements and recent challenges those requirements have posed for independent commissions).
[232] Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 SO. CAL. L. REV. 913, 947–48 (2009). Frequent turnover may also have benefits, including exposure to "new ideas and fresh connections with certain relevant outside groups." *Id*.
[233] Given turnover generally and turnover between presidential administrations specifically, agencies may turn to subdelegation. Brian D. Feinstein & Jennifer Nou, *Strategic Subdelegation*, 20 J. EMPIR. LEG. STUD. 746 (2023).
[234] *E.g*., Joel D. Aberbach & Bert A. Rockman, *The Appointments Process and the Administrative Presidency*, 39 PRES. STUD. Q. 38 (2009); Nick Gallo & David E. Lewis, *The Consequences of Presidential Patronage for Federal Agency Performance*, 22 J. PUB. ADMIN. RSCH. & THEORY 219 (2012); David E. Lewis, *Testing Pendleton's Premise: Do Political Appointees Make Worse Bureaucrats*, 69 J. OF POL. 1073 (2007); David E. Lewis, *Revisiting the Administrative Presidency: Policy, Patronage, and Agency Competence*, 39 PRES. STUD. Q. 60 (2009).
[235] ROBERT MARANTO, BEYOND A GOVERNMENT OF STRANGERS: HOW CAREER EXECUTIVES AND POLITICAL APPOINTEES CAN TURN CONFLICT INTO COOPERATION (2005). As a result, it is not unusual for presidents to remove poorly performing PAS officials in the first year they are on the job. *See, e.g*., Kathryn Dunn Tenpas, *White House Staff Turnover in Year One of the Trump Administration: Context, Consequences, and Implications for Governing*, 48 PRES. STUD. Q. 502 (2018).
[236] HUGH HECLO, A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON (1977).

mean that these appointees must work hard to adapt to their new environments.[237] Adjudication systems, especially high-volume systems, pose extraordinarily difficult organizational challenges. Efficient and effective management involves expertise not only in substantive and procedural policymaking but also skills such as organizational design, human capital management, procurement of office space, and development of information technology capabilities. It can take years to gain mastery, let alone a basic understanding, of adjudication systems' complexity.

Fourth, because PAS officials by definition are transitory employees, it can be hard for them to build relationships with and effectively manage more permanent members of the federal civil service.[238] Conflicts between PAS officials and the administrators they manage can arise due to their differential knowledge about the technical core of their agencies' work; varying political, policy, and ideological perspectives; and different sensitivities to timelines.[239] These conflicts not only can make it difficult for PAS officials to acclimate to their positions but also can affect appointees' trust in administrators' ability to perform tasks and adhere to agency goals.[240] This lack of trust can have real consequences for adjudication, particularly when PAS officials have the authority to review adjudicative decisions, as a lack of trust may affect the frequency of PAS officials' discretionary involvement in adjudication.

Finally, many PAS officials come to government from the private sector and, as noted above, expect to return to the private sector after a relatively short stint in government service. A PAS official's past and anticipated future employers and clients may have an interest in the outcome of proceedings that come before the agency to which the PAS official was appointed. There may be concerns in some contexts about the official's ability to impartially decide cases that come before them.[241]

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[237] Nick Gallo & David E. Lewis, *The Consequences of Presidential Patronage for Federal Agency Performance*, 22 J. PUB. ADMIN. RSCH. & THEORY 219 (2012); DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE (2008). *But see* Matthew R. Auer, *Presidential Environmental Appointees in Comparative Perspective*, 68 PUB. ADMIN. REV. 68 (2008) (finding that more than 40 percent of appointed officials in the environmental bureaucracy have prior federal management experience).

[238] Patricia W. Ingraham, B*uilding Bridges or Burning Them? The President, the Appointees, and the Bureaucracy,* 47 PUB. ADMIN. REV. 425 (1987); Patricia W. Ingraham, James R. Thompson & Elliot F. Eisenberg, *Political Management Strategies and Political/Career Relationships: Where Are We Now in the Federal Government*, 55 PUB. ADMIN. REV. 263 (1995).

[239] ROBERT MARANTO, BEYOND A GOVERNMENT OF STRANGERS: HOW CAREER EXECUTIVES AND POLITICAL APPOINTEES CAN TURN CONFLICT INTO COOPERATION (2005).

[240] WILLIAM G. RESH, RETHINKING THE ADMINISTRATIVE PRESIDENCY: TRUST, INTELLECTUAL CAPITAL, AND APPOINTEE-CAREERIST RELATIONS IN THE GEORGE W. BUSH ADMINISTRATION (2015).

[241] *See generally* Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023 (2016); Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1 (2018); Madeline June Kass, *Presidentially Appointed Environmental Agency Saboteurs*, 87 UMKC L. REV. 697 (2019); Cole D. Taratoot, *The Influence of Administrative Law Judge and Political Appointee Decisions on Appellate Courts in National Labor Relations Board Cases*, 36 LAW & POL'Y 35 (2014); *see also* JAMES M. LANDIS REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 11–12 (1960).

3. PAS Officials' Relationship with the President and Political Appointees

Most executive-branch personnel are appointed and supervised according to merit system principles. Those principles ensure that civil servants are "hired, promoted, rewarded, and retained on the basis of individual ability and fitness for employment" and "protected from discrimination, improper political influence and personal favoritism."[242] But PAS officials, like other political appointees, are not subject to merit system principles. Indeed, they are often appointed precisely *because* of their political affiliation, activity, or beliefs.

By constitutional design, PAS officials exist to ensure democratic accountability in administrative decisionmaking.[243] Through the appointment of officials on the basis of similar ideology or programmatic support, presidents can take direct action to enhance responsiveness throughout the executive branch.[244] As a result, presidents have used PAS appointments as an important management strategy to promote democratic accountability and counteract administrative inertia.[245] PAS officials tend to be more sensitive to politics when performing their jobs, and they are more likely to make decisions that reflect the preferences of their democratically elected principals.[246]

Many types of agency decision making involve a fair measure of discretion, and, within limits, politics (defined broadly) can fairly inform those decisions.[247] To the extent that the adjudication of cases involves substantive policymaking on important issues, responsiveness to politics may be valuable. PAS participation in adjudication might also raise awareness of case

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[242] 4 C.F.R. § 2.4.
[243] Edmond v. United States, 520 U.S. 651 (1997).
[244] Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION OF AMERICAN POLITICS (John E. Chubb & Paul E. Peterson eds., Brookings 1985).
[245] *E.g.,* Linda J. Bilmes & Jeffrey R. Neal, *The People Factor: Human Resources Reform in Government*, *in* FOR THE PEOPLE: CAN WE FIX PUBLIC SERVICE? (John D. Donahue & Joseph S. Nye eds., Brookings 2003); Matthew J. Dickinson & Andrew Rudalevige, P*residents, Responsiveness, and Competence: Revisiting the "Golden Age" and the Bureau of the Budget*, 119 POL. SCI. Q. 633 (2004); ROBERT F. DURANT, THE ADMINISTRATIVE PRESIDENCY REVISITED: PUBLIC LANDS, THE BLM, AND THE REAGAN REVOLUTION (1992); MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS (2000); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE (2008); B. DAN WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMIC: THE ROLE OF BUREAUCRACY IN DEMOCRACY (1994).
[246] *E.g.*, DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE (2008); David E. Lewis, *Presidential Politicization of the Executive Branch in the United States*, *in* EXECUTIVE POLITICS IN TIMES OF CRISIS (Martin Lodge & Kai Weigrich eds., Palgrave Macmillan 2012); Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION OF AMERICAN POLITICS (John E. Chubb & Paul E. Peterson eds., Brookings 1985).
[247] *See generally* Kathleen Bawn, *Political Control versus Expertise: Congressional Choices about Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995); Randall L. Calvert, Mathew D. McCubbins & Barry R. Weingast, *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588 (1989); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Richard J. Pierce, Jr., *Political Control versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481 (1990); 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.).

processing challenges that require political solutions such as additional funding or legislative reforms.

In general, though, political control of administrative adjudication is more controversial. Democratic accountability is only one of many considerations in agency adjudication.[248] In adjudicating cases, agencies are expected to reach decisions based on a "neutral, objective application of the law" to case-specific facts.[249] Yet a variety of considerations go into selecting PAS officials, including loyalty, responsiveness, professionalism, expertise, organizational competence, or a combination of these factors.[250] Furthermore, trends in contemporary administrative management suggest that agencies are increasingly likely to place salient policy decisions within components of an agency's hierarchy that are more likely to share the views of the President, are more amenable to receiving political signals, and are more responsive to oversight.[251]

There have long been concerns about the potential for politics to distort adjudicative decision making.[252] Commentators have long believed that presidential participation in adjudication would "contravene procedural norms and inject an inappropriate influence into the resolution of controversies,"[253] and Congress has often restricted the President's ability to remove officials who exclusively or principally perform adjudicative functions.[254] Indeed, tenure protections for PAS officials with predominately adjudicative duties have sometimes been inferred even in the absence of an statutory provisions expressly providing them.[255] Likewise, the

[248] *E.g.*, Lisa Shultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003); Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1 (2022).
[249] Louis J. Virelli III, Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators 53 (May 14, 2020) (report to the admin. Conf. of the U.S.).
[250] *E.g.*, Kenneth W. Abbott, Philipp Genschel, Duncan Snidal & Bernhard Zangl, *Beyond Opportunism: Intermediary Loyalty in Regulation and Governance*, 15 REGUL. & GOVERNANCE S83 (2021); George A. Krause & Anne Joseph O'Connell, *Loyalty-Competence Trade-offs for Top U.S. Federal Bureaucratic Leaders in the Administrative Presidency Era*, 49 PRES. STUD. Q. 527 (2019); Yu Ouyang, Evan T. Haglund & Richard W. Waterman, *The Missing Element: Examining the Loyalty-Competence Nexus in Presidential Appointments*, 47 PRES. STUD. Q. 62 (2017); Richard W. Waterman & Yu Ouyang, *Rethinking Loyalty and Competence in Presidential Appointments*, 80 PUB. ADMIN. REV. 717 (2020).
[251] *See* Adam B. Cox & Christina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015); Jennifer L. Selin, Cody A. Drolc, Jordan Butcher, Nicholas L. Brothers, & Hanna K. Brant, *Under Pressure: Centralizing Regulation in Response to Presidential Priorities*, 52 PRES. STUD. Q. 340 (2022); Jerry L. Mashaw & David Bereke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549 (2018).
[252] *See, e.g.*, Kent H. Barnett, *Regulating Impartiality in Agency Adjudication*, 69 Duke L.J. 1695 (2020); Jack M. Beermann, *Administrative Adjudication and Adjudicators*, 26 Geo. Mason L. Rev. 861 (2019); Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 Geo. Mason L. Rev. 897 (2019).
[253] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2363 (2001); *see also* Emily Bremer, *Presidential Adjudication*, 110 VA. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4726519.
[254] JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 96–99 (2018)
[255] *See* Wiener v. United States, 357 U.S. 349 (1958).

Administrative Procedure Act establishes structures to insulate non-PAS ALJs from the influence of politically appointed agency heads.[256]

Some have voiced a fear that political appointees in certain circumstances may be tempted to use their office to benefit friends and political allies, undermining rule-of-law values.[257] Assuming good intent, PAS officials may simply be more likely to have strongly held and publicly expressed beliefs on politically salient issues relevant to cases that come before them; some parties may perceive this as prejudgment.[258]

4. PAS Officials' Relationship with the Senate

The nature of their appointment provides PAS officials with the endorsement of two branches of government and therefore offers credibility and legitimacy to the choices made by those officials.[259] Additionally, the PAS confirmation process both directly and indirectly provides the Senate with opportunities to communicate with agency leadership in ways that can translate to increased agency responsiveness to congressional preferences.

First, presidents account for the preferences of senators when making PAS nominations.[260] In this way, PAS officials are part of a larger conversation between the two branches about the direction and content of agency policy implementation.[261] Through the confirmation process, the Senate articulates its vision for an agency and establishes a relationship with agency leadership.

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[256] *See generally* Jeffrey S. Lubbers, *Selection, Supervision, and Oversight of Adjudicators*, *in* A GUIDE TO FEDERAL AGENCY ADJUDICATION 125–57 (Jeremy S. Graboyes ed., 3d ed. 2023); Louis J. Virelli III, *Integrity in Agency Adjudication*, *in* A GUIDE TO FEDERAL AGENCY ADJUDICATION 159–76 (Jeremy S. Graboyes ed., 3d ed. 2023); *see also* Emily Bremer, *Presidential Adjudication*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 6), https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=4726519.

[257] Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 72 (2023).

[258] *See, e.g.*, Jay Greene & Rachel Lerman, *Amazon seeks recusal of FTC Chair Khan, a longtime company critic*, WASH. POST (June 30, 2021), https://www.washingtonpost.com/technology/2021/06/30/amazon-khan-ftc-recusal/; *see also* Louis J. Virelli III, *An Ethical Gap in Agency Adjudication*, 69 BUFF. L. REV. 1329, 1334 (2021).

[259] Joshua D. Clinton, Anthony Bertelli, Christian R. Grose, David E. Lewis & David C. Nixon, *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. OF POL. SCI. 341 (2012); William G. Resh, Gary E. Hollibaugh, Jr., Patrick S. Roberts & Matthew M. Dull, *Appointee Vacancies in US Executive Branch Agencies*, 41 J. PUB. POL'Y 653 (2021).

[260] *E.g.*, Thomas H. Hammond & Jeffrey S. Hill, *Deference or Preference?: Explaining Senate Confirmation of Presidential Nominees to Administrative Agencies*, 5 J. THEORETICAL POL. 23 (1993); Gary E. Hollibaugh, Jr. & Lawrence S. Rothenberg, *The Who, When, and Where of Executive Nominations: Integrating Agency Independence and Appointee Ideology*, 62 AM. J. POL. SCI. 296 (2018); Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1995*, 43 AM. J. POL. SCI. 1122 (1999); David C. Nixon, *Separation of Powers and Appointee Ideology*, 20 J. L. ECON. & ORG. 438 (2004).

[261] *See* Joel D. Aberbach & Bert A. Rockman, *The Appointments Process and the Administrative Presidency*, 39 PRES. STUD. Q. 38 (2009); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006); MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL & HISTORICAL ANALYSIS (2003).

Second, because senators understand the important roles PAS officials play in agency policy, the oversight relationship between senators and PAS appointees can be stronger than with other agency officials.[262] Agency responsiveness to congressional direction often is linked to the committees and subcommittees actively involved in overseeing an agency and confirming presidential appointees.[263] Simply, the investment of congressional effort to understand agency policy and process during confirmation translates to higher quality oversight once an appointee has been confirmed.

Traditionally, this is particularly true with respect to agencies created as independent commissions (those led by multi-member bodies whose members serve fixed terms and are protected from removal for political reasons). Combined with partisan balancing requirements, congressional design decisions in this respect are intended to limit presidential control and facilitate a non-partisan environment where experts can apply their knowledge.[264] Indeed, these agencies not only are seen as quasi-judicial, but also as "creatures of Congress."[265]

In total, the direct and indirect effects of Senate confirmation may result in PAS officials who are more responsive to Congress than other agency officials.[266]

5. PAS Officials' Relationship with their Agencies

While PAS officials may have the endorsement of both the President and the Senate, their effectiveness in leading their agencies' adjudicative processes depends in large part on their relationships with career administrators. Without accounting for these relationships, there can be uncertainty regarding how PAS officials' authority over their agencies will be exercised.[267]

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[262] *See* Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 ADMIN. L. REV. 259 (2017); Seymour Scher, *Conditions for Legislative Control*, 25 J. of Pol. 526 (1963).
[263] David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. Rev. 1487 (2015).
[264] *See* Staff of S. Comm. on Gov't Operations, 95th Cong., Study on Federal Regulation: The Regulatory Appointments Process (1977); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459 (2008); Peter L. Strauss, *The Place of Agencies in Government Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN (2003). Consistent with this research, empirical evidence suggests that structuring an agency as a commission removes the agency from presidential influence. However, administrators in independent commissions do not perceive a statistically different amount of congressional influence than those who work in executive departments or independent administrations. Jennifer L. Selin, *What Makes an Agency Independent?* 59 AM. J. POL. SCI. 971 (2015). Put another way, it may be that independent commissions are not necessarily more responsive to Congress than other agencies, just that they are less responsive to the President. *Id*.
[265] *E.g*., Humphrey's Executor v. United States, 295 U.S. 602 (1935); Neal Devins, *Congress, The FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS. 145 (1993); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); Susan Sommer, *Independent Agencies as Article One Tribunals: Foundations of a Theory of Agency Independence*, 39 ADMIN. L. REV. 83 (1987).
[266] Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L. J. 1002 (2017); Kenneth Lowande, *Politicization and Responsiveness in Executive Agencies*, 81 J. OF POL. 33 (2018);
[267] George A. Krause, *Organizational Complexity and Coordination Dilemmas in U.S. Executive Politics*, 39 PRES. STUD. Q. 74 (2009).

Bluntly, a federal agency is a "they," not an "it"[268] and the desirability and effectiveness of participation of PAS officials' in administrative adjudication varies with context.[269]

Promotion of accurate, consistent, fair, impartial, efficient, and timely adjudication requires PAS leadership that not only facilitates administrative responsiveness but also encourages communication and information sharing throughout the administrative hierarchy.[270] The very thing that makes the participation of Senate-confirmed officials in adjudication attractive (connection to elected officials and the promotion of democratic accountability) can hurt program performance if those officials are unfamiliar with agency processes or unreceptive to the expertise and experience of career administrators.[271] Positively or negatively, PAS officials have a strong influence on the behavior of career civil servants throughout their agencies and the most successful PAS officials fully understand their agencies' adjudicative processes and adjust their leadership strategies accordingly.[272] Such strategies promote trust throughout the agency and ultimately work to sanction the legitimacy of PAS involvement.[273]

While volumes could be written on dissecting appointee-careerist relations, two aspects of PAS officials' relationships with administrators are of note when considering agency adjudication. First, PAS officials often express frustration with the pace of their agencies' policy processes.[274] This usually is a result of a lack of familiarity with agency culture, capacity, and structure (including decentralization).[275] Thus, there tends to be a "cycle of accommodation" that takes, on average, two to three years of learning on the part of both PAS officials and career administrators before the agency reaches peak performance.[276] However, close working

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[268] *E.g.*, Elisabeth Magill & Adrian Vermuele, *Allocating Power within Agencies*, 120 YALE L.J. 1032 (2011); Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now:" When Agencies Defer Decisions*, 103 GEO. L. J. 157 (2014).

[269] *See generally* Scott Limbocker, Mark D. Richardson & Jennifer L. Selin, *The Politicization Conversation: A Call to Better Define and Measure the Concept,* 52 PRES. STUD. Q. 10 (2022); Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 29 AM. J. POL. SCI. 721 (1985); Christopher Reenock, David M. Konisky & Matthew J. Uttermark, *Chain of Command vs. Who's in Command: Structure, Politics, and Regulatory Enforcement*, 50 Pol'y Stud. J. 797 (2022).

[270] *See* Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349 (2019) (discussing the concept of reciprocal hierarchy).

[271] David E. Lewis, *Testing Pendleton's Premise: Do Political Appointees Make Worse Bureaucrats?*, 69 J. OF POL. 1073 (2007).

[272] *E.g.*, Gary E. Hollibaugh, Jr., *How Effective are Political Appointees?*, OXFORD RSCH. ENCYCLOPEDIA. OF POL. (2019); MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS (2000).

[273] WILLIAM G. RESH, RETHINKING THE ADMINISTRATIVE PRESIDENCY: TRUST, INTELLECTUAL CAPITAL, AND APPOINTEE-CAREERIST RELATIONS IN THE GEORGE W. BUSH ADMINISTRATION (2015).

[274] Carolyn Ban & Patrician W. Ingraham, *Political Appointee Mobility and Its Impact on Political-Career Relations in the Reagan Administration*, 22 ADMIN. & SOC'Y 106 (1990).

[275] Martin Laffin, *The President and the Subcontractors: The Role of Top Level Policy Entrepreneurs in the Bush Administration*, 26 PRES. STUD. Q. 550 (1996).

[276] James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57 (1987).

relationships between PAS officials and the administrators they oversee can help speed up this process.[277]

Second, these relationships can become stifled depending on the President and Senate's understanding of why a particular official was appointed to an agency.[278] For example, when PAS officials assume office with widespread agreement and continued support of an agency's mission, their leadership tends to be more effective.[279] However, when tensions arise because the views of political leadership diverge from existing agency practices, PAS involvement not only can hurt agency performance, but also lead to turnover among the career administrators who are regularly engaged in an agency's adjudicative processes.[280]

Considering these two points together along with existing research on the relationship between PAS officials and career administrators, it is clear that effective PAS involvement in agency adjudication requires appointees who have the capacity for and adopt strategies to anticipate, understand, and constructively engage adjudicators within their agencies.[281] The most successful PAS officials exhibit developmental and supportive leadership, are willing to learn from and trust career adjudicators, and seek counsel regarding best practices in agency adjudication.[282] Such cooperative leadership not only can promote consistency, accountability, and efficiency in agency adjudication, but can also promote internal checks on waste, fraud, and abuse.[283]

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[277] Judith E. Michaels, *A View from the Top: Reflections of the Bush Presidential Appointees*, 55 PUB. ADMIN. REV. 273 (1995).
[278] Karen M. Hult & Robert Maranto, *Does Where You Stand Depend on Where You Sit? Careerists' Attitudes toward Political Appointees under Reagan*, 31 AM. REV. POL. 91 (2010).
[279] Hyunjung Kim, Haeil Jung & Sun Young Kim, *Does Politicization Influence Senior Public Officials' Work Attitudes? Different Forms and Effects of Politicization in the Civil Service*, 24 PUB. MGMT. REV. 1100 (2022); Robert Maranto, *Still Clashing after All These Years: Ideological Conflict in the Reagan Executive*, 37 AM. J. POL. SCI. 681 (1993).
[280] *E.g.*, Susannah Bruns Ali, *Does Political Turbulence Encourage Fight or Flight for Federal Employees? Examining Political Environments and Turnover Intent*, 49 PUB. PERS. MGMT. 262 (2020); Carolyn Ban & Patrician W. Ingraham, *Political Appointee Mobility and Its Impact on Political-Career Relations in the Reagan Administration*, 22 ADMIN. & SOC'Y 106 (1990); Alexander Bolton, John de Figueredo & David E. Lewis, *Elections, Ideology, and Turnover in the U.S. Federal Government*, 31 J. PUB. ADMIN. RSCH. & THEORY 451 (2021); Kathleen M. Doherty, David E Lewis & Scott Limbocker, *Presidential Control and Turnover in Regulatory Personnel*, 51 ADMIN. & SOC'Y 1606 (2019); Kathleen M. Doherty, David E Lewis & Scott Limbocker, *Executive Control and Turnover in the Senior Executive Service*, 29 J. PUB. ADMIN. RSCH. & THEORY 159 (2019); Mark D. Richardson, *Politicization and Expertise: Exit, Effort, and Investment*, 81 J. OF POL. 878 (2019).
[281] *See* Robert F. Durant, *Beyond Fear or Favor: Appointee-Careerist Relations in the Post-Reagan Era*, 50 PUB. ADMIN. REV. 319 (1990).
[282] *See generally* Judith E. Michaels, *A View from the Top: Reflections of the Bush Presidential Appointees*, 55 PUB. ADMIN. REV. 273 (1995); Sung Min Park & Hal G. Rainey, *Leadership and Public Service Motivation in U.S. Federal Agencies*, 11 INT'L PUB. MGMT. J. 109 (2008).
[283] *See* Hongseok Lee, *The Implications of Organizational Structure, Political Control, and Internal System Responsiveness on Whistleblowing Behavior*, 40 REV. OF PUB. PERS. ADMIN. 155 (2020).

6. Range of Duties Assigned to PAS Officials

There is substantial variation in the range of functions assigned to PAS officials with adjudicative authority and in the size and complexity of the programs they administer. At one end of the spectrum are officials assigned limited duties under a single program. Members of the Occupational Safety and Health Review Commission (OSHRC), for example, are statutorily responsible only for deciding contests of citations that the Occupational Safety and Health Administration issues to employers following workplace inspections.[284] OSHRC received a total of 1,881 new cases in fiscal year 2023, only a small percentage of which resulted in appeals of ALJ decisions to the members of the Commission.[285] Such officials may have capacity to participate personally in the adjudication of cases, at least in an appellate role, given a relatively small caseload and few competing demands on their time.

At the other end of the spectrum are officials, in particular the heads of executive departments, who are responsible for a much broader range of duties under multiple programs. Consider the assignment of one of the highest-volume adjudication programs, veterans disability compensation, to the Secretary of Veterans Affairs. In addition to supervising all aspects of the program, including the annual adjudication of millions of claims and payment of billions of dollars to millions of beneficiaries, the Secretary is responsible for managing pension and other benefits programs; administering education, insurance, and vocational rehabilitation programs; managing more than 150 national cemeteries; and providing health care to more than nine million veterans at more than 1,000 facilities nationwide. It would be impossible for the Secretary to attend personally to any but a small fraction of veterans disability compensation cases, and adjudication of individual cases—even in a limited, appellate capacity—may not be an effective use of the Secretary's time given other assigned duties.

The competing demands on the limited capacity of PAS officials makes delegation an essential characteristic of public administration. Policymakers must determine which duties warrant personal attention by a limited number of PAS officials and which duties can lower-level officials perform effectively. As the Attorney General's Committee on Administrative Procedure explained in its 1941 final report:

> [I]t becomes obvious at once that the major work of the heads of an agency is normally supervision and direction. They cannot themselves be specialists in all phases of the work, but specialists must be immediately available to them. They cannot themselves receive material which must be filed and analyse [sic] it. They cannot, and they should not, conduct investigations, determine in every instance whether or not action is required, hear controversies, and at the same time make all decisions. Administrative procedures must be founded upon the reality that many persons in the agency other than the heads must do the bulk of this work.

[284] 29 U.S.C. § 659.
[285] U.S. OCCUPATIONAL SAFETY & HEALTH REV. COMM'N, FY 2023 PERFORMANCE AND ACCOUNTABILITY REPORT 3–10 (2023).

> When agency heads permit themselves to be overwhelmed by detail, they rob themselves of time essential for their most important tasks.[286]

For purposes of this report, in designing a program, policymakers must determine whether it is an effective use of a PAS official's limited time to participate in some capacity in the adjudication of individual cases under the program, or whether the PAS official can more effectively direct and supervise the program in other ways.

Aside from whether a PAS official has capacity to participate in the adjudication of individual cases in light of other functions assigned to him or her, policymakers must also consider whether certain functions should be combined or separated in a single individual. For programs in which adjudication is an important component of policy development, for example, the combination of generalized policymaking and case-by-case adjudication in a single official may be valuable. As Christopher J. Walker and Melissa Feeney Wasserman have written:

> There are several reasons why the traditional administrative model vests final decision-making authority with the agency head. Perhaps most saliently, it ensures agency heads control the regulatory structure they supervise. Agency heads—who can comprise a single director, secretary, or administrator; or a commission, board, or body with five to seven members—oversee the agency's activities and set the agency's policy preferences. It is widely accepted that agency heads have a comparative advantage in policy expertise relative to agency adjudicators. Generally, agency leadership has greater access to experts and staff that provide inputs and partake in the deliberative process that lead to better informed decisions than adjudicatory officers. Moreover, in contrast to agency heads, adjudicatory officers often have significant caseloads that rob them of the time necessary to think deeply about policy matters. Because adjudication is a primary policy-making vehicle for federal agencies, granting agency-head review authority over adjudication helps to ensure agency-head control over policy development.[287]

On the other hand, providing a PAS official free rein to implement policy preferences through generally applicable rules or through case-by-case adjudication might disincentivize the official from using rulemaking to make policy.[288]

The combination of traditionally adversarial functions, namely investigation and prosecution, with adjudicative functions may raise policy concerns,[289] even if it does not violate

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[286] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 20–21 (1941).
[287] Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 167 (2019) (internal citations omitted).
[288] Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 6, 71 (2023).
[289] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 55–60 (1941)*; see also* Michael Asimow, *Greenlighting Administrative Prosecution*, 75 ADMIN. L. REV. 227, 251–56 (2023); Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 66–67 (2023).

constitutional due process.[290] There may be concerns about assigning cases to PAS officials who interface regularly with Congress and the public and face external pressures to improve timeliness, improve decisional quality, reduce costs, or ensure program—all worthy objectives that might lead a decision maker to consider factors beyond the relevant law and facts of a specific case.[291] There may also be concerns about combining functions under multiple programs in a single officials. A PAS official who serves as investigator and prosecutor under one program may not be perceived as an impartial adjudication under another, even when he or she plays no adversarial role in that program.[292]

Congress and agencies have devised different methods for separating adjudicative from other functions. For example:

- In many programs, the separation of adversarial functions (e.g., investigation, prosecution) from adjudicative functions is achieved "through internal barriers within the agency which separate and insulate those employees who judge from those who investigate and prosecute." The most notable example is the APA's formal-adjudication process, which restricts interactions between ALJs and adversarial personnel. "The chains of command, however, come together at the top in the person of the head or heads of the agency, who, through subordinates, are responsible for all three functions."[293] Still, the APA insulates ALJs from agency heads' influence, granting them qualified decisional independence.[294] And although PAS officials are generally free to reverse ALJs' decisions on appeal or on their own motion, they must provide reasons for doing so, and the ALJ's initial or recommended decision remains

[290] *See* Withrow v. Larkin, 421 U.S. 35 (1975); *see also* Michael Asimow, *Greenlighting Administrative Prosecution*, 75 ADMIN. L. REV. 227, 258–60 (2023). *But see* Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. MICH. J. L. REFORM 103 (2018).
[291] *See* Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 26–27 (2023).
[292] Writing about immigration removal adjudication, one commentator wrote in 1981 that "The Attorney General's ability to review Board [of Immigration Appeals] decisions inappropriate injects a law enforcement official into a quasi-judicial appellate process." Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 Notre Dame L. Rev. 644, 650 (1981). At the time, the Attorney General also oversaw the Immigration and Naturalization Service, which enforced the immigration laws. Nevertheless, similar arguments have been made since 2003, when the Service's functions were transferred to new agencies under the supervision of the Secretary of Homeland Security. SARAH PIERCE, MIGRATION POLICY INSTITUTE, OBSCURE BUT POWERFUL: SHAPING U.S. IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW 10 (2021), https://www.migrationpolicy.org/sites/default/files/ publications/rethinking-attorney-general-referral-review_final.pdf ("The attorney general's referral and review power is unique compared to agency head review in other departments in that it rests in the hands of the nation's chief law enforcement officer.").
[293] Admin. Conf. of the U.S., *The Split-Enforcement Model for Agency Adjudication*, 51 Fed. Reg. 46986 (Dec. 30, 1986).
[294] Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 252 (1996).

part of the whole record for judicial review.[295]

- The NLRB offers a historically unique example. Adjudication is assigned to the Board (made up of five PAS officials), while adversarial functions are assigned to a separate PAS official (the General Counsel) who is located within the agency but statutorily independent of the Board.[296]

- The split-enforcement model offers a strong form of separation. The Mine Safety and Health Act, for example, authorizes the Secretary of Labor to adopt policies regulating mine safety and health, inspect workplaces for compliance with the Act and policies adopted under it, and issue citations to employers who violate the law. If an employer contests a citation, a separate agency—the Federal Mine Safety and Health Review Commission (FMSHRC), made up of five PAS officials—hears and decides the matter.[297] Similar models exist for adjudicating occupational safety and health[298] and airmen certification matters.[299] Similarly, certain federal employment-related actions may be appealed to a separate agency, MSPB, headed by PAS officials.[300] Actions to remove noncitizens from the United States are prosecuted by employees of one agency (DHS) in a tribunal administered by another (DOJ).[301] And many IRS and VA decisions are subject to review by Tax Court and CAVC judges, respectively.[302]

- In some programs, the wholesale delegation of the adjudicative function to lower-level officials might serve to separate conflicting functions. In part to separate adversarial from adjudicative functions, for example, the EPA Administrator in 1992 delegated nearly all final decisional authority to the Environmental Appeals Board, then composed of three career senior executives.[303]

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[295] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); *see also* Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 29 (2023); Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication*, 103 TEX. L. REV. (forthcoming 2024) (manuscript at 15–16, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4563879.

[296] Michael Asimow, *Greenlighting Administrative Adjudication*, 75 ADMIN. L. REV. 227, 241–42 (2023); *see also* Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 965, 985–87 (1991); *see also* JAMES M. LANDIS REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 4, 59–64 (1960).

[297] Recommendation 86-4, *The Split-Enforcement Model for Agency Adjudication*, 51 Fed. Reg. 46986 (Dec. 30, 1986).

[298] *Id*.

[299] Admin. Conf. of the U.S., Recommendation 91-8, *Adjudication of Civil Penalties Under the Federal Aviation Act*, 56 Fed. Reg. 67141 (Dec. 30, 1991); Admin. Conf. of the U.S., Recommendation, Recommendation 90-1, *Civil Money Penalties for Federal Aviation Violations*, 55 Fed. Reg. 34209 (Aug. 22, 1990).

[300] 5 U.S.C. § 7513(d).

[301] *See* Admin. Conf. of the U.S., Recommendation 2012-3, *Immigration Removal Adjudication*, 77 Fed. Reg. 47,804 (Aug. 10, 2012).

[302] 26 U.S.C. § 7442; 38 U.S.C. § 7252.

[303] 57 Fed. Reg. 5320, 5322 (Feb. 13, 1992).

7. PAS Officials' Position in Bureaucratic Hierarchies

Given the transaction costs inherent in and the internal coordination required for consistency in an agency's adjudicative system, agencies have experimented with different ways of using PAS officials to limit variance in adjudication decisions, including thinking carefully about the layers of hierarchy within an agency and the workflow processes that allocate decisional authority across that hierarchy.[304] Because it is impossible to design a "neutral hierarchy," or an agency hierarchy that does not affect decision-making,[305] PAS officials' positions in their agencies' hierarchies affect administrative adjudication.

Adjudication can be organized like a pyramid. In many programs, all cases are processed at an initial stage, and some cases are appealed or selected for review at subsequent stages. Fewer and fewer cases are processed at each subsequent stage. Decision makers at the final stage of administrative appeal or review have a vantage point to correct errors made at previous stages and identify systemic quality issues.

This sort of system, where those at the top of the hierarchy delegate authority to those subordinate to them, while at the same time holding those subordinate officials responsible for their decisions through review, is one of the most commonly known and long-standing mechanisms of accountability.[306] Hierarchical controls can enhance program responsiveness to democratically elected officials and can promote consistency in decisionmaking within an agency.[307] With respect to adjudication, the Attorney General's Committee on Administrative Procedure observed that PAS officials' review authority can play an important role ensuring "uniformity" and "effective supervision."[308] More recently, Walker and Wasserman suggested that by participating personally in the adjudication of cases PAS officials can play an important role in ensuring decisional quality.[309]

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[304] *See generally* Adam B. Cox & Christina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015); Emmanuelle Mathieu, Koen Verhoest & Joery Matthys, *Measuring Multi-Level Regulatory Governance: Organizational Proliferation, Coordination, and Concentration of Influence*, 11 REGUL. & GOVERNANCE 252 (2016); Jennifer L. Selin, Cody A. Drolc, Jordan Butcher, Nicholas L. Brothers, and Hanna K. Brant, *Under Pressure: Centralizing Regulation in Response to Presidential Priorities*, 52 PRES. STUD. Q. 340 (2022).

[305] Thomas H. Hammond & Paul A. Thomas, *The Impossibility of a Neutral Hierarchy*, 5 J. L. ECON. & ORG. 155 (1989).

[306] Mark D. Jarvis, *Hierarchical Accountability*, *in* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY (Mark Bovens, Robert E. Goodin & Thomas Schillemans, eds., 2014).

[307] *See generally* Melvin J. Dubnik & H. George Frederickson, *Accountable Agents: Federal Performance Measurement and Third-Party Government*, 20 J. PUB. ADMIN. RSCH. & THEORY i143 (2010); Luther Gulick, *Notes on the Theory of Organization with Special Reference to Government in the United States*, *in* PAPERS ON THE SCIENCE OF ADMINISTRATION (Luther Gulick et al. eds. 1937); Herbert A. Simon, *Decision-Making and Administrative Organization*, 4 PUB. ADMIN. REV. 16 (1944).

[308] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 51 (1941).

[309] Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 176–77 (2019).

Rebecca Eisenberg and Nina Mendelson have questioned how well PAS officials can play this role in practice.[310] Layers of hierarchy (and, as a result, layers of decision-makers) can dilute accountability.[311] Increasing the number of actors involved in moving a case from initial to final decision raises the costs of adjudication, can slow agency processes, and can make it difficult to communicate goals and expectations across the agency.[312]

8. Resource Constraints

Agencies adjudicate in a resource constrained environment, and PAS participation in adjudication necessarily requires resources to be directed towards that participation, and away from other aspects of the the agencies' task environments.

Notably, PAS officials are typically compensated under the Executive Schedule, which generally exceeds the pay rates for employees under the General Schedule, ALJs, and many other career adjudicators.[313] Policymakers must consider the potential added financial costs associated with the participation of PAS officials in determining whether, when, and how they should participate directly in the adjudication of individual cases.

Financial resource considerations are only part of the equation. Agencies also face real time contraints as they work to adjudicate. Considerations of PAS official' participation must be sensitive to this reality. For example, regardless of whether PAS officials' participation is direct or indirect, when appointments are delayed or positions remain vacant, agencies must shuffle responsibilities among their current staff to fill the gaps. Once a PAS official onboards, it takes time to become familiar with agency processes and build rapor with administrators. Inefficiencies and uncertainties arising from these things can trickle down an agency's hierarchy and affect adjudication in unexpected ways.

Additionally, because PAS officials balance a variety of tasks, including the need to build relationships with the president, Congress, and other political officials, PAS officials must make consequential decisions regarding which tasks to prioritize and when. These decisions are variable over time, depending upon the agency's current policy environment. The practical reality of political leadership is that, at times, PAS officials will have to deprioritize adjudication in favor of another policy or managerial task.

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[310] Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 5–6 (2023).
[311] *See* George A. Krause, *Organizational Complexity and Coordination Dilemmas in U.S. Executive Politics*, 39 PRES. STUD. Q. 74 (2009).
[312] *See generally* PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY (1995)
[313] *See Salaries & Wages*, U.S. OFF. OF PERSONNEL MGMT., https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/ (last visited Mar. 11, 2024).

III. Who Should Determine How PAS Officials Participate

The institutional design of any agency is a function of choices by Congress and the executive branch. For some programs, Congress has defined an agency's organization and procedure with great specificity, including the role of PAS officials. Title 38 of the U.S. Code, for example, regulates how veterans file claims for veterans' disability compensation; how adjudicators within the Veterans Benefits Administration (VBA), directed and supervised by a PAS official, process claims and issue initial decisions; how the Board of Veterans Appeals (BVA), chaired by a PAS official, reviews VBA decisions; and how Senate-confirmed judges of the Court of Appeals for Veterans Claims—an independent, executive-branch tribunal whose members are all PAS officials—review appeals from BVA.[314] Specifically regarding adjudication, at least historically, the establishment of independent agencies may reflect congressional intent that PAS officials will participate personally in the adjudication of at least those cases that are especially significant.[315]

For many programs, though, Congress has left most important structural decisions to executive-branch officials. All aspects of administering a program are commonly assigned to a PAS official or collegial body made up of several PAS officials, and that official (or those officials) are given broad discretion to structure a system for adjudicating cases as they see fit.[316]

Legislative flexibility allows Congress to create bureaucratic structures, binding on executive branch actors, that for each program strike the desired balance between administrative expertise and external accountability.[317] At the same time, cases like *Lucia* and *Arthrex* suggest that the Supreme Court views certain legislatively mandated structures as violating the separation of powers, because they "break[] the chain of dependence" between the President and executive-branch officers.[318]

Delegations of authority within the executive branch do not raise the same constitutional concerns.[319] And as a policy matter, granting agencies greater flexibility to structure their

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[314] *See* Appendix W.

[315] *See* Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 263–64, 269 (1988); Daniel J. Gifford, 66 NOTRE DAME L. REV. 965, 970 (1991); Ralph F. Fuchs, *Fairness and Effectiveness in Administrative Agency Organization and Procedures*, 36 IND. L.J. 1, 31 (1960) ("There are legal limits to delegation within an agency. . . . [I]t can scarcely be doubted that, for example, the members of a regulatory commission are required either to render personally a decision which the governing statute entrusts to the commission, or to hold themselves available to review if objection is raised to the determination of subordinates acting for them."); HIROSHI OKAYAMA, JUDICIALIZING THE ADMINISTRATIVE STATE: THE RISE OF THE INDEPENDENT REGULATORY COMMISSIONS IN THE UNITED STATES, 1883–1937 (2019).

[316] Ralph F. Fuchs, *Fairness and Effectiveness in Administrative Agency Organization and Procedures*, 36 IND. L.J. 1, 30 (1960)

[317] Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 3 (2023).

[318] *See supra* note 105; *see also* Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1 (2023); Nikolas Bowie & Daphna Renan, *The Separation-of-Power Counterrevolution*, 131 YALE L.J. 2020 (2022).

[319] *See* Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695 (2020).

adjudicative systems may make it easier to modify those structures in light of lived experience and changed circumstances. At the same time, such flexibility narrows the options available for congressional oversight and prevents Congress from insulating career adjudicators from political control when such insulation is desired.

Congress has passed many statutes regulating the conduct of hearings. With some notable exceptions, it has not regulated administrative review nearly as much. By way of example, consider the APA. While Congress established a comprehensive scheme for the conduct of hearings required by law to be conducted on the record, it rejected proposals to formalize review and "instead gave agencies discretion to determine the structure of their appellate processes."[320]

Historical ACUS recommendations reiterate this approach. In Recommendation 68-6, ACUS encouraged Congress to amend the APA to clarify agencies' discretion in cases of formal adjudication to establish intermediate appellate boards and accord administrative finality to the initial decisions of presiding officers.[321] ACUS more explicitly recommended that Congress grant agencies broad discretion to structure their adjudicative systems in Recommendation 83-3, stating:

> In drafting legislation governing the institutional structure for agency adjudicatory proceedings, Congress should favor delegation of decisional authority and should not prescribe detailed review structures. The presumption should be that each agency head is best able to allocate review functions within the agency.

ACUS recommended that Congress authorize agency heads to review initial decisions of presiding officers on a discretionary basis and delegate review authority to a judicial officer or appellate board "either with possibility for further review by the agency head in his [or her] discretion or without further administrative review." ACUS recommended that Congress require agency heads to review decisions personally "[o]nly in the rarest circumstances." ACUS listed only two circumstances (apparently an exclusive list):

> (i) in the case of an agency headed by an individual, the subject matter at issue is of such importance that attention at the very highest level is imperative; or
>
> (ii) in the case of an agency headed by a collegial body, the subject matter at issue is of special importance, the cases comprising the relevant class of decisions are few in number, and the agency either has no other significant non-adjudicatory functions or has few such functions and has a sufficient number of members adequately to perform review and other tasks.[322]

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[320] Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 287 (1996).
[321] Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19,783 (July 23, 1973).
[322] Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983)

As the case studies appended to this report illustrate, institutional design is an ongoing, iterative process in which both congressional and executive-branch actors (and perhaps increasingly the courts) actively participate. As Eisenberg and Mendelson observe: "Over time the political branches have continued to gather information and innovate, modifying agency structures and procedures to improve them in light of experience . . . ."[323]

IV. Options for Structuring Direct Participation by PAS Officials

As an initial matter, policymakers must consider whether or not PAS officials should participate at all in the adjudication of individual cases. We briefly address that question below. But the participation by PAS officials in the adjudication of individual cases is not a binary choice. There are many options for structuring participation by PAS officials, each with potential benefits and drawbacks.

As we discuss below, policymakers must consider at least the following questions to determine the appropriate role a PAS official(s) should play in the adjudication of individual cases under a program:

(1) Should a PAS official(s) participate in any capacity in the adjudication of individual cases and, if so, which PAS official(s)?

For programs in which direct participation by a PAS official(s) is deemed beneficial:

(2) At what level or stage of adjudication should the PAS official(s) participate?
(3) In what circumstances should the PAS official(s) participate directly in the adjudication of cases?
(4) What procedures should the PAS official(s) use when they participate in the adjudication of individual cases?
(5) What legal or precedential effect should decisions of the PAS official(s) be accorded?
(6) When, if ever, should the PAS official(s) be disqualified or recuse himself or herself from participating directly in the adjudication of a case?
(7) What staff support should be available to the PAS official(s) when he or she participates directly in the adjudication of cases?

A. To Participate Directly or Not

Determining whether PAS officials should participate in the adjudication of individual cases—and, if they do, when, how, and how often they should participate—depends ultimately on consideration of the policy objectives that policymakers aim to achieve for a specific adjudicative system and whether participation by PAS officials best accomplishes them. In Recommendation 2020-3, *Agency Appellate Systems*, ACUS considered best practices for agency appellate systems, whether staffed by PAS officials or by non-PAS officials such as career

[323] Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 74–77 (2023).

administrative appeals judges[324] or senior executives. The recommendation identified several possible objectives of agency appellate systems, including:

> the correction of errors, inter-decisional consistency of decisions, policymaking, political accountability, management of the hearing-level adjudicative system, organizational effectiveness and systemic awareness, and the reduction of litigation in federal courts.

In this section, we assume the potential value of agency appellate systems in achieving such objectives but consider the extent to which adjudication by PAS officials, in particular, might serve or disserve them.

For any adjudicative system, policymakers must consider: (1) the potential advantages of assigning adjudicative functions to PAS officials; (2) the potential disadvantages of assigning adjudication functions to PAS officials; and (3) the comparative advantages or disadvantages of alternative mechanisms for directing and supervising the system.

The programs surveyed for this report, and described in the appended case studies, illustrate nicely how policymakers in Congress and the executive branch have navigated tradeoffs. They encompass a range of structures, including (1) a complete absence of direct participation by a PAS official(s) as a matter by statute (e.g., civilian contract disputes, longshore and harbor worker's compensation, immigrant and nonimmigrant visas) or internal delegation of authority (e.g., old-age, survivors, and disability insurance; animal health protection enforcement); (2) legally authorized but unused direct participation by a PAS official(s) (e.g., air and water pollution enforcement); (3) infrequent or intermittent review by PAS officials (e.g., immigration removal, payment of prevailing wage rates by federal contractors); and (4) frequent and routinized appellate review by PAS officials (e.g., securities fraud enforcement, tax deficiency cases, veterans disability compensation, unfair practices in import trade).

1. Potential Advantages

There are at least potential advantages of PAS participation in the adjudication of cases, including: (1) centralized coordination of policymaking, (2) political control of policymaking, (3) greater access to expertise in policymaking, (4) ability to gain and act on systemic awareness, (5) ability to promote interdecisional consistency, and (6) ability to make difficult decisions.

1. Centralized Coordination of Policymaking. With some notable exceptions, Congress typically assigns responsibility for all aspects of the administration of a federal program (including adjudication) to a single PAS official or a collegial body made up of multiple PAS officials. "The most important reason for allowing agency heads to retain their review authority," Weaver observed, "is to permit them to control regulatory schemes under their supervision."[325] Adjudications may involve "interpretations of statutory and regulatory provisions, and these

[324] *See* 5 U.S.C. § 5372b.
[325] Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 288–89 (1996)

interpretations can contain policy choices that result in the creation of new policies and rules."[326] Programs vary in the extent to which non-PAS adjudicators must confront important or novel questions of law or policy in the course of adjudicating individual cases. But in programs in which such questions regularly arise, the option for review by a PAS official(s) may promote centralized coordination of policymaking.

2. Political Control of Policymaking. A traditional rationale for assigning administrative policymaking to PAS officials, both as a constitutional and policy matter, is to ensure that policymaking is responsive to the preferences of the electorate.[327] Adjudication is an important mode for developing policy in some programs—and historically, at the time of the APA's enactment, was a primary means for developing policy.[328] The NLRB, for example, famously relies on case-by-case adjudication as its primary policymaking mode.[329] In such contexts, "political oversight of adjudication resembles rulemaking oversight and supports consistent, accountable policy development."[330] In other programs, individual cases may never or only rarely give raise to novel or important legal or policy questions.

3. Greater Access to Expertise in Policymaking. When policy questions arise, PAS officials might have a comparative advantage over non-PAS officials given "greater access to experts and staff that provide inputs and partake in the deliberative process that lead to better informed decisions than adjudicatory officers."[331] There is, of course, variation in the expertise available to PAS officials. Primarily adjudicative agencies might not have as much access to such expertise as combined-function agencies.

4. Ability to Gain and Act on Systemic Awareness. PAS-official participation might "help[] the agency head gain greater awareness of how a regulatory system is functioning."[332] Walker and Wasserman observe that such awareness not only helps the agency head "tailor[] training and instruction for the agency's adjudicators" but also helps him or her "consider whether adjustments to the regulatory scheme are necessary." This awareness, they write, is "even more critical with respect to agencies that have substantial enforcement or similar regulatory responsibilities."[333] Of course, there are also other mechanisms by which a PAS official might seek to gain and act on systemic awareness.

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[326] *Id*.
[327] Russell L. Weaver, *Appellate Review in Executive Departments*, 48 ADMIN. L. REV. 251, 287–88 (1996); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141 (2019).
[328] *See* Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 978 (1991).
[329] *See* Admin. Conf. of the U.S., Recommendation 91-5, *Facilitating the Use of Rulemaking by the National Labor Relations Board*, 56 Fed. Reg. 33,851 (July 24, 1991).
[330] Rebecca Eisenberg & Nina Mendelson, *Limiting Agency Head Review in the Design of Administrative Adjudication*, YALE J. REG. NOTICE & COMMENT (Feb. 21, 2022), https://www.yalejreg.com/nc/symposium-decisional-independence-06/.
[331] Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 175 (2019).
[332] Russell L. Weaver, *Appellate Review in Executive Departments*, 48 ADMIN. L. REV. 251, 289 (1996).
[333] Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 177 (2019).

5. Ability to Promote Interdecisional Consistency. PAS-official participation in adjudication might "help ensure consistency in adjudicative outcomes." Although agency heads direct and supervise the work of non-PAS adjudicators through substantive and procedural rules and managerial controls such as training, performance management, and quality assurance techniques, inconsistency remains a feature of many adjudicative systems. The option for a PAS official to review decisions made by non-PAS officials might "help[] ensure that agency policy preferences are consistently applied and that similarly situated parties receive similar results across decision-makers."[334] A PAS official's ability to promote interdecisional consistency by exercising review authority likely depends on his or her ability to personally consider a sufficient proportion of cases.

6. Ability to Make Difficult Decisions. Weaver writes: "Some argue that only political appointees can adequately deal with some types of cases." He cites the example of cases involving allegations against other political appointees.[335] In other words, "[t]he political appointee has more clout in the regulatory structure, which makes it easier for him to take difficult positions."[336] Programs differ, of course, in the extent to which individual cases are politically sensitive.

2. Potential Disadvantages

There are at least eight potential disadvantages of PAS participation in the adjudication of individual cases: (1) lack of adjudicative capacity, (2) potential to increase the duration and cost of administrative adjudication, (3) limited opportunity for party participation, (4) limited opportunity for public participation in policymaking, (5) incentives to develop policy through adjudication, (6) frequent turnover, (7) a perception of unfairness or partiality, (8) lack of specialized expertise, and (9) risk of political manipulation of adjudicative decision making.

1. Lack of Adjudicative Capacity. The Attorney General's Committee on Administrative Procedure emphasized that the limited capacity of PAS officials to individually decide large numbers of cases in a timely manner:

> In single headed departments and agencies, like the Post Office and the Departments of Commerce and Agriculture, the Committee recommends that all pretense of consideration of each case by the agency head be abandoned and that there be created either boards of review, as in immigration procedure, or chief deciding officers who shall exercise the final power of decision. But if the agency head in these departments does review a case, he must assume the burden of personal decision. It is obviously impossible for the Postmaster General to give personal consideration to every case of use of the mails to defraud, for the

[334] Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 177 (2019).
[335] Weaver cites a former high-level official, who "wondered whether someone other than a political appointee would have the temerity to act against another political appointee." Russell L. Weaver, *Appellate Review in Executive Departments*, 48 ADMIN. L. REV. 251, 289 (1996).
[336] *Id*.

> Secretary of Commerce to pass on the suspension or revocation of seamen's licenses, or for the Secretary of Agriculture to adjudicate all the cases arising under the many statutes administered by his Department. In such instances the cases should be heard and initially decided by the hearing commissioners and reviewed if necessary by designated officials who are charged with that responsibility and who will perform it personally.[337]

Weaver further notes that, given competing demands on their time, many agency heads realistically would need to delegate many tasks associated with decision making and engage personally "in a very limited review process."[338] Otherwise, the adjudication of individual cases could quickly occupy much of agency heads' busy schedules.[339]

2. Potential to Increase the Duration and Cost of Administrative Adjudication. In programs where PAS officials play a direct role in adjudicating cases, particularly multi-member agencies with quorum requirements, vacancies can significantly impact agencies' ability to decide cases in a timely manner. Additionally, as PAS officials likely do not have background in adjudication, it can increase time and resources to ensure they have proper expertise in the procedural and substantive issues involved in case adjudication.

3. Limited Opportunity for Party Participation. Weaver observes that the "major problem with agency review is that the agency head's review is often the most meaningful part of the adjudicative process, but litigants often have little opportunity to participate." Agency-head review is especially meaningful because the agency head may not be bound by the findings of the lower-level adjudicator. At the same time, the agency head often has limited practical capacity to personally consider the law and facts of the case and so typically conducts his or her review "on the record," perhaps with an opportunity to submit additional arguments but rarely an opportunity for oral presentation.[340] There is wide variation in PAS officials' capacity to participate in the adjudication of individual cases, of course, and procedures in cases in which they participate vary accordingly.

4. Limited Opportunity for Public Participation in Policymaking. There is a consensus that public participation is valuable when agencies develop policy. As ACUS has stated in the context of rulemaking: "By providing opportunities for public input and dialogue, agencies can obtain more comprehensive information, enhance the legitimacy and accountability of their decisions, and increase public support for their rules."[341] Opportunities for public participation may be absent or less robust when agencies develop policies through adjudication. Even when opportunities for public participation do exist (e.g., amicus briefing), individual adjudications may lack the visibility of notice-and comment rulemakings and thus may not attract the same degree of public engagement. Of course, the same is true even when non-PAS

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[337] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 53 (1941).
[338] Russell L. Weaver, *Appellate Review in Executive Departments*, 48 ADMIN. L. REV. 251, 290–92 (1996).
[339] The *Morgan* cases, described *infra* at notes 502–511, offer perhaps the best historical example of this reality.
[340] Russell L. Weaver, *Appellate Review in Executive Departments*, 48 ADMIN. L. REV. 251, 290–92 (1996).
[341] Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).

adjudicators are required to answer novel or important questions of law or policy in the course of adjudicating a case.[342]

5. Incentives to Develop Policy Through Adjudication. There is a longstanding, widely held consensus that generalized rulemaking is a more effective mechanism for policymaking than particularized adjudication.[343] Separating a program's chief policymaker from its adjudicative apparatus and requiring him or her to "communicate policies to an independent adjudicating body in advance" by regulation may lead the policymaker to "draft those policies with precision and coherence."[344] Conversely, combining policymaking and adjudication in a single official might incentivize the policymaker to rely on adjudication to develop policy and disincentivize the use of notice-and-comment rulemaking.[345]

6. Frequent Turnover. Weaver notes that turnover in PAS positions, especially during changes in presidential administrations, can slow down agency decision making.[346] This can affect the timeliness of adjudication in programs in which review by a PAS official(s) is mandatory or petition for review by a PAS official(s) is a prerequisite to judicial review.[347]

7. Perception of Unfairness or Partiality. Some commentators have raised concerns in some programs about combining adjudication and enforcement in a single official or collegial body.[348] In a few programs, such concerns have prompted Congress to establish separate agencies to execute these functions.[349] Even when there is an internal separation of functions, Weaver suggests that there may be "perception problems." He explains:

> In some agencies, the agency head delegates the review process to the agency's office of general counsel—the same office that is litigating the case. The agency's regulations may provide a wall of separation between those who litigate and those who adjudicate, but it is difficult for those outside the agency to know whether this separation is actually observed. Parties know that their case has been appealed, and they may have the chance to file briefs. But they may hear little or

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[342] Russell L. Weaver, *Appellate Review in Executive Departments*, 48 ADMIN. L. REV. 251, 296 (1996).
[343] *See* Admin. Conf. of the U.S., Recommendation 91-5, *Facilitating the Use of Rulemaking by the National Labor Relations Board*, 56 Fed. Reg. 33,851 (July 24, 1991); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1396–97 (2004); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 87 HARV. L. REV. 921, 922 (1965). *But see* Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 498–99 (2021).
[344] Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 984–85 (1991).
[345] Russell L. Weaver, *Appellate Review in Executive Departments*, 48 ADMIN. L. REV. 251, 294–96 (1996).
[346] Russell L. Weaver, *Appellate Review in Executive Departments*, 48 ADMIN. L. REV. 251, 292 (1996).
[347] *See* 5 U.S.C. § 704 ("Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority"); *see also* Darby v. Cisneros, 509 U.S. 137 (1993).
[348] Russell L. Weaver, *Appellate Review in Executive Departments*, 48 ADMIN. L. REV. 251, 293 (1996).
[349] *See* Admin. Conf. of the U.S., Recommendation 86-4, *The Split-Enforcement Model for Agency Adjudication*, 51 Fed. Reg. 46,986 (Dec. 30, 1986).

> nothing for the many months the agency head takes to consider the case. During this time, the agency head may consult with many different people within the agency. Parties outside the agency will generally know little about who discussed what with whom, and may question the fairness of the process.[350]

In some programs review by a PAS official may simply "detract[] from the appearance of independence."[351] That will depend, of course, on factors including the nature of cases under a program, the types of matters frequently in dispute in cases, and the relationship between parties and the agency.

8. Lack of Specialized Expertise. Eisenberg and Mendelson (and others) question whether PAS officials in certain contexts are likely to have the substantive expertise necessary to decide disputed factual matters in a fair, accurate, and timely manner. PAS officials might lack the scientific or technical expertise needed in some programs to adjudicate cases.[352] Given their typically short tenure in office, PAS officials may also lack the procedural, managerial, and organizational expertise obtained by career officials through years of experience.[353] Further, if the delegation of final decisional authority might actually "encourage appointees and civil servants alike to develop more specialized expertise,"[354] retaining authority to review decisions of lower-level adjudicators might undermine the development of specialized expertise.

9. Risk of Political Manipulation of Adjudicative Decision Making. Commentators have long raised concerns about the potential for the President and political appointees to politicize administrative adjudication.[355] While there are certainly historical instances of politicization,[356] the likelihood and consequences of politicization vary from program to

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[350] Russell L. Weaver, *Appellate Review in Executive Departments*, 48 ADMIN. L. REV. 251, 293 (1996).
[351] Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 1988 IMMIGR. & NAT'LITY REV. 233, 319; *see also* Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 544 (2011) ("Board [of Immigration Appeals] members adjudicative with the knowledge that their boss, a politically appointed prosecutor, may take a case away from them.").
[352] Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 62–64 (2023).
[353] *Cf.* Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571, 1596–97 (2015).
[354] Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 486–87 (2017).
[355] *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2362 (2001); Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. REV. 2679 (2019); Russell L. Weaver, *Appellate Review in Executive Departments*, 48 ADMIN. L. REV. 251, 293–94 (1996); Richard J. Pierce, Jr., *Agency Adjudication: It Is Time to Hit the Reset Button*, 28 GEO. MASON L. REV. 643, 650 (2021); Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707 (2019); Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 49 (2020); Bijal Shah, *The President's Fourth Branch*, 92 FORDHAM L. REV. 499 (2023); Emily Bremer, *Presidential Adjudication*, 110 VA. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=4726519; Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1 (2018); David Hausman, Daniel E. Ho, Mark Krass & Anne McDonough, *Executive Control of Agency Adjudication: Capacity, Selection and Precedential Rulemaking*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3830897; Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. L. RSRV. REV. 1083 (2015).
[356] The Teapot Dome scandal is perhaps the best known incident.

program. Eisenberg and Mendelson raise the concern that participation by PAS officials in "low-visibility decisions with high financial stakes for well-funded and politically-connected interests" carries a heightened risk of injecting politics into adjudication without clear benefits.[357]

3. Comparison with Other Participation Mechanisms

In addition to considering the potential advantages and disadvantages of PAS-official participation in a specific program, policymakers must also consider whether alternatives to PAS-official participation are more likely to achieve policy objectives and less likely to raise the concerns described in the previous section. As discussed earlier, alternatives include the adoption of substantive and procedural rules, the issuance of administrative manuals and staff instructions, managerial controls, and quality assurance systems.[358]

By way of example, the potential advantages of PAS-official participation may outweigh the potential disadvantages in a program in which only a small number of cases require resolution through trial-like proceedings and cases regularly require the agency to resolve novel or important questions of law, policy, or discretion. Alternative mechanisms may not be as effective at coordinating or ensuring political accountability over regulatory policymaking.[359]

Conversely, the potential disadvantages of PAS-official participation may outweigh potential advantages in a program in which a high volume of cases mostly require individualized factfinding and rarely raise novel or important questions of law, policy, or discretion. No doubt, there is a great deal of interstitial policy interpretation and policy implementation even in such systems—whether or not termed "policymaking"[360]—but there may be more efficient and effective mechanisms that a busy PAS official, charged with other tasks, can use to coordinate policy development, promote decisional accuracy and interdecisional consistency, and gain systemic awareness.[361]

4. Choosing the PAS Official(s) to Participate

Deciding that direct participation by a PAS official(s) is warranted in a particular program does not determine *which* PAS official(s) should be assigned that function. As discussed earlier, Congress typically assigns overall administration for a program (including adjudication) to a single PAS official or a collegial body made up multiple PAS officials. In such programs, the PAS official(s) may (1) retain authority to participate directly in the adjudication of cases,

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[357] Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 68–71 (2023).
[358] *See supra* Part II.A.12.
[359] Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 28–29 (2023); Daniel J. Gifford, *Adjudication in Independent Tribunals; The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 992–93 (1991).
[360] *See generally* Charles H. Koch, Jr., Policymaking by the Administrative Judiciary, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 49 (2005).
[361] Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 27–28 (2023); Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 967–68 (1991).

(2) delegate that function to another PAS official(s) under his or her supervision, or (3) transfer the function to a PAS official(s) elsewhere in the executive branch.

The first approach is common. In establishing a system of discretionary review of ARB decisions by a PAS official, for example, then-Secretary of Labor Eugene Scalia assigned that function to the Secretary rather than the Senate-confirmed heads of relevant DOL subunits, such as the Administrator of the Wage and Hour Division. Since its inception, the ARB has reported directly to the Secretary and Deputy Secretary, rather than the heads of subunits, in order to internally separate adjudicative from enforcement functions.[362]

The second approach is common among executive departments. The Secretary of Transportation, for example, has delegated authority to adjudicate matters under several programs to, among others, the Federal Aviation Administrator,[363] the Federal Motor Carrier Safety Administrator,[364] Pipeline and Hazardous Materials Safety Administrator,[365] and the Senate-confirmed heads of other DOT operating units. And the Attorney General has delegated authority to adjudicate matters relating to controlled pharmaceuticals to the Administrator of the Drug Enforcement Administration.[366] In such programs, delegations likely represent an effort to optimize, among other values, capacity and expertise.

The third approach can be accomplished through formal delegations, memoranda of understanding, and other documents transferring authority from one executive-branch agency to another or delineating the jurisdiction of different agencies. Bijal Shah discusses one example involving transfers of authority between the Secretary of the Treasury, Customs and Border Patrol, and the Food and Drug Administration. Such intrabranch transfers of authority likely represent efforts to optimize expertise and capacity.[367]

Multimember bodies often have statutory authority to delegate adjudicative authority to a single member or a division or panel of members. This is particularly common among Article I tribunals, such as the Tax Court and CAVC, but some administrative agencies, including the NLRB[368] and historically the Interstate Commerce Commission,[369] do so as well. In such programs, delegations likely represent an effort to optimize capacity.

Finally, in some programs, Congress has specifically chosen an alternative PAS official(s) to adjudicate matters. Examples include occupational safety and health matters, mine safety and health matters, airmen certification matters, immigration removal, federal employee adverse actions, federal employment discrimination, tax deficiency cases, veterans disability compensation. In such cases, Congress typically assigns adjudication to a multimember body

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[362] *See* Appendix H.
[363] 49 C.F.R. § 1.83(a)(8);
[364] 49 C.F.R. § 1.87(a)(8)–(9).
[365] 49 C.F.R. § 1.97(a)(3), (5).
[366] *See* Appendix G.
[367] Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 842–46 (2015).
[368] Christopher J. Walker & Matthew Lee Wiener, Agency Appellate Systems App. K 5–6 (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.).
[369] *See infra* note 396.

independent of the PAS official(s) with primary administrative authority for the program. Members are often protected from at-will removal by the President, and they may serve relatively long, fixed terms.[370] They may also be subject to statutory limitations on the types of persons who can serve in such positions, including expertise and party balancing requirements.[371] These bodies may also be exempted from presidential control over budgeting and other congressional relationships.[372]

Such structures can serve any of several objectives. Most obviously, they are often intended to separate adjudication from other executive-branch functions (e.g., policymaking, investigation, prosecution) and firmly shield decision making from control by the President, political appointees, and other executive-branch actors.[373] Additionally, their creation may "help[] mitigate concerns with the delegation of . . . adjudicatory authority to executive officials who may be tempted to use this authority for partisan benefit."[374] Moreover, the establishment of such bodies may optimize capacity by creating an adjudicative authority that "can focus on a narrow task of national importance and not have to compete with other sub-department agencies for attention, budgets, or personnel."[375] Finally, the combination of long fixed terms and relative job security may incentivize individual members to develop expertise.[376]

B. Preliminary Decision, Hearing, First-Level Review, or Second-Level Review

Systems of administrative adjudication often entail multiple stages.[377] A typical structure in which there is a legally required opportunity for an evidentiary hearing contains at least three stages: (1) a preliminary decision reached through bureaucratic methods; (2) an initial, tentative, or recommended decision made after a trial-like hearing; and (3) an opportunity for final administrative review.[378] A typical structure in which no evidentiary hearing is required may consist of an informal decision-making process, resulting in an initial, proposed, or preliminary

[370] JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 97 (2018).
[371] *See* JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 92 (2018).
[372] *See* JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 104 (2018).
[373] *See* Admin. Conf. of the U.S., *The Split-Enforcement Model for Agency Adjudication*, 51 Fed. Reg. 46986 (Dec. 30, 1986).
[374] JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 53 (2018).
[375] JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 53 (2018).
[376] *See* Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935).
[377] *See generally* Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377 (2021); Christopher J. Walker, *Stages of Agency Adjudication Processes*, *in* A GUIDE TO FEDERAL AGENCY ADJUDICATION 125–57 (Jeremy S. Graboyes ed., 3d ed. 2023).
[378] *See* 5 U.S.C. §§ 554, 556–557; Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94314 (Dec. 23, 2016).

decision, followed by an opportunity for reconsideration or final administrative review.[379] Such structures allow matters to be concluded as efficiently as possible, reserving the added time and cost of additional procedures and more senior adjudicators only for matters that cannot be resolved satisfactorily at earlier stages.[380]

A brief note on terminology: The Committee used "informal" to mean the first stage of adjudication at which agency personnel decide matters through essentially bureaucratic methods like examinations and investigations. It reserved the term "formal" for a subsequent stage involving a hearing and any opportunity for final review by the agency head.[381] Because "informal" has come to mean any adjudication not subject to the APA's hearing provisions,[382] we use the term "preliminary," also used by the Committee, to refer to the adjudication of matters through bureaucratic methods, whether or not there exists a subsequent opportunity for an evidentiary or other quasi-judicial hearing.

PAS officials could participate at any or all stages of an adjudicative process, but there often would be little value in their doing so. Given PAS officials' limited capacity, policymakers must consider the stages of an overall adjudicative process at which participation by a PAS official is likely to be most valuable.

1. Preliminary Decision

The Attorney General's Committee on Administrative Procedure recommended that agency heads (typically PAS officials) largely delegate their authority to (1) dispose of routine matters, (2) dispose of matters informally, and (3) initiate formal proceedings. Although it recognized there may be good reasons for agency heads to retain some role in the informal disposition of matters and the initiation of formal proceedings,[383] the Committee recommended:

> Cases of difficulty or novelty should continue to have the attention of the agency heads. But where the matter falls into an established pattern, and where the agency's policies have become crystallized so that little question arises concerning whether a complaint should or should not be issued, the agency heads should be relieved of the duty of making the decision to proceed or not to proceed in each case.

Rather than participating in the adjudication of all cases, the Committee believed that, in most cases, agency heads could effectively supervise and direct the activities of lower-level officials through guidance, careful selection of personnel, monitoring, and in rare cases, "consideration by

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[379] *See* 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).
[380] Jeremy S. Graboyes & Jennifer L. Selin, Improving Timeliness in Agency Adjudication 13 (Dec. 11, 2023) (report to the Admin. Conf. of the U.S.).
[381] *See* Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 404 (2021).
[382] *See* MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 5–6 (2019).
[383] *See* Michael Asimow, *Greenlighting Administrative Prosecution*, 75 ADMIN. L. REV. 227 (2023)

the agency heads of cases for which no such policies have been crystallized or in which application of the policies is difficult."[384]

The Committee's recommendations, and the APA which incorporated them, have informed administrative practice over the past eight decades. There are, of course, many programs in which PAS officials participate in the informal disposition of matters or the initiation of formal proceedings. At several independent regulatory agencies, for example, PAS officials routinely participate in approving settlement agreements and "greenlighting" formal proceedings.[385]

2. Hearing

The Committee focused much of its attention on the proper role of agency heads in cases that require resort to formal proceedings. The Committee observed (correctly) that most cases can be concluded informally, and that formality was required only in two limited circumstances: first, when a case is of "such far-reaching importance to so many interests that sound and wise government is thought to require that proceedings be conducted publicly and formally so that the information on which action is to be based may be bested, answered if necessary, and recorded"; and second, when the differences between the parties' interests "have proved sufficiently irreconcilable to require settlement through formal public proceedings in which the parties have an opportunity to present their own and attack the others' evidence and arguments before an official body with authority to decide the controversy."[386]

Although PAS officials might play a valuable role in either circumstance, the Committee acknowledged that, though comparatively few in number, formal proceedings might still consume a fair amount of agency heads' limited capacity. It observed: "In very few agencies can the heads of the agency sit, individually or together, to hear the testimony of witnesses in formal proceedings. The press of their many duties is too great."[387]

A better use of agency heads' limited capacity, the Committee believed, was "to supervise and direct and to hear protests of alleged error." In many cases, a decision by a lower-level official, bearing "a hallmark of fairness and capacity," would likely resolve the matter. And in the limited cases in which an initial decision did not resolve the matter, it would at least provide "the statement of it from which appeal may be taken to the heads."[388] For this purpose, the Committee recommended importing into the administrative context the equity courts' practice of using special masters.[389] This recommendation led Congress to create the ALJ system. As the

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[384] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 22–24 (1941).
[385] *See* Michael Asimow, *Greenlighting Administrative Prosecution*, 75 ADMIN. L. REV. 227 (2023).
[386] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 43 (1941).
[387] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 24 (1941).
[388] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 43–44 (1941).
[389] REPORT OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ON S. 7, A BILL TO IMPROVE THE ADMINISTRATION OF JUSTICE BY PRESCRIBING FAIR ADMINISTRATIVE PROCEDURE, H.R. REP. NO. 79-1980, at 38 (1946).

legislative history to the APA notes, "the examiner system is made necessary because agencies themselves cannot hear cases."[390]

For formal adjudication, the APA contemplates that one or more PAS officials might preside at the reception of evidence. More often, agencies have delegated the hearing function to ALJs. A 1964 study of the FTC, for example, found that no Commissioner had presided over a hearing since 1956.[391] The same is generally true for adjudications, not subject to the APA's formal hearing provisions, in which there is a legally required opportunity for an evidentiary hearing. Although some agencies have rules that permit PAS officials to preside over hearings,[392] it is unclear how often they actually do so.

3. First-Level and Second-Level Review

Most commonly, PAS officials who participate in the adjudication of individual cases do so in a reviewing capacity. At some agencies, PAS officials provide the first and only opportunity for appellate review.[393] This is particularly common among independent regulatory agencies[394] but also exists in some programs administered by cabinet departments.[395]

Some multimember agencies have delegated decision-making authority in certain circumstances to individual members or panels of members, with the full agency "reviewing decisions only in cases of exceptional importance or upon petition." Historically, both the Interstate Commerce Commission and the Board of Tax Appeals followed this model.[396] The chief benefit of this model is that it affords members more time to give personal attention to cases brought before them. Some Article I courts follow a similar model today, including CAVC and the Tax Court (the successor to the Board of Tax Appeals). At CAVC, cases are ordinarily decided by a single judge. In exceptional circumstances, however, cases may be decided by a three-judge panel or the entire court sitting en banc.[397] Tax Court cases are ordinarily decided by a single judge, but the Chief Judge may determine whether the full court sitting en banc should review a case.[398] Of course, both CAVC and the Tax Court have more members than the typical multimember agency; CAVC has seven members,[399] and the Tax Court has 19.[400]

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[390] ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79TH CONG. 210 (1946).
[391] Carl A. Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 466 (1964).
[392] *See, e.g.*, 85 Fed. Reg. 63,166.
[393] Christopher J. Walker & Matthew Lee Wiener, Agency Appellate Systems 7–9 (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.).
[394] Christopher J. Walker & Matthew Lee Wiener, Agency Appellate Systems 8 (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.).
[395] *See, e.g.*, Russell L. Weaver, *Appellate Review in Executive Departments*, 48 Admin. L. Rev. 251, 265–69 (1996).
[396] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 53 (1941); JAMES M. LANDIS REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 38–39 (1960).
[397] U.S. Ct. of Vet. App., CAVC Court Process, https://www.uscourts.cavc.gov/documents/CourtProcess.pdf (last visited Apr. 7, 2024).
[398] *See* 26 U.S.C. § 7444.
[399] 38 U.S.C. § 7253.
[400] 26 U.S.C. § 7443.

In some programs, PAS officials have delegated first-level review authority to an appellate board staffed by non-PAS officials (or, in some cases, a single non-PAS judicial officer), with PAS officials reviewing cases only in very limited circumstances. This model developed in the mid-twentieth century as agencies such as the Federal Power Commission, FCC, ICC, and NRC struggled to keep up with increasingly high caseloads.[401] Delegating review of routine decisions to intermediate appellate boards allowed PAS officials "more time for cases raising significant policy questions."[402]

In 1960, James Landis recommended that then-President-Elect Kennedy address delays in agency adjudication at several multimember regulatory agencies through the adoption of reorganization plans that expressly permitted "delegation of the decision making powers to subordinate officials, such as hearing examiners or employee boards, subject only to a limited administrative review by the agency itself."[403]

Eight years later, ACUS recommended that agencies that have "a substantial caseload of formal adjudications" consider establishing intermediate appellate boards and that Congress amend the APA to permit such delegations expressly. ACUS explained that doing so would "make more efficient use of the time and energies of agency members and their staffs," "improve the quality of decision without sacrificing procedural fairness," and "help eliminate delay in the administrative processes."[404]

Although the model first took hold in the independent regulatory agencies, the shift in preference from particularized proceedings (usually adjudications) to generalized rulemaking as means for developing policy eventually reduced many independent regulatory agencies' caseloads. Several intermediate appellate boards were eliminated as a result, including the NRC's in 1991 and the FCC's in 1996.[405] Intermediate appellate boards (and individual judicial officers) continue to exist in executive departments and single-headed agencies. Current examples include the Justice Department's Board of Immigration Appeals,[406] the Labor Department's ARB,[407] and USPTO's TTAB.[408] Post-*Arthrex*, PTAB also functions as an intermediate appellate board.[409]

As a general principle, it may make sense for PAS officials to serve as first-level reviewers when caseloads are relatively low and cases regularly raise novel or important

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[401] J. Parker Connor, *The Right to Review at the Agency Level—Recent Federal Legislative Changes*, 67 DICK. L. REV. 53 (1962); James O. Freedman, Report of the Committee on Agency Organization and Procedure in Support of Intermediate Appellate Boards: Subparagraph 1(a) of Recommendation No. 6 (1968) (report to the Admin. Conf. of the U.S.).
[402] Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 990–91 (1991).
[403] JAMES M. LANDIS REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 65–66 (1960)
[404] Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19783 (July 23, 1973).
[405] Russell L. Weaver, *Appellate Review in Executive Departments*, 48 ADMIN. L. REV. 251, 263–70 (1996).
[406] *See* Appendix M.
[407] *See* Appendix H.
[408] *See* Appendix T.
[409] *See* Appendix Q.

questions of law, policy, or discretion. As caseloads increase and the frequency of cases raising novel or important questions of law, policy, and discretion decrease, it may be a more efficient and effective use of a PAS official's limited time to serve as a second-level reviewer. (And as agencies receive increasingly high caseloads and cases only rarely raise novel or important questions of law, policy, or discretion, the utility of direct participation by the PAS official in adjudication becomes less clear.[410])

C. Case Selection

This section examines the manner in which cases are selected for direct participation by a PAS official(s). We focus on six aspects of case selection: (1) the force and effect of decisions issued by lower-level adjudicators, (2) events triggering direct participation during a proceeding before a lower-level decision maker, (3) events triggering direct participation following issuance of a decision by a lower-level decision maker, (4) mandatory and discretionary participation by PAS officials, and (5) grounds for exercising discretion to participate directly in the adjudication of cases, and (6) direct participate as a prerequisite to judicial review.

1. Force and Effect of Decisions Issued by Lower-Level Adjudicators

In many programs, non-PAS adjudicators generally issue decisions that become final and binding unless the decision is appealed to or selected for further review by a PAS official. This practice is common among agencies surveyed for this study and was the approach recommended by the Attorney General's Committee on Administrative Procedure in 1941.[411] As discussed earlier, ACUS in 1968 recommended that "every agency having a substantial caseload of formal adjudication" consider adopting "procedures for according administrative finality to presiding in officers' decisions."[412] The chief benefit of this approach is that, given competing demands on their time, PAS officials only participate in cases in which there is a legitimate dispute or an issue of exceptional importance. This "make[s] more efficient use of the time and energies of agency members" and "help[s] eliminate delay in the administrative process."[413]

There are several programs, however, in which non-PAS adjudicators generally issue recommended decisions, which trigger automatic review (often by one or more PAS officials). The decision becomes final and binding only after the reviewing authority takes some affirmative action. The chief benefit of this approach, depending on one's perspective, is that the reviewing authority exercises closer supervision of the adjudicative system and gains more comprehensive

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[410] Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 992–99 (1991).
[411] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 50–51 (1941).
[412] Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19783 (July 23, 1973). In 1962, the second temporary ACUS recommended that Congress amend the APA to "make clear than an agency, upon review of the presiding officer's decision, may confine its review to alleged errors in that decision" and require parties to clearly show prejudicial error requiring further review. SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. DOC. NO. 88-24, at 153–63 (1963); *see also* FINAL REPORT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 13–15 (1962).
[413] *Id*.

awareness of the system's functioning. In systems in which PAS officials serve as reviewers, the drawback, of course, is that each case requires the personal attention of PAS officials.

The APA's formal-adjudication provisions contemplate the issuance of recommended decisions, and some agencies surveyed for this study, including the ITC and DEA, continue to use this approach. An interesting case is the FTC, which recently transitioned from a decades-only rule, under which ALJs issue initial decisions, to a new rule under which ALJs issue recommended decisions requiring further action by the Commission.[414] No public explanation was provided for the change.

Some programs strike a balance between the approaches, specifying limited circumstances in which a recommended decision should be issued[415] or giving PAS officials flexibility to direct non-PAS adjudicators to issue recommended decisions only in those cases in which the PAS officials wish to issue the final decision of the agency.[416] Non-PAS adjudicators might also be given flexibility to issue recommended decisions when they believe participation by PAS officials is warranted.

2. Events Triggering Direct Participation by a PAS Official(s) During a Proceeding Before a Lower-Level Adjudicator

In many programs, direct participation by a PAS official(s) takes place only after a lower-level adjudicator has issued a decision. In some programs, however, a rule provides for interlocutory review by the PAS official(s) while a proceeding is before a lower-level adjudicator. One benefit of a process for interlocutory review by a PAS official(s) is that it allows the official(s) to decide novel or important issues of law, policy, and discretion as soon as they arise. Interlocutory review may be an especially beneficial tool for coordinating policy development when an issue is present in multiple pending cases. One drawback is that interlocutory review creates an additional workload for the PAS official(s), who may already have limited capacity to decide matters in a timely manner. Consideration of the issue by the PAS official(s) may also benefit from further argument or evidentiary development before the lower-level adjudicator.

There are examples of programs in which a party may petition the PAS official(s) directly to consider a matter at issue in a proceeding before a lower-level adjudicators. One example is the trademark registration program.[417] (Interlocutory review apparently is not available in patent cases.[418])

In other programs, requests for interlocutory review are routed through the lower-level adjudicator. MSPB provides a representative example. A party must file a motion for certification

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[414] 88 Fed. Reg. 42872 (July 5, 2023).
[415] *See, e.g.*, 14 C.F.R. § 302.31 (DOT aviation proceedings); 15 C.F.R. § 766.17 (export controls).
[416] *See, e.g.*, 17 C.F.R. § 201.360(a)(1) (SEC); 47 C.F.R. § 1.274 (FCC).
[417] 37 C.F.R. § 2.146(e).
[418] *See Revised Interim Director Review Process*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/patents/ptab/decisions/revised-interim-director-review-process (last visited Apr. 7, 2024).

of an interlocutory appeal with the lower-level adjudicator before whom the case is pending. The adjudicator determines whether to grant or deny the motion. The adjudicator may also certify an interlocutory appeal to the Board on his or her own motion. The adjudicator may only certify a ruling for review if the record shows that "[t]he ruling involves an important question of law or policy about which there is substantial ground for difference of opinion" and "[a]n immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public."[419] This process—and indeed the quoted language—is consistent with ACUS Recommendation 71-1, *Interlocutory Appeal Procedures*.[420] It is also the approach adopted by the working group that revised ACUS's *Model Adjudication Rules* in 2018[421] and used in the federal courts.[422]

In some programs, interlocutory review may be available but "disfavored." SEC rules, for example, provided that the Commission "ordinarily will grant a petition to review a hearing officer ruling prior to its consideration of an initial decision only in extraordinary circumstances."[423]

3. Events Triggering Direct Participation by a PAS Official Following Issuance of a Decision By a Lower-Level Adjudicator

Our survey revealed six events that may trigger direct participation by a PAS official (or collegial body of PAS officials) following issuance of a decision by a lower-level adjudicator: (1) issuance of a recommended decision by the lower-level adjudicator, (2) petition for review filed directly with the PAS official(s) by a party or other interested person, (3) petition for review filed with the lower-level adjudicator or adjudicative body by a party or other interested person, (4) certification to the PAS official(s) by the lower-level adjudicator or adjudicative body, (5) certification to the PAS official(s) by a high-level non-adjudicator, and (6) sua sponte review by the PAS official(s).

1. Issuance of a Recommended Decision. Issuance of a recommended decision by an adjudicator at the level immediately below a PAS official automatically triggers consideration by the PAS official. As discussed above, lower-level adjudicators issue recommended decisions as a matter of course in some programs. In other programs, PAS officials direct lower-level officials to issue recommended decisions in specific cases, or lower-level adjudicators may have discretion to issue recommended decisions in specific cases and certify the records in such cases to the PAS official for final action.[424]

2. Petition for Review Filed Directly with the PAS Official(s) by a Party or Other Interested Person. A party or other interested person (e.g., an intervenor) dissatisfied with the decision of a lower-level adjudicator may petition the PAS official(s) directly to request further

[419] 5 C.F.R. §§ 1201.91, 1201.92.
[420] 38 Fed. Reg. 19787 (July 23, 1973).
[421] Admin. Conf. of the U.S., Model Adjudication Rules § 400 (2018).
[422] 28 U.S.C. § 1292.
[423] 17 C.F.R. § 201.400.
[424] *See supra* Part IV.C.1.

consideration. This is most common among agencies where PAS officials serve as first-level reviewers (e.g., FCC, MSPB, NLRB, SEC) and programs in which an Article I court serves as the second-level reviewer (e.g., CAVC, Tax Court). An example of a program in which a party or other interested person may petition a PAS official for second-level review is USPTO—for trademark cases and, after *Arthrex*, patent cases.

3. Petition for Review Filed with the Lower-Level Adjudicator or Adjudicative Body by a Party or Other Interested Person. A party or other interested person dissatisfied with the decision of a lower-level adjudicator may petition the adjudicator or adjudicative body, requesting that the case be referred to the PAS official for further consideration. In Davis-Bacon Act proceedings, for example, a party dissatisfied with a decision of the Labor Department's ARB may file a petition with the ARB requesting further review by the Secretary of Labor. The ARB considers the petition and refers the case to the Secretary for review if a majority of Board members determines further review is warranted.[425]

A petition filed under option two or three typically must contain exceptions to the lower-level decision and explain clearly why further review by the PAS official is warranted.[426]

4. Certification to the PAS Official(s) by the Lower-Level Adjudicator or Adjudicative Body. A lower-level adjudicator or adjudicative body may certify a case to a PAS official for consideration. The Board of Immigration Appeals, for example, may refer to the Attorney General for review any case that the Chairman or a majority of the Board believes should be so referred.[427] And the EAB may refer any case or motion to the EPA Administrator whenever it, "in its discretion, deems it appropriate to do so."[428] [429]

5. Certification to the PAS Official(s) by a High-Level Non-Adjudicator. In at least one program, a high-level official other than an adjudicator who is dissatisfied with the decision of a lower-level official may certify the case to a PAS official for consideration. Specifically, the Board of Immigration Appeals is directed to refer to the Attorney General all cases that "[t]he Secretary of Homeland Security, or specific officials of [DHS] designated by the Secretary with the concurrence of the Attorney General, refers to the Attorney General for review."[430]

6. Sua Sponte Review by the PAS Official(s). Following issuance of decision by a lower-level official, a PAS official may on his or her own motion select a case for further consideration. The APA contemplates that agency heads might review lower-level decisions on

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[425] 85 Fed. Reg. 13,186 (Mar. 6, 2020).
[426] *See, e.g.*, 37 C.F.R. § 2.146(c)(1).
[427] 8 C.F.R. § 1003.1.
[428] 40 C.F.R. § 22.4(a)(1). A similar rule exists at USPS, under which the Judicial Officer may "refer the record in any proceeding to the Postmaster General or the Deputy Postmaster General for final agency decision." Unlike the EPA Administrator, however, neither the Postmaster General nor the Deputy Postmaster General is a PAS official. The Postmaster General is appointed by nine Governors, who are PAS officials. 39 U.S.C. § 202(a)(1), (c). The Deputy Postmaster General is appointed by the Governors and Postmaster General. *Id*. § 202(d).
[429] 39 C.F.R. § 952.26(a)(5).
[430] 8 C.F.R. § 1003.1(h)(1)(ii). DHS attorneys prosecute immigration removal cases in proceedings before the Justice Department.

their own motion,[431] and the Attorney General's Committee on Administrative Procedure anticipated that the availability of own-motion review would help "preserve uniformity and effective supervision of an agency's work."[432] In Recommendation 83-3, ACUS stated: "Normally, a reviewing authority should call up a case for review sua sponte only where policy issues are involved and the functions of that authority include resolution of such issues."[433] More recently, in Recommendation 2020-3, ACUS encourages agencies to "consider implementing procedures for sua sponte appellate review of non-appealed hearing-level decisions."[434]

Programs in which a PAS official retains explicit authority to review the decisions of lower-level adjudicators on his or her own motion include Davis-Bacon Act enforcement,[435] federal employee adverse actions,[436] immigration removal,[437] immigration-related employment discrimination,[438] patentability,[439] securities fraud enforcement,[440] and matters within the jurisdiction of the Bureau of Indian Affairs.[441] Some agencies have adopted standards for exercising discretion to review cases sua sponte. For patentability cases, for example, sua sponte review is "[t]ypically . . . reserved for issues of exceptional importance."[442]

4. Mandatory and Discretionary Participation by a PAS Official(s)

In some programs, parties have a legal right to consideration of their cases by a PAS official(s). The NLRB, for example, provides for an appeal as of right from any ALJ decision.[443] The SEC, will grant any petition to review certain types of initial decisions.[444] And CAVC and the Tax Court will review most timely appeals within their jurisdiction.[445]

More commonly, though, a PAS official(s) has discretion to review, decline to review, or take no action regarding a decision of a lower-level adjudicator. This practice is generally consistent with Recommendation 68-6, in which ACUS recommended that each agency "having a substantial caseload" accord administrative finality to the decisions of lower-level adjudicators

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[431] 5 U.S.C. § 557(b).
[432] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 51 (1941).
[433] Rec 83-3
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[439] https://www.uspto.gov/patents/ptab/decisions/revised-interim-director-review-process
[440] 17 C.F.R. §§ 201.360(d)(1), 201.411(c).
[441] 25 C.F.R. §§ 2.508–2.511. Historically, the Secretary was "frequently asked" to assume jurisdiction. Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 262 (1996). But current rules provide no process for requesting that the Secretary consider a case and prohibit parties from requesting that the Assistant Secretary-Indian Affairs take jurisdiction. *See* 25 C.F.R. §§ 2.509, 2.511.
[442] https://www.uspto.gov/patents/ptab/decisions/revised-interim-director-review-process
[443] 29 C.F.R. § 102.46.
[444] 17 C.F.R. § 201.411(b)(1).
[445] *See* U.S. Ct. App. Vet. Cl., Rules of Practice and Procedure, https://www.uscourts.cavc.gov/rules_of_practice.php (last visited Apr. 7, 2024); U.S. Tax Ct., Rules of Practice and Procedure, https://www.ustaxcourt.gov/rules.html (last visited Apr. 7, 2024).

"with discretionary authority in the agency to affirm summarily or to review, in whole or in part [such decisions]."[446] It is also consistent with Recommendation 83-3, in which ACUS recommended that Congress authorize agency heads to review decisions "on a discretionary basis" and "only in the rarest circumstances" require agency heads to review decisions personally.[447] This practice is intended, among other objectives, to preserve the limited time of PAS official(s) to decide matters that merit their personal attention (e.g., novel or important issues of law, policy, or discretion) and conclude matters before the agency expeditiously.

Among programs in which review is discretionary, one point of variation is whether the PAS official(s) must take action when they receive a petition for review or a matter is certified to them, or whether the passage of time with no action by the PAS official(s) functions as a decision not to review a decision. FMSHRC rules, for example, permit parties to file a petition for Commission review within 30 days after issuance of an ALJ's decision. Any petition that the Commission does not grant within 40 days after issuance of the decision is "deemed denied."[448] The ACUS *Model Adjudication Rules* follow this approach "[i]n the interest of encouraging prompt appellate review of an adjudicator's decision."[449]

5. Grounds for Exercising Discretion to Participate Directly in a Case

In some programs in which a PAS official(s) retains discretion to reconsider matters decided by lower-level adjudicators, there is no publicly stated standard for exercising such discretion. Examples include immigration removal adjudication,[450] immigration-related employment discrimination,[451] Bureau of Indian Affairs-administered programs,[452] and trademark registration cases.[453] Similarly, in some programs in which lower-level adjudicators have authority to refer cases to a PAS official(s), there is no publicly stated standard for doing so. One example is the EAB.[454] and the USPS's Judicial Officer.[455]

In other programs, a regulation or other public statement includes an exclusive or nonexclusive list of circumstances in which the PAS official(s) will reconsider a matter decided by a lower-level official. This is consistent with Recommendation 83-3, which stated: "Where the agency head retains the right of discretionary review of an initial or intermediate decision, the

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[446] Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19783 (July 23, 1973).
[447] The Recommendation stated that review by right "is appropriate in certain cases because of the severe consequences to the parties, such as cases involving the imposition of a substantial penalty or the revocation of a license." Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983).
[448] 29 C.F.R. § 2700.70(h).
[449] Admin. Conf. of the U.S., Model Adjudication Rules § 410 (2018).
[450] 8 C.F.R. § 1003.1(h).
[451] 28 C.F.R. § 68.55.
[452] 25 C.F.R. §§ 2.508–2.511.
[453] 37 C.F.R. § 2.146.
[454] 8 C.F.R. § 1003.1; 25 C.F.R. §§ 2.508–2.511.
[455] 39 C.F.R. § 952.26(a)(5). A similar rule exists at the USPS, though referral there is to the Postmaster General or Deputy Postmaster General, neither of which is a PAS official. *See supra* note 428.

agency should provide by regulation the grounds and procedures for invoking such review."[456] ACUS also reaffirmed this view in Recommendation 2020-3, urging agencies to address in their codified procedural regulations "[t]he standards for granting review, if review is discretionary."[457]

Here, it is useful to separate first-level reviewers from second-level reviewers because different levels of review serve—or should serve—different purposes. In many programs, for example, first-level review is intended to correct a broader range of legal and factual errors. Recommendation 83-3 provides a useful list of circumstances in which first-level review (either by a PAS official(s) or an entity exercising delegated review authority) may be warranted. In that recommendation, ACUS urged agencies to "consider the desirability in routine cases of authorizing the review authority to decline review in the absence of a reasonable showing" that:

> (i) a prejudicial error was committed in the conduct of the proceeding, or
>
> (ii) the initial decision embodies (A) a finding or conclusion of material fact which is erroneous or clearly erroneous, as the agency may by rule provide; (B) a legal conclusion which is erroneous; or (C) an exercise of discretion or decision of law or policy which is important and which should be reviewed.[458]

Several agencies have adopted regulations mirroring this language.

Second-level review, where it exists, is often restricted to issues of exceptional importance that more clearly warrant personal attention by the PAS official(s). ACUS recommended that second-level review by an agency head "should normally be exercisable only in his [or her] discretion on a showing that important policy issues are presented or that the delegate erroneously interpreted agency policy. Multilevel review of purely factual issues should be avoided.[459] The Secretary of Labor, for example, may review a decision of the ARB if a case "presents a question of law that is of exceptional importance and warrants review by the Secretary."[460]

Other options are possible. For example, the original rule establishing the Board of Immigration Appeals, in effect between 1940 and 1947, included a nonexclusive list of circumstances in which the Attorney General would review decisions of the Board of Immigration Appeals, namely: (1) "any case in which a dissent has been recorded," (2) "any case in which the Board shall certify that a question of difficulty is involved," and (3) "any case in

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[456] Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983).
[457] Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, ¶ 2(c), 86 Fed. Reg. 6618, 6619 (Jan. 22, 2021).
[458] Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983).
[459] Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983).
[460] 85 Fed. Reg. 13,186 (Mar. 6, 2020).

which the Board orders the suspension of deportation pursuant to the provisions of section 19(c) of the Immigration Act of 1917, as amended."[461]

In a 2016 article, former Attorney General Alberto Gonzales reflected on how the current rule—which focuses on who may direct review rather than when review is appropriate—considered how the rule might be amended to include "substantive or objective grounds" encompassing "those cases where a decision on an important legal or policy matter is warranted." Gonzales observed:

> One example of a decision that should be referred is a precedential Board decision with a registered dissent. Such an occurrence signals a question of some difficulty, as adjudicators would have reached different conclusions on the issue presented, and the potential need for the Attorney General to step in, review the issue, and provide a definitive resolution for immigration officials. Questions of exceptional importance or difficulty should also be referred. Rather than one simple, broad category that would guide referral, however, an amended regulation should provide illustrative circumstances when such a question is presented. For instance, if the case implicates significant constitutional interests or necessitates rendering an interpretation of a provision of the [Immigration and Nationality Act] that has engendered division in the courts of appeals, such a question could be deemed "difficult." Questions of exceptional importance might be those where the resolution of the issue would have significant practical ramifications in the enforcement of the immigration laws, the granting of discretionary relief from removal, or the manner in which aliens could be apprehended, detained, and removed. In some sense, these criteria would track the spirit of the rehearing criteria of the Federal Rules of Appellate Procedure, which contemplate en banc proceedings in rare circumstances.[462]

6. Direct Participation by a PAS Official(s) as a Prerequisite to Judicial Review

One final consideration is whether a party must seek review by a PAS official(s) before seeking judicial review. One benefit of requiring appeal to a PAS official(s) is that the PAS official(s) can publicly address novel or important questions of law, policy, or discretion before judicial proceedings. Requiring appeal also gives the PAS official(s) greater control over which cases it (or DOJ) must litigate in federal court. The downside, of course, is that PAS official(s) will need to devote time and resources to considering and acting on petitions. Especially when PAS positions are vacant, or a collegial agency lacks a quorum, requiring action by the PAS official(s) may delay case processing.

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[461] 8 C.F.R. § 90.12 (1940). For a history of the rule, see Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 845–52 (2016).

[462] Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 915 (2016).

In some programs, a party must first request review by a PAS official before seeking judicial review. This is particularly common in programs in which PAS officials serve as first-level reviewers. In other programs, however, even when parties may request review by a PAS official, appeal is not required for exhaustion of administrative remedies. Examples include adverse action appeals before the MSPB,[463] federal-sector discrimination cases before the EEOC,[464] and trademark and patent cases before USPTO.[465] In such programs, parties can, and often do, opt instead to seek review directly in the federal courts.

D. Procedures

In this section, we examine six procedural aspects related to the direct participation of PAS officials in the adjudication of cases: (1) notice to parties and other interested persons, (2) issues the PAS official(s) will consider, (3) standard of review, (4) record on review, (5) submission of additional arguments by parties, and (6) public participation.

1. Notice to Parties and Other Interested Persons

A preliminary procedural question is the provision of notice to affected parties, which may include notice that a petition for review has been granted or denied, that a matter has been referred to a PAS official(s) for possible consideration, or that a PAS official(s) has assumed jurisdiction of a case on their own motion or upon referral, as well as notice of the issues that the PAS official(s) will consider on review. Concerns have been raised in some systems about a lack of notice, particularly in cases in which a PAS official(s) reviews a case on their own motion.[466]

2. Issues the PAS Official(s) Will Consider

Statutes often provide PAS officials broad discretion to determine what issues they will consider in reviewing the decisions of lower-level adjudicators. In cases of formal adjudication, for example, the APA grants agency heads "all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."[467]

Because a traditional rationale for the direct participation of PAS officials in agency adjudication is control of policymaking, it makes sense for PAS officials to consider legal issues—at least those that are sufficiently novel or important. Whether it is a good use of a PAS official's limited capacity to consider questions of fact and mixed questions of law and fact will depend on the policy purpose for their direct participation in the adjudication of individual cases.

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[463] 5 C.F.R. § 1201.113.
[464] 29 C.F.R. § 1614.405(c).
[465] 37 C.F.R. § 2.145; *Revised Interim Director Review Process*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/patents/ ptab/decisions/revised-interim-director-review-process (last visited Apr. 7, 2024).
[466] *See, e.g.*, Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766 (2010); SARAH PIERCE, MIGRATION POLICY INSTITUTE, OBSCURE BUT POWERFUL: SHAPING U.S. IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW (2021), https://www.migrationpolicy.org/sites/default/files/ publications/rethinking-attorney-general-referral-review_final.pdf.
[467] 5 U.S.C. § 557(b).

It can be challenging in practice to separate questions of law from questions of fact, of course, and "it is not difficult to imagine the jurisdictional skirmishes that such a separation would set off."[468]

Relatedly, policymakers must determine which issues PAS officials should consider in individual cases. In many programs, there are rules limiting consideration to issues raised before the lower-level decision maker. In programs in which PAS officials typically participate in a case in response to a petition for review, PAS officials may also limit their consideration to issues raised in the petition.

3. Standard of Review

Statutes often provide PAS officials with plenary review of all factual and legal questions. In cases of formal adjudication, for example, the APA grants agency heads "all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."[469] Because a traditional rationale for the direct participation of PAS officials in administrative adjudication is coordination and political oversight of policymaking, it makes sense for PAS officials to review questions of law de novo.

But for the same reasons that appellate adjudicators typically defer to certain findings and conclusions of lower-level adjudicators, it often makes little sense for PAS officials—sitting either as first- or second-level reviewers—to consider factual questions or mixed questions of fact and law de novo.[470]

The precise standard of review that a PAS official(s) should employ when considering questions of fact, mixed questions of law and fact, and questions of discretion will depend on the purpose behind and role of direct participation in the adjudication of cases. For example, PAS officials who serve as a second-level reviewers, have limited adjudicative capacity, and participate solely to control policymaking should use a highly deferential standard of review in considering nonlegal findings and conclusions—to the extent they consider such findings and conclusions at all. In such cases, agencies avoid "[m]ultilevel review of purely factual issues."[471]

Conversely, a less deferential standard may be appropriate for PAS officials who serve as first-level reviewers, have ample adjudicative capacity, and participate directly to accomplish a broader range of policy purposes (e.g., error correction, consistency, systemic awareness). Still, policymakers should pay close attention to the comparative advantages of different adjudicators. While a PAS official serving as an appellate reviewer may have greater policy expertise, for

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[468] Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 1988 IMMIGR. & NAT'LITY L. REV. 233, 319 (1988).
[469] 5 U.S.C. § 557(b).
[470] *See* Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, ¶ 10, 86 Fed. Reg. 6618 (Jan. 22, 2021).
[471] Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983).

example, a lower-level adjudicator who presided over an evidentiary hearing may have greater expertise ruling on routine procedural motions and judging parties' and witnesses' credibility.

4. Record on Review

Rules regarding direct participation by PAS officials rarely provide explicitly for the consideration of new evidence. Indeed, ACUS has recommended for all agency appellate systems that agencies "consider limiting the introduction of new evidence on appeal that is not already in the administrative record from the hearing-level adjudication."[472]

One notable exception is the MSPB, which provides that the Board may grant a petition for review upon a showing that "[n]ew and material evidence . . . is available that, despite the petitioner's due diligence, was not available when the record closed."[473] It is worth recognizing, however, that the MSPB may be particularly well suited to receive at least some new evidence. First, Board members serve as first-level reviewers and most of their statutory responsibilities relate to the adjudication of cases. Further, because the Board receives many petitions from self-represented parties, fairness may counsel a more permissive rule on the receipt of new evidence.

5. Presentation of Arguments by Parties

In programs in which a PAS official(s) serves as a first-level reviewer, parties are often permitted to present arguments to the PAS official(s)—typically arguments raised before the lower-level adjudicator rather than new arguments. Arguments may be presented through written submissions, such as pleadings and briefs, or through oral arguments or presentations. ACUS has recommended that agencies "assess the value of oral argument . . . in their appellate system based on the agencies' identified objectives for appellate review." Criteria that may favor oral argument include "issues of high public interest, issues of concern beyond the parties to the case, specialized or technical matters, and a novel or substantial question of law, policy, or discretion."[474]

In many programs in which a PAS official(s) serves as second-level reviewer and parties lack the right to petition the PAS official(s) for further consideration, rules do not explicitly provide for the submission of arguments. Concerns have been raised in some such systems about the lack of such an opportunity.[475] Certainly there is value in minimizing the submission or presentation of arguments that are already included in the record. And there is certainly value in ensuring that any nonduplicative arguments are received in the most efficient way possible. At the same time, there may be value in at least providing parties with a short window in which to submit brief and nonduplicative written arguments.

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[472] *See* Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, ¶ 10, 86 Fed. Reg. 6618 (Jan. 22, 2021).
[473] 5 C.F.R. § 1201.115(d).
[474] Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, ¶ 13, 86 Fed. Reg. 6618 (Jan. 22, 2021).
[475] *See, e.g.*, Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766 (2010).

6. Public Participation

There may be value in public participation in cases in which an agency, in the course of adjudicating a matter, must decide novel or important questions of law, policy, or discretion, because rulings on such issues are likelier to affect persons beyond the parties to the case. In such cases, public participation serves much the same role in adjudication as it does in rulemaking.[476] PAS officials are not the only adjudicators who must decide important questions of law, policy, or discretion, of course. But cases involving such questions may be likelier to reach PAS officials, control over policymaking presents the clearest normative rationale for direct participation by PAS officials, and PAS officials typically are the final word within the executive branch.

Concerns have been raised in some systems about a lack of public participation in cases in which a PAS official(s) exercises discretion to participate directly in a case involving a novel or important question of law, policy, or discretion.[477] ACUS has recommended that agencies "assess the value of . . . amicus participation in their appellate system," especially in cases that present "issues of high public interest, issues of concern beyond the parties to the case, specialized or technical matters, and a novel or substantial question of law, policy, or discretion."[478] As an alternative to amicus participation, a process for public notice and comment may also be useful in some programs.

E. Effect of Decisions

A decision rendered by a PAS official(s) is typically the final decision of the agency and becomes final and binding absent reconsideration by the PAS official(s) or judicial review—if one or both are available.

Aside from the effect of a decision with respect to the parties to a proceedings, agencies must also determine what effect, if any, the decision will have in subsequent proceedings involving similar issues but different parties. As ACUS examined in Recommendation 2022-4, many agencies rely on precedential decision making to promote consistency, predictability, uniformity, and efficiency in their adjudicative systems. Agencies also use precedential decision making to coordinate the development of policy, to "communicate how they interpret legal requirements or intend to exercise discretionary authority."[479] In this way, precedential decision making serves many of the same objectives as direct participation by PAS officials, and the two should be considered in combination.

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[476] *See* Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 496, 520–22, 544–46 (2021).
[477] *See, e.g.*, Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766 (2010).
[478] Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, ¶ 13, 86 Fed. Reg. 6618 (Jan. 22, 2021).
[479] Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023).

As Recommendation 2022-4 notes, there is tremendous variation in precedential decision-making practices. Some agencies treat all decisions issued by an appellate decision maker (whether or not a PAS official(s)) as precedential, while others teat only certain, designated decisions as precedential. Some agencies treat no decisions as precedential.[480] In determining whether to treat all, some, or no appellate decisions as precedential, ACUS recommended that agencies consider the extent to which they issue (a) "decisions that would be useful as precedent and are written in a form that lends itself to use as precedent;" (b) "decisions that mainly concern only case-specific factual determinations or the routine application of well-established policies, rules, and interpretations to case-specific facts; and (c) "such a large volume of decisions that adjudicators cannot reasonably be expected to identify those which should control future decisions."[481] A decision may be particularly useful as precedent if it:

(a) Addresses an issue of first impression;
(b) Clarifies or explains a point of law or policy that has caused confusion among adjudicators or litigants;
(c) Emphasizes or calls attention to an especially important point of law or policy that has been overlooked or inconsistently interpreted or applied;
(d) Clarifies a point of law or policy by resolving conflicts among, or by harmonizing or integrating, disparate decisions on the same subject;
(e) Overrules, modifies, or distinguishes existing precedential decisions;
(f) Accounts for changes in law or policy, whether resulting from a new statute, federal court decision, or agency rule;
(g) Addresses an issue that the agency must address on remand from a federal court; or
(h) May otherwise serve as a necessary, significant, or useful guide for adjudicators or litigants in future cases.[482]

When a PAS official(s) participates directly in the adjudication of cases under a program, it is common for the agency to treat at least some decisions by the PAS official(s) as precedential. When a PAS official(s) serves as a first-level reviewer, and review is discretionary and limited to factors such as those discussed in Part IV.C.5, many of his or her decisions are likely to satisfy one of the eight factors listed above and should be designated as precedential.

When PAS officials serve as second-level reviewers, the decisions they issue will or almost certainly should satisfy one of those factors. Indeed, the grounds for exercising second-level, discretionary review sometimes track these factors. In determining whether the Secretary of Labor should review a decision of the ARB, for example, the relevant consideration is whether the case "involves a matter of exceptional importance."[483] (All decisions issued by the Secretary do, in fact, serve as "binding precedent on all Department employees and in all Department

[480] Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023).
[481] Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023).
[482] Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023).
[483] 85 Fed. Reg. 13,186, 13,188 (Mar. 6, 2020).

proceedings involving the same issue or issues."[484]) As a general principle, then, designating such decisions as precedential is likely to further bolster the underlying objective of direct participation by a PAS official(s), whether the objective is to coordinate and ensure expert policymaking, subject policymaking to political control, gain and act on systemic awareness, or promote interdecisional consistency.

Of note, precedential decision making may not be appropriate in contexts in which a PAS official(s) decides matters under a generally applicable statute, particularly if authority for making policy under the statute is assigned to another agency. Examples include matters adjudicated under FOIA,[485] the Program Fraud Civil Remedies Act,[486] the Equal Access to Justice Act,[487] and the Debt Collection Act.[488]

F. Disqualification and Recusal

Impartiality is an important value in administrative adjudication. Recognizing that recusal (or "the voluntary or involuntary withdrawal of an adjudication from a particular proceeding") is an "important tool for maintaining the integrity of adjudication," ACUS in 2018 recommended that agencies adopt recusal rules for adjudicators who preside over adjudications in which there is a legally required evidentiary hearing and appellate adjudicators.[489]

By its own terms, the recommendation "does not apply to adjudications conducted by agency heads." (ACUS noted, however, that "agencies could take into account many of the provision in the Recommendation when determining rules for the recusal of agency heads.") As Louis Virelli has written, designing an effective recusal regime for agency heads is complex:

> [T]he applicability of recusal standards to agency heads has intuitive appeal when they are reviewing specific adjudications, for the same reasons that recusal is appropriate for traditional judges. Unlike judges, however, agency heads also function as chief policymakers for the agency. Their policymaking role makes recusal of agency heads more complex than recusal of more easily replaceable, less powerful initial adjudicators. Policymaking is an inherently value-laden enterprise; it requires policymakers to employ their own normative viewpoints in a way that traditional adjudication—especially in the courts—seeks to avoid. Conversely, the higher public profile of agency heads makes the substantive and procedural recusal standards discussed earlier potentially more important to their conduct than that of less visible intermediate or initial adjudicators. Because agency heads' decisions are more likely to be publicly scrutinized than those of

[484] *Id*.
[485] 5 U.S.C. § 552.
[486] 31 U.S.C. § 3801 *et seq*.
[487] 5 U.S.C. § 504.
[488] 5 U.S.C. § 5514.
[489] Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudication*, 84 Fed. Reg. 2139 (Feb. 6, 2019).

> individual adjudicators, the public confidence engendered by clear and transparent recusal standards may be even more valuable at the top of the agency hierarchy.[490]

Virelli notes an additional complication at multimember agencies, namely that recusal by one or more members of a multimember agency might "change the nature of adjudication among agency heads by changing the number and, potentially, the collective ideology of the decisionmakers." Recusal might "cause the agency to lose a quorum, thereby rendering it totally ineffective." Recusal might also "deprive the group of an adjudicator who may have been an influential part of the agency's ultimate decision."[491]

As a general matter, PAS officials—whether acting in an adjudicative capacity or otherwise—are already subject to a host of requirements under the ethics laws and Office of Government Ethics (OGE) regulations. For example, officials who participate in proceedings in which they have a personal financial interest face criminal penalties.[492] PAS officials who negotiate for or agree to any future employment or compensation while in office must recuse themselves "whenever there is a conflict of interest, or appearance of a conflict of interest."[493] And OGE rules specify when officials should recuse themselves from proceedings to "avoid an appearance of loss of impartiality in the performance of [their] official duties."[494] Agencies have processes in place to promote compliance with generally applicable ethics requirements.

The political processes by which PAS officials are appointed and removed from office—and their susceptibility to presidential and congressional oversight—sometimes also shape whether or not, as an ethical matter, PAS officials choose to participate in adjudications. There are instances in which senators have focused on the likelihood that a nominee for a PAS position might need to recuse himself or herself in many circumstances due to conflicts of interest.[495] And members of Congress periodically direct oversight activities at PAS officials who participate in proceedings in which they allegedly have a conflict of interest. In at least one instance, pressure promoted from Congress and the press promoted an agency to undertake a "thorough review" of its policies and practices for recusal by PAS officials.[496]

Beyond ethics requirements and political process, some agencies have extended their rules for adjudicator recusal to PAS officials. Examples Virelli cited include FMSHRC, FTC, and MSPB.[497] And following the Supreme Court's decision in *Arthrex* and the adoption of interim

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[490] Louis J. Virelli III, Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators 42 (May 14, 2020) (report to the Admin. Conf. of the U.S.) (internal citations omitted).
[491] Louis J. Virelli III, Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators 43 (May 14, 2020) (report to the Admin. Conf. of the U.S.).
[492] 18 U.S.C. § 208.
[493] Pub. L. No. 112–105, 126 Stat. 304 (2012).
[494] 5 C.F.R. §§ 2635.501–2635.503.
[495] *See, e.g.*, Press Release, Catherine Cortez Masto, Cortez Masto Statement on Opposition to SEC Chair Nominee Jay Clayton (2017), https://www.cortezmasto.senate.gov/news/press-releases/cortez-masto-statement-on-opposition-to-sec-chair-nominee-jay-clayton/.
[496] *See, e.g.*, NAT'L LABOR RELATIONS BD., ETHICS RECUSAL REPORT (2019).
[497] Louis J. Virelli III, Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators 43 (May 14, 2020).

procedures for review of PTAB decisions by the USPTO Director, the Director established recusal procedures for "matters requiring the Director's or Deputy Director's review, approval, or other involvement" in trademark and patent appeals.[498]

Other agencies—for example, OSHRC, the SEC, and the CFTC—expressly exempt PAS officials from adjudicator recusal requirements.[499] Virelli concluded: "When judging agencies' recusal standards, it is important to distinguish between those that omit standards altogether and those that exclude only agency heads, as the latter may represent a strength, rather than a weakness, in the agency's approach to recusal."[500]

G. Support for Decision Making

Given limited capacity and, in policymaking, the need for expertise, PAS officials rely heavily on others for support. This is a practical necessity, but it may also be quite valuable. Given many PAS officials' relatively short tenure, support by career employees may promote consistency of practice, the development of efficient processes over time, and other rule-of-law values.

The considerable role that staff might play in supporting PAS officials who participate directly in the adjudication of cases—particularly more formal adjudications—is well documented.[501] Although they concern a ratemaking proceeding,[502] the *Morgan* cases[503] provide an illustration of the role that staff may play in judicialized proceedings. In *Morgan*, parties alleged that the Secretary of Agriculture deprived them of the right to a legally required hearing because "the Secretary made the rate order without having heard the oral arguments or having read or considered the briefs which the plaintiff submitted."[504] The Supreme Court agreed, holding as a general matter that "[t]he one who decides must hear." But it caveated that holding, stating:

> This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written.

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[498] Memorandum from Kathi Vidal, Under Sec'y of Commerce for Intell. Prop. & Dir. U.S. Pat. & Trademark Off., to Management Council, Procedures for Recusal to Avoid Conflicts of Interest and Delegations of Authority (Apr. 20, 2022), https://www.uspto.gov/sites/default/files/documents/Director-Memorandum-on-Recusal-Procedures.pdf.
[499] Louis J. Virelli III, Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators 10 (May 14, 2020).
[500] Louis J. Virelli III, Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators 10 (May 14, 2020).
[501] *See, e.g.*, JAMES M. LANDIS REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 19–20 (1960).
[502] In part as a response to *Morgan*, the APA classified ratemakings as rulemakings and exempted them from the Act's requirement of a separation of functions and restrictions on ex parte contacts in cases of formal adjudication. Daniel J. Gifford, *The Morgan Cases: A Retrospective Review*, 30 ADMIN. L. REV. 237, 242 (1978).
[503] United States v. Morgan, 313 U.S. 409 (1941); United States v. Morgan, 307 U.S. 183 (1939); Morgan v. United States, 304 U.S. 1 (1938); Morgan v. United States, 298 U.S. 468 (1936).
[504] 298 U.S. 468, 474 (1936).

> The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important duty conferred.[505]

The Secretary answered interrogatories on remand, which revealed that he had communicated off the record with Department personnel and incorporated findings prepared by them in his decision.[506] The Court condemned this practice and remanded again.

The Court's decisions in these cases had important consequences for the use of support staff by agency officials performing quasi-judicial functions. That is especially true for PAS officials given the likelihood that they will be called upon to decide difficult and disputed matters and the press of other duties. As one congressman noted around the time of the *Morgan* cases: "The fact is that if the Secretary of Agriculture himself personally should read the record, and personally review the findings in each case, it would take all his time; there would be no other work done by him except that one task."[507]

The *Morgan* cases certainly influenced the Attorney General's Committee on Administrative Procedure, which emphasized organizing appellate systems so that "many of the perplexing problems of assistance by subordinate reviewers to the heads of the agency in deciding cases will disappear." The Committee noted that "[l]ike judges, . . . each agency head may find it useful to have attached to his office one or more law clerks . . . . But these assistants should be aides and not substitutes. The heads of the agency should personally what the heads purport to do."[508]

The *Morgan* cases also left many practical questions about the role of subordinates unanswered. As Daniel Gifford explained:

> The Court said that the Secretary could use assistants to "sift" and "analyze" evidence, but that his decision nonetheless must be a "personal" one based upon his own weighing of the evidence. It is unclear how the assistants may both sift and analyze on the one hand, while the Secretary, on the other hand, makes a personal decision by weighing the evidence himself. The Court might have been thinking of the personal responsibility of a judge, who nevertheless receives assistance from his law clerk. Extrapolated to the functioning of a large agency, the Secretary might be said to decide "personally" when he closely supervises his assistants and discusses their conclusions with them. Yet the line between the

[505] 298 U.S. 468, 481–82 (1936).
[506] 304 U.S. 1, 14 (1938).
[507] 84 Cong. Rec. 7092 (1939).
[508] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 52 (1941).

> close supervision of assistants and a "departmental" decision-making process which the Court condemned as impersonal is not easily drawn.[509]

As a matter of judicial review, the question is largely moot. On remand a third time in *Morgan*, the district court permitted the parties to depose the Secretary to develop evidence regarding his decision-making process. The Supreme Court held that "the Secretary should never have been subjected to this examination,"[510] making it that much more difficult for parties to "probe" the Secretary's "mental processes" and determine whether his decision in a case was a personal one.[511]

Today, staff supporting PAS officials play a critical role. In his 1993 study for ACUS, Russell Weaver reported:

> At most agencies, the agency head takes little part in the review process. The agency head may have ultimate responsibility for the agency's decision, but the agency head will delegate the review task to subordinates. Such delegation may be necessary and inevitable. Many agency heads are burdened with other responsibilities besides adjudication. Moreover, at most agencies, there are far too many cases for the agency head to carefully review all of them.
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> . . .
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> These circumstances force agency heads to engage in a very limited review process. They ask subordinates to review the records and briefs, and have them prepare proposed decisions. The agency head will usually meet with the subordinates to discuss the case, but the meeting may be brief depending on the interests and obligations of the agency head.[512]

And a review of contemporary agency materials makes clear that staff continue to perform a wide range of functions, including reviewing petitions for review and recommending whether they should be granted or denied, analyzing evidence and arguments, making recommendations regarding the disposition of cases, and drafting orders and decisions for review and signature.

Given the extensive role that staff play in supporting PAS officials, important to consider who supports PAS officials and what functions they perform. In this section, we address: (1) which subordinates support PAS officials when they participate directly in the adjudication of cases, and (2) what functions do those subordinates perform.

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[509] Daniel J. Gifford, *The* Morgan *Cases: A Retrospective View*, 30 ADMIN. L. REV. 237, 256–57 (1978).
[510] 313 U.S. 409, 422 (1941).
[511] Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 292 (1996).
[512] Russell L. Weaver, *Organization of Adjudicative Offices in Executive Departments and Agencies*, 1993 ACUS 657 (1993).

1. Types of Subordinates Who Support PAS Officials

Subordinates who support direct participation by PAS officials hold many different positions within agency hierarchies. Positions identified in our survey include: (1) lower-level adjudicators and staff, (2) dedicated appeals counsel, (3) personal assistants, (4) agency legal officers, (5) a clerk or executive secretary, (6) policymaking and operational officials, and (7) personnel with specialized scientific or technical expertise. In many programs, PAS officials rely on several different types of personnel. At the MSPB, for example, Board members are assisted in their appellate role by dedicated appeals counsel, Office of General Counsel (OGC) personnel, and a clerk, with each performing distinct functions. At multimember agencies, certain functions may also be delegated to single members or divisions of members.

1. Lower-Level Adjudicators and Staff. In some programs, lower-level adjudicators, lower-level adjudicative bodies, or staff associated with lower-level adjudicative bodies support review by PAS official(s), for example by reviewing petitions for review and identifying cases that may warrant further consideration by a PAS official(s).[513]

2. Dedicated Appeals Counsel. Some agencies—such as the MSPB,[514] DEA,[515] and FAA[516]—have established positions or centralized offices dedicated primarily or solely to assisting PAS officials when they participate directly in the adjudication of cases. They may, for example, review petitions for review, evaluate case records, make recommendations regarding the disposition of cases, and prepare decisions and orders.

3. Advisors. Particularly at multimember agencies, such as the NLRB,[517] individual members of the agency often rely on advisors assigned to assist them. Legal advisors often function like law clerks in federal courts. Individual members may also have access to policy advisors or subject-matter experts.

4. Agency Legal Officers. At many agencies, the chief legal officer or subordinates who report to the chief legal officer assist PAS official(s) when they participate directly in the adjudication of individual cases.[518] Legal officers play different role at different agencies. At some agencies, such as the SEC and FTC, they are the primary source of support for PAS officials.[519] At others, such as the MSPB, they may play a more limited role such as providing legal advice or facilitating settlement.[520] Because chief legal officers might also be involved in

[513] *See supra* Part IV.C.3.
[514] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2022 5 (2023).
[515] U.S. DEP'T OF JUSTICE, OFF. OF INSPECTOR GEN., I-2014-003, THE DRUG ENFORCEMENT ADMINISTRATION'S ADJUDICATION OF REGISTRANT ACTIONS 25–26 (2014).
[516] 14 C.F.R. § 13.65(e).
[517] 29 U.S.C. § 154.
[518] *See supra* note 350.
[519] 17 C.F.R. § 200.21(b) (SEC); FED. TRADE COMM'N, CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2025 130–31 (2024).
[520] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2022 6 (2023).

investigation, prosecution, and litigation, some agencies have established mechanisms to insulate legal officers who support adjudication from legal officers who support enforcement activities.[521]

5. Clerk or Executive Secretary. Some agencies have established the position of clerk or executive secretary, delegating to that office responsibility for functions such as receiving petitions, briefs, and evidence; docketing cases; and issuing decisions, orders, notices, and other correspondence.[522]

6. Policymaking and Operational Officials. Senior officials involved in coordinating agency policymaking or operational functions may support PAS officials in some programs. The USPTO provides one example. When a party requests that the USPTO Director review a PTAB decision, the request is routed to an Advisory Committee established to review such requests and recommend to the Director whether review should be granted. The Advisory Committee includes at least 11 members drawn from relevant agency subcomponents, including the Office of the Under Secretary, PTAB, Office of the Commissioner for Patents, Office of the General Counsel, and Office of Policy and International Affairs. The Advisory Committee may be assisted by other personnel, including technical and subject matter experts.[523]

7. Scientific or Technical Personnel. In some programs, especially those in which cases regularly demand scientific or technical expertise, PAS officials may have access to agency personnel with specialized expertise.[524]

2. Functions That Subordinates Perform

Subordinates perform a wide range of functions when PAS officials participate directly in the adjudication of individual cases. Functions identified in our survey include: (1) evaluating petitions for review; (2) granting, denying, and dismissing petitions for review; (4) affirming interlocutory rulings; (5) identifying unappealed cases that may warrant direct participation by a PAS official(s); (6) managing proceedings and responding to routine motions; (7) encouraging settlement; (8) reviewing lower-level decisions and evaluating evidence and arguments; (9) conducting legal and policy research; (10) recommending case dispositions; (11) preparing decisions and orders; and (12) staying decisions and orders pending reconsideration or judicial review.

1. Evaluating Petitions for Review. As described above, subordinates play an essential role in reviewing petitions for review. In some programs, lower-level adjudicators and adjudicative bodies receive and review petitions and refer cases that may warrant direct participation by a PAS official(s). In other programs, subordinates who work more closely with

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[521] *See, e.g.*, U.S. Secs. & Exch. Comm'n, Statement, Commission Statement Relating to Certain Administrative Adjudications (Apr. 5, 2022), https://www.sec.gov/news/statement/second-commission-statement-relating-certain-administrative-adjudications.
[522] *See, e.g.*, MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2022 5 (2023).
[523] *Revised Interim Director Review Process*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/patents/ptab/decisions/revised-interim-director-review-process (last visited Apr. 7, 2024).
[524] *See, e.g.*, *id*.

PAS official(s) may review petitions for review (and requests for reopening or rehearing) and recommend whether they should be granted, denied, or dismissed. As noted above, senior legal, policymaking and operational components may also play a role in evaluating petitions for review, particularly when the chief objective of direct participation by a PAS official(s) is to coordinate policymaking.

2. Granting, Denying, and Dismissing Petitions for Review. In some programs, subordinates have authority not only to evaluate petitions for review but also to grant and/or deny them in certain circumstances.[525] Subordinates may also be delegated authority to dismiss petitions under certain circumstances, for example when a petitioner alone or the parties jointly request it, or when a petition is repetitious or frivolous.[526]

4. Affirming Interlocutory Rulings. In at least one program, subordinates are delegated authority to consider and affirm interlocutory rulings certified by lower-level adjudicators.[527]

5. Identifying Unappealed Cases That May Warrant Direct Participation by a PAS Official(s). In some programs, lower-level adjudicators, a lower-level adjudicative body, support staff associated with the lower-level adjudicative body, or support staff who work more closely with a PAS official(s) may review decisions issued by lower-level adjudicators to identify cases in which it may be appropriate for the PAS official(s) to exercise own-motion review authority. At USPTO, for example, PTAB has "an internal post-issuance review team that alerts the Director that an issued decision may warrant Director Review."[528]

6. Managing Proceedings and Responding to Routine Motions. Subordinates play a range of duties in managing proceedings pending before PAS officials. They may, for example, docket petitions, issue briefing schedules, schedule oral arguments before PAS officials, issue final decisions and orders, and rule on routine procedural motions (e.g., requests for extensions of time, requests to supplement the record, requests to consolidate multiple proceedings).[529]

7. Encouraging Settlement. In some programs, subordinates are empowered to encourage settlement between parties[530] and may have authority to issue findings and orders pursuant to offers of settlements.[531]

8. Reviewing Lower-Level Decisions and Evaluating Evidence and Arguments. Across programs, subordinates are frequently assigned responsibility for conducting an initial

[525] *See, e.g.*, 17 C.F.R. § 200.30-14(h)(1)(v) (SEC).
[526]14 C.F.R. § 13.65(e) (FAA); 17 C.F.R. § 200.30-14(h)(1)(viii) (SEC).
[527] 17 C.F.R. § 200.30-14(h)(1)(ii) (SEC).
[528] *Revised Interim Director Review Process*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/patents/ptab/decisions/revised-interim-director-review-process (last visited Apr. 7, 2024).
[529] *See, e.g.*, 14 C.F.R. § 13.65(e) (FAA); 17 C.F.R. § 200.30-14(h) (SEC); MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2022 5 (2023).
[530] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2022 5 (2023).
[531] 17 C.F.R. § 200.30-14(h) (SEC).

review of lower-level decisions and evaluating evidence and arguments. In this way, subordinates often function much like law clerks in federal courts.[532]

9. Conducting Legal and Policy Research. In addition to reviewing lower-level decisions and evaluating case-specific evidence and arguments, subordinates are frequently tasked with conducting legal and policy research to better inform how a PAS official(s) considers the case and potentially decides novel or important questions of law, policy, or discretion.[533]

10. Recommending Case Dispositions. Based on their evaluation of lower-level decisions, evaluation of case-specific evidence and arguments, and legal and policy research, subordinates in many programs are tasked with recommending how PAS officials should decide cases or rule on motions.[534] In some programs, subordinates may convey their recommendations in a preliminary conversation or memorandum. In other programs, the subordinate might instead prepare and transmit a proposed decision or order for review by the PAS official(s).[535]

11. Preparing Decisions and Orders. Subordinates are commonly assigned primary responsibility for preparing decisions and orders, either based on their initial review or according to instructions from a PAS official(s).[536]

12. Staying Decisions and Orders. Subordinates in some programs have authority to stay decisions and orders of a PAS official(s) pending judicial review or reconsideration.[537]

V. Developing and Communicating Policies on Participation by PAS Officials

In prior statements, ACUS recommended that agencies adopt and make publicly available certain rules regarding the structure and process of their administrative review systems:

- In Recommendation 68-8, ACUS recommended that Congress amend the APA (5 U.S.C. § 557) to clarify the authority of agencies to establish intermediate appellate boards and provide for discretionary review of initial decisions by agency heads. As

[532] 29 U.S.C. § 154(a) (NLRB); U.S. DEP'T OF JUSTICE, OFF. OF INSPECTOR GEN., I-2014-003, THE DRUG ENFORCEMENT ADMINISTRATION'S ADJUDICATION OF REGISTRANT ACTIONS 25–26 (2014); *Attorney Advisor (DEA)*, U.S. DEP'T OF JUST., https://www.justice.gov/legal-careers/job/attorney-advisor-108 (last visited Apr. 7, 2024); *Adjudication*, U.S. SECS. & EXCH. COMM'N, https://www.sec.gov/ogc/adjudication (last visited Apr. 7, 2024).
[533] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2022 5 (2023); *Adjudication*, U.S. SECS. & EXCH. COMM'N, https://www.sec.gov/ogc/adjudication (last visited Apr. 7, 2024).
[534] *Adjudication*, U.S. SECS. & EXCH. COMM'N, https://www.sec.gov/ogc/adjudication (last visited Apr. 7, 2024).
[535] U.S. DEP'T OF JUSTICE, OFF. OF INSPECTOR GEN., I-2014-003, THE DRUG ENFORCEMENT ADMINISTRATION'S ADJUDICATION OF REGISTRANT ACTIONS 25–26 (2014); *Attorney Advisor (DEA)*, U.S. DEP'T OF JUST., https://www.justice.gov/legal-careers/job/attorney-advisor-108 (last visited Apr. 7, 2024).
[536] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2022 5 (2023); 14 C.F.R. § 13.65(e) (FAA); U.S. DEP'T OF JUSTICE, OFF. OF INSPECTOR GEN., I-2014-003, THE DRUG ENFORCEMENT ADMINISTRATION'S ADJUDICATION OF REGISTRANT ACTIONS 25–26 (2014); *Attorney Advisor (DEA)*, U.S. DEP'T OF JUST., https://www.justice.gov/legal-careers/job/attorney-advisor-108 (last visited Apr. 7, 2024); 29 U.S.C. § 154(a); 17 C.F.R. § 200.21 (SEC).
[537] 14 C.F.R. § 13.65(e) (FAA).

amended, the APA would have authorized an agency by rule or order to (a) establish intermediate appellate boards; (b) delegate to such boards authority to review initial decisions; (c) prescribe procedures for the review of initial decisions by the intermediate appellate board or the agency head; and (d) and restrict the scope of inquiry by such boards and the agency head "without impairing the authority of the agency in any case to decide on its own motion any question of procedure, fact, law, policy, or discretion as fully as if it were making the initial decision." As amended, the APA would also have established default procedures for the operation of intermediate appellate boards and discretionary review of decisions by presiding officers.[538]

- In Recommendation 83-3, ACUS recommended that "[w]here the agency head retains the right of discretionary review of an initial or intermediate decision, the agency should provide by regulation the grounds and procedures for invoking such review."[539]

- Recommendation 2020-3, ACUS recommended that agencies adopt regulations covering all significant procedural matters pertaining to agency appellate review, whether or not conducted by a PAS official(s). The recommendation provided a long, nonexclusive list of topics that such regulations should cover:

  (a) The objectives of the agency's appellate review system;
  (b) The timing and procedures for initiating review, including any available interlocutory review;
  (c) The standards for granting review, if review is discretionary;
  (d) The standards for permitting participation by interested persons and amici;
  (e) The standard of review;
  (f) The allowable and required submissions by litigants and their required form and contents;
  (g) The procedures and criteria for designating decisions as precedential and the legal effect of such designations;
  (h) The record on review and the opportunity, if any, to submit new evidence;
  (i) The availability of oral argument or other form of oral presentation;
  (j) The standards of and procedures for reconsideration and reopening, if available;
  (k) Any administrative or issue exhaustion requirements that must be satisfied before seeking agency appellate or judicial review, including

[538] Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19,783 (July 23, 1973).
[539] [539] Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983).

whether agency appellate review is a mandatory prerequisite to judicial review;
(l) Openness of proceedings to the public and availability of video or audio streaming or recording;
(m) In the case of multi-member appellate boards, councils, and similar entities, the authority to assign decision-making authority to fewer than all members (e.g., panels); and
(n) Whether seeking agency appellate review automatically stays the effectiveness of the appealed agency action until the appeal is resolved (which may be necessary for appellate review to be mandatory, see 5 U.S.C. § 704), and, if not, how a party seeking agency appellate review may request such a stay and the standards for deciding whether to grant it.[540]

ACUS also recommended that agencies "include on their websites brief and accessibly written explanations as to how their internal decision-making processes work and, as appropriate, include links to explanatory documents appropriate for public disclosure." Subjects agencies might address in such explanations include, among other things, "the role of staff."[541]

- Recommendation 2022-4, ACUS recommended that agency codify as part of their rules of practice rules regarding precedential decision making, including which decisions, if any, are treated as precedential; which official(s) designates decisions as precedential and through what process; and any opportunities for public participation in precedential decision making.[542]

In general, programs in which PAS officials regularly serve in an appellate—often first-level appellate—capacity have developed rules that are at least comparable in scope and detail to rules governing review by non-PAS adjudicators. Some programs, particularly those in which PAS officials regularly participate in an appellate—often first-level appellate—capacity, have detailed, codified regulations regarding the participation of PAS officials. These regulations typically cover at least those procedural aspects discussed above in sections A through E of Part IV—that is: (a) whether the PAS official(s) participate directly in the adjudication of individual cases, (b) the level or stage of adjudication at which the PAS official(s) participates directly, (c) the cases in which the PAS official(s) participate directly, (d) the procedures followed by the PAS official(s) when he or she participates directly, and (e) the legal effect of the decisions of PAS

[540] Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, ¶ 2, 86 Fed. Reg. 6618 (Jan. 22, 2021).
[541] Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, ¶ 21, 86 Fed. Reg. 6618, 6620 (Jan. 22, 2021).
[542] Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, ¶ 17, 88 Fed. Reg. 2312, 2313 (Jan. 13, 2023).

official(s). Some agencies have also publicly communicated standards—codified or not—for recusal by a PAS official(s)[543] and the role of staff in proceedings before a PAS official(s).[544]

In other programs, policies regarding the participation of PAS officials are not as clear or as readily available to the public. In programs in which a PAS official(s) has delegated final decision making authority to a judicial officer or appellate board, delegations of final decision making authority may not be expressly codified or may be difficult to locate. Where delegations are available, they may not clearly explain that the PAS official(s) has opted not to retain any authority to review decisions issued by lower-level adjudicators.

For example, an SSA rule describes the administrative review process as consisting of (1) an initial determination, (2) reconsideration, (3) a hearing before an ALJ, (4) review by the Appeals Council (an appeal board established by the agency head in 1940 and made up of non-PAS officials), and (5) federal court review. Regulatory silence regarding review by the Commissioner may be read to preclude such review, but the Commissioner's delegation of final decision making authority is not explicit, and there is at least one historical instance of the Commissioner participating directly in a case despite such a rule.[545]

Compare this with a USDA rule, which authorizes the Judicial Officer to act as the "final deciding officer" in specified adjudicator proceedings.[546] By statute, this delegation is interpreted to mean that the adjudicative function has "(to the extent of the delegation) been vested by law in the individual to whom the delegation is made." Although the Secretary may revoke the delegation at any time, he or she may not do so retroactively.[547]

In several programs in which a rule explicitly provides for some degree of second-level review by a PAS official(s), publicly available rules do not describe the circumstances in which such review may be warranted. In immigration removal adjudication, for example, the Board of Immigration is directed to refer cases to the Attorney General for review when the Attorney General or Secretary of Homeland Security (or his or her delegate) so requests, or when the Chairman or a majority of the Board believes referral is warranted. No publicly available guidance sets forth or provides illustrative examples of circumstances in which the Attorney General or Secretary may request referral or the Board may find referral warranted.[548] Compare the original version of the rule, in effect between 1940 and 1947, which specified circumstances in which review by the Attorney General might be warranted.[549]

Similarly, an EPA rule specifies that the EAB "may refer any case or motion to the Administrator when the [EAB], in its discretion, deems it appropriate to do so."[550] The rule does

[543] *See supra* Part IV.F.
[544] *See, e.g.*, 14 C.F.R. § 13.65(e) (FAA).
[545] *See generally* Appendix P.
[546] 7 C.F.R. § 2.35.
[547] 7 U.S.C. § 2204–3.
[548] 8 C.F.R. § 1003.1(h)(1).
[549] *See supra* note 461.
[550] 40 C.F.R. § 22.4(a)(1).

not specify when referral is appropriate. (It is not evident that the EAB has ever referred a case or motion to the Administrator.[551]) And in Indian affairs matters, no rule explains when the Assistant Secretary-Indian Affairs may take jurisdiction over an appeal to the IBIA, or when the Secretary of the Interior may assume jurisdiction of a case or review a decision.[552]

In several programs, no rule describes in detail the procedures a PAS official(s) will use when he or she assumes jurisdiction over a case or review a decision. The current rule governing referral to and review by the Attorney General in immigration removal adjudication, for example, provides only that the Attorney General's decision shall be in writing and transmitted to the parties.[553] In contrast, the EPA Administrator is directed to generally follow the rules of practice used by the EAB when considering a case or motion.[554]

The lack of routinization and procedural transparency has been called "disruptive" in at least one program—immigration removal—given that review by the Attorney General has been historically irregular, varied across administrations, and used to effect significant changes in law or policy that are often viewed as political in nature.[555] Several commentators have suggested that the adoption of regularized and transparent procedures would improve the quality of and public confidence in agency decision making.[556] This seems generally consistent with previous ACUS recommendations regarding the adoption and public availability of rules regarding agency adjudication.[557]

There are at least three benefits of publicly available rules and standards. First, they may increase confidence in the integrity and regularity of agency proceedings. Second, they provide a procedural baseline against which action by a PAS official(s) can be measured by the President, Congress, the courts, and the public. Third, rulemaking—whether after notice and comment or otherwise[558]—offers pre- and post-promulgation opportunities for broad public engagement.[559]

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[551] *See* Appendix A.
[552] 25 C.F.R. §§ 2.508–2.511; 43 C.F.R. § 4.5.
[553] 8 C.F.R. § 1003.1(h)(2).
[554] 40 C.F.R. § 22.4(a)(1).
[555] *See* Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. 129 (2017).
[556] *See id*. at Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. 129, 139–40 (2017); SARAH PIERCE, MIGRATION POLICY INSTITUTE, OBSCURE BUT POWERFUL: SHAPING U.S. IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW 21–24 (2021), https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review_final.pdf; David A. Martin, *Improving the Exercise of the Attorney General's Immigration Referral Power: Lessons from the Battle over the "Categorical Approach" to Classifying Crimes*, 102 IOWA L. REV. 1, 5–9 (2016); Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766 (2010).
[557] *See supra* notes 538–542; *see also* Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019).
[558] *See* Admin. Conf. of the U.S., Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30,102 (July 8, 1992).
[559] *See* Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).

Former Attorney General Alberto Gonzales has argued against adopting set procedures, at least for Attorney General review. In a 2016 article, he emphasized the low risk of erroneous deprivation of parties' protected liberty or property interests following a hearing before an immigration judge and appellate review by the Board of Immigration Appeals, a potentially high burden on the government associated with set procedures, and an opportunity for judicial review. Regarding the burden on the government, Gonzales emphasized the potential value of flexibility in choosing the appropriate degree of formality needed for a given case:

> The government has weighty interests in the procedures used, and the likelihood is that any additional procedures would entail administrative burdens disproportionate to any "due process" gains realized. Currently, the Attorney General has flexibility to dispose of referred cases in a number of ways, including through vacatur and remand, decision on the administrative record, or decision after briefing. How or why an Attorney General may settle on a particular procedure in a specific case may depend on a number of factors both intrinsically and extrinsically related to the case, including how important the issue is, whether he wants to render a decision on an issue not fully raised or aired below, whether he may simply want reconsideration or a stay of proceedings pending further developments, or what level of involvement and time his current commitments permit to be devoted to matters of immigration review. Because the determination of procedures is ad hoc, the Attorney General retains the maximum amount of flexibility to determine in specific cases how and to what extent he will be involved in the review.[560]

Citing the *Morgan* cases, discussed earlier,[561] Gonzales wrote:

> [T]here is a weight government interest in confining Attorney General review to the written administrative record, while permitting the determination of additional procedures on an ad hoc basis. Mandating additional procedures to govern every case would have the effect of impinging on the Attorney General's ability to discharge his multitudinous functions in an efficient manner. Requiring the opportunity to submit briefs, even when clearly cumulative and duplicative of arguments already contained in the administrative record on which the Attorney General's decision will be based, does nothing to enhance due process protections, while necessarily requiring that the proceedings before the Attorney General are more drawn out and that he must expend additional time and effort in the review of the case materials.[562]

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[560] Hon. Alberto R. Gonazles & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 909 (2016).
[561] *See supra* notes 502–511.
[562] Hon. Alberto R. Gonazles & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 910 (2016).

While Gonzales ultimately advised against revising the regulation to establish set procedures governing referral and review, he appeared open to the idea of amending it to include "substantive or objective criteria" for selecting cases for Attorney General review.[563]

Of course, rules and standards need not be exhaustive and can be drafted to permit procedural flexibility, as indicated by the many ACUS recommendations regarding alternative dispute resolution,[564] simplified proceedings,[565] and active case management.[566] Agency rules routinely permit decision makers and parties ample discretion to dispense with unnecessary formalities and supplement procedures in appropriate circumstances.[567] One example is the interim Director review process, adopted by USPTO following the Supreme Court's decision in *Arthrex*. Under that process, the Director "generally makes a decision based on the existing record but may order additional briefing, discovery, or oral argument."[568]

VI. Transparency of Proceedings Involving PAS Officials

ACUS has addressed public access to adjudicative proceedings (e.g., hearings, meetings, conferences), decisions (e.g., orders, opinions), and supporting materials (e.g., pleadings, motions, briefs) on several occasions. Taken together, these recommendations suggest that most aspects of adjudication involving direct participation by PAS officials should be transparent.

With respect to proceedings, ACUS in 2021 recommended that agencies "ordinarily should presume that evidentiary hearings and appellate proceedings (including oral arguments) are open to public observation."[569] ACUS recognized that there may be a need to close proceedings, in whole or in part, when the need to protect national security, law enforcement interests, confidential business information, personal privacy interests, the interests of minors and juveniles, or other legally protected interests outweighs the public interest in openness.[570] For other types of adjudicative proceedings, which are typically closed, ACUS recommended considering several factors, among them whether public access would promote important policy objectives such as transparency, fairness, accuracy, efficiency, and public participation in agency decision making; whether there is public interest in proceedings; and whether proceedings

[563] *See supra* note 462.
[564] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, 53 Fed. Reg. 26,030 (July 11, 1988); Admin. Conf. of the U.S., Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 51 Fed. Reg. 25,643 (July 16, 1986).
[565] *See* Admin. Conf. of the U.S., Recommendation 90-6, *Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission*, 55 Fed. Reg. 53,271 (Dec. 28, 1990).
[566] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 Fed. Reg. 46,989 (Dec. 30, 1986).
[567] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2023-7, *Improving Timeliness in Agency Adjudication*, ¶ 12, 89 Fed. Reg. 1513 (Jan. 10, 2024).
[568] CHRISTOPHER T. ZIRPOLI & KEVIN J. HICKEY, CONG. RSCH. SERV., R48016, THE PATENT TRIAL AND APPEAL BOARD AND INTER PARTES REVIEW 34 (2024).
[569] Admin. Conf. of the U.S., Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*, 87 Fed. Reg. 1715 (Jan. 12, 2022).
[570] Admin. Conf. of the U.S., Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*, ¶ 5, 87 Fed. Reg. 1715 (Jan. 12, 2022).

involve "issues of broad public interest or the interests of persons beyond the parties."[571] These statements suggest that proceedings before PAS officials ordinarily should be open to public observation. Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*, provides best practices for facilitating public access, including through advance public notice of adjudicative proceedings and remote observation.[572]

With respect to adjudicative decisions, FOIA directs agencies to proactively disclose on their websites "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."[573] Although this formulation has existed in some form since 1946, its scope has never been clear. Commentators (including Kenneth Culp Davis) and many litigants have argued for a broad interpretation, while DOJ and some agencies have argued for a narrower interpretation.[574] At a minimum, precedential decisions should be made publicly available.[575] But ACUS has recommended recently that agencies should make available on their websites all "[f]inal opinions and orders issued in adjudications that are governed by 5 U.S.C. § 554 and 556–557 or otherwise issued after a legally required opportunity for an evidentiary hearing," regardless of whether they are designated as precedential.[576] This suggests that decisions issued by PAS officials in their personal capacity ordinarily should be made publicly available.

Finally, with respect to supporting materials, ACUS has recommended that agencies consider providing online access to supporting materials. Factors to consider in determining which materials to disclose include (a) "the interests of the public in gaining insight into the agency's adjudicative processes;" (b) "the costs to the agency in disclosing adjudication materials in excess of FOIA's requirements;" (c) "any offsetting benefits the agency may realize in disclosing these materials" (e.g., a reduction in the volume of FOIA requests); and (d) the volume of cases.[577] All of these factors tend to favor making at least those supporting materials relevant to the issues considered by PAS officials publicly available, recognizing that certain legally protected or sensitive information may need to be redacted or withheld.

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[571] Admin. Conf. of the U.S., Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*, ¶ 6, 87 Fed. Reg. 1715 (Jan. 12, 2022).
[572] Admin. Conf. of the U.S., Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*, 87 Fed. Reg. 1715 (Jan. 12, 2022); *see also* Admin. Conf. of the U.S., Recommendation 72-6, *Broadcast of Agency Proceedings*, 38 Fed. Reg. 19,791 (July 23, 1973); Jeremy Graboyes & Mark Thomson, Public Access to Agency Adjudicative Proceedings (Nov. 22, 2021) (report to the Admin. Conf. of the U.S.).
[573] 5 U.S.C. § 552(a)(2)(A).
[574] *See generally* Jeremy S. Graboyes, *Transparency*, *in* A GUIDE TO FEDERAL AGENCY ADJUDICATION 447, 451–456 (Jeremy S. Graboyes ed., 3d ed. 2023); *see also* Admin. Conf. of the U.S., Recommendation 89-9, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*, 54 Fed. Reg. 53,495 (Dec. 29, 1989).
[575] 5 U.S.C. § 552(a)(1); *see also* Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023); Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, ¶ 27, 81 Fed. Reg. 94,314 (Dec. 23, 2016).
[576] Admin. Conf. of the U.S., Recommendation 2023-1, *Proactive Disclosure of Agency Legal Materials*, ¶ 1, 88 Fed. Reg. 42,678 (July 3, 2023).
[577] Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

Aside from prior ACUS recommendations, there are particularly good reasons to promote transparency in proceedings involving PAS officials. As Aaron Nielson, Christopher Walker, and Melissa Wasserman have written, the APA's model for adjudication relies substantially on transparency as a tool to strike the appropriate balance between hearing-level adjudicators' decisional independence and political control by agency heads. They write:

> [T]he standard [APA] model envisions the agency head exercising political control over agency adjudication but requires this power to be implemented through a transparent mechanism. This point cannot be overstated. The agency head has wide latitude to reverse the ALJ's initial decision, including for policy considerations, but must explain her reasons for the reversal in a written decision. The agency head's decision becomes part of the administrative record that is subject to judicial review by a federal court and scrutiny by Congress, the President, and the public more generally.[578]

Viewed in this way, broad transparency enables agencies to achieve the policy objectives of direct participation by PAS officials while mitigating potential risks[579] through exposure to judicial, presidential, congressional, and public oversight.

Several statutes make explicit that proceedings involving direct participation by PAS officials should be publicly transparent, including the Government in the Sunshine Act[580] (for agencies headed by multimember bodies) and any number of agency- or program-specific statutes.[581] Agencies have also adopted rules ensuring transparency. In establishing a system of discretionary agency-head review of ARB decisions, for example, then-Secretary of Labor Eugene Scalia orders the ARB to "publish" any decision issued by the Secretary.[582]

Recommendations

Determining Whether and When a PAS Official(s) Will Participate in the Adjudication of Cases

1. When a statute authorizes an officer appointed by the President by and with the consent of the Senate (a PAS official) or a 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, who retain authority to conduct initial proceedings should exercise such authority only if a matter is exceptionally significant, broadly consequential, or politically sensitive, and they have the capacity to

[578] Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication* 103 TEX. L. REV. (forthcoming 2024) (manuscript at 16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4563879.
[579] *See supra* Part IV.A.2.
[580] *See supra* Part II.C.2.
[581] *See, e.g.*, 49 U.S.C. § 46102.
[582] 85 Fed. Reg. 13,186 (Mar. 6, 2020).

personally receive and evaluate evidence and arguments and issue a decision in a fair, accurate, consistent, efficient, and timely manner.

2. When a statute authorizes a PAS official or a collegial body of PAS officials to adjudicate matters arising under the statute or review decisions rendered by other adjudicators, and such authority is delegable as a constitutional and statutory matter, the agency should determine whether it would be beneficial for a PAS official or collegial body of PAS officials to review decisions rendered by lower-level adjudicators or whether it would be more appropriate to delegate final decision-making authority to a non-PAS official (e.g., a judicial officer) or a collegial body of non-PAS officials (e.g., a final appellate board). Circumstances in which it may be beneficial to provide for review by a PAS official(s) include:

    a. When a case involves legal or factual issues that are exceptionally significant, broadly consequential, or politically sensitive;

    b. When a case involves a novel or important question of law, policy, or discretion, such that direct participation by the PAS official(s) would promote centralized or politically accountable coordination of policymaking;

    c. When participation in the adjudication of individual cases would provide the PAS official(s) with greater awareness of how the agency's adjudicative or regulatory system is functioning; and

    d. When participation by the PAS official(s) in the adjudication of individual cases would promote consistent decision making by lower-level adjudicators.

3. When it would be beneficial to provide for review by a PAS official(s), 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 decisions rendered by lower-level adjudicators*. Participation by PAS officials in "first-level" review 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 judicial officer or appellate board and retaining authority to exercise second-level administrative review in exceptional circumstances*. Participation by PAS officials in "second-level" review may be appropriate when caseloads are relatively high and individual cases infrequently raise novel or important questions of law, policy, or discretion or have significant consequences beyond the parties to the case.

    c. *Delegating final review authority to another PAS office.* This option may be appropriate, for example, when individuals who hold the other office, by virtue of holding that office, 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 a PAS Official(s)

4. An agency ordinarily should provide that a decision subject to review by a PAS official(s) becomes final and binding after a specified number of days unless some event triggers participation by the PAS official(s). Events that may trigger participation by the PAS official(s) include, as appropriate:

   a. A party or other interested person files a petition requesting review of the decision of a lower-level adjudicator by the PAS official(s);

   b. A lower-level adjudicator or an appellate board (as a body or through its chief executive or administrative officer) refers a decision to the PAS official(s) for review;

   c. A federal official who oversees a program impacted by a decision, or his or her delegate, requests review of the decision; and

   d. The PAS official(s) exercises authority to review a decision on his or her own motion.

5. Unless the law entitles a party or other interested person to review of a decision of a lower-level adjudicator by a PAS official(s) as a matter of right, an agency should provide that the PAS official(s) retains discretion to affirm summarily, review, decline to review, or take no action with regard to the decision. The agency should determine the circumstances in which the PAS official(s) may review a case. Circumstances in which first-level review by a PAS official(s) may be appropriate include:

   a. A prejudicial procedural error or abuse of discretion was committed in the conduct of the proceeding;

   b. The lower-level decision embodies a finding or conclusion of material fact which is erroneous or clearly erroneous;

   c. The lower-level decision embodies a legal conclusion which is erroneous;

   d. The lower-level decision embodies an exercise of discretion or decision of law or policy which is important; and

e. The lower-level decision presents a recurring issue or an issue that lower-level adjudicators have decided in different ways, and the PAS official(s) can resolve the issue more accurately and efficiently through precedential decision making.

To avoid multilevel review of purely factual issues, second-level review by a PAS official(s) should be limited to circumstances in which:

a. There is a novel or important issue of law, policy, or discretion, or

b. The first-level reviewer erroneously interpreted the law or agency policy.

6. When parties or other interested persons are permitted to file a petition requesting that a PAS official(s) review a decision of a lower-level adjudicator, and review is discretionary, the agency should require that petitioners explain in the petition why review by the PAS official(s) is warranted.

7. When parties or other interested persons are permitted to file a petition for review, and a PAS official(s) has discretion to grant or deny petitions, an agency should consider providing that if a PAS official(s) or his or her delegate does not grant a petition within a set time period, the petition is deemed denied.

8. In determining whether to provide interlocutory review by a PAS official(s) of rulings by lower-level adjudicators, an agency should consider the best practices identified in Recommendation 71-1, *Interlocutory Appeal Procedures*, and evaluate whether interlocutory appeals can be decided in a fair, accurate, consistent, efficient, and timely manner.

Procedures for Review by a PAS Official(s)

9. When a PAS official(s) exercises discretion to review a decision or assume jurisdiction of a case on his or her own motion, upon referral by a lower-level adjudicator or an appellate board, or upon request by another federal official who oversees a program impacted by a decision, the PAS official(s) should notify the parties, provide a brief statement of the grounds for taking such action, and provide the parties a reasonable time to submit written arguments.

10. When a PAS official(s) grants a petition for review, he or she should notify all other parties to the case that he or she has done so and provide them a reasonable time to respond to the petition or file a counterpetition.

11. When a PAS official(s) reviews the decision of a lower-level adjudicator, he or she ordinarily should limit his or her consideration to the evidence and legal issues considered by the lower-level adjudicator. The PAS official(s) should consider new evidence and arguments, if at all, only if the proponent of new evidence or a new legal issue shows that it is material to the outcome of the case and that, despite his or her due diligence, it was not available when the record closed. In such contexts, the PAS official(s) should determine whether it would be more effective for the PAS official(s) to consider the new evidence or legal issue or instead to

remand the case to a lower-level adjudicator for further development and consideration.

12. An agency should provide the PAS official(s) discretion to permit oral argument on his or her own initiative or upon a party's request if doing so would assist the PAS official(s) in deciding a matter in a fair, accurate, consistent, efficient, and timely matter.

13. In cases when a PAS official(s) will decide a novel or important question of law, policy, or discretion, the agency should consider soliciting arguments from interested members of the public, for example by inviting amicus participation, accepting submission of written comments, or holding a public hearing to receive oral comments.

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

Coordination of Policymaking

15. An agency ordinarily should treat the decision of a PAS official(s) as precedential if it addresses a novel or important issue of law, policy, or discretion, or if it resolves a recurring issue or an issue that lower-level adjudicators have decided in different ways. Unless the agency treats all decision of a PAS official(s) as precedential, in determining whether to treat other 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 a PAS official(s) to determine whether issues raised repeatedly indicate a need for notice-and-comment rulemaking or other general policymaking by the agency.

Adjudicative Support for a PAS Official(s)

17. A PAS official(s) should assume the burden of personal decision for any case in which he or she participates.

18. Agencies should delegate routine functions that do not require personal attention by a PAS official(s), including, when appropriate:

    a. Conducting the initial evaluation of petitions for review and petitions for reconsideration;

    b. 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;

    c. Identifying unappealed decisions that may warrant review by the PAS official(s);

d. Managing dockets and case filings;

e. Managing proceedings, including the submission of materials and the scheduling of oral arguments;

f. Responding to routine motions;

g. Encouraging settlement and approving settlement agreements;

h. Conducting the initial review of lower-level decisions, evidence, and arguments;

i. Conducting legal and policy research;

j. Recommending case dispositions;

k. Drafting decisions and orders for review and signature by a PAS official(s);

l. Transmitting decisions and orders to parties and making them publicly available; and

m. Staying decisions and orders pending judicial review or reconsideration by the PAS official(s).

19. For each delegated function, the agency should determine the office or official(s) best suited to perform it in a fair, accurate, consistent, efficient, and timely manner. Options include:

    a. Lower-level adjudicators and staff;

    b. Full-time appeals counsel;

    c. Advisors to a PAS official(s);

    d. The chief legal officer or personnel under his or her supervision; and

    e. A Clerk or Executive Secretary or personnel under his or her supervision.

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

Transparency

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

invasion of personal privacy. In indexing decisions, the agency should clearly indicate which decisions are issued by a PAS official(s).

21. Each agency ordinarily should presume that oral arguments and other review proceedings before a PAS official(s) 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 Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*.

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

22. Each agency should promulgate and publish procedural regulations governing the participation of PAS official(s) 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 official(s). In addition to those matters identified in Paragraph 2 of Recommendation 2020-3, *Agency Appellate Systems*, such regulations should address, as applicable:

    a. The level(s) of adjudication (e.g., hearing level, first-level appellate review, second-level appellate review) at which the PAS official(s) has or may assume jurisdiction of a case (see Paragraphs 1–3);

    b. Events that trigger participation by the PAS official(s) (see Paragraph 4);

    c. An exclusive, nonexclusive, or illustrative list of circumstances in which the PAS official(s) will or may review a decision or assume jurisdiction of a case, if assumption of jurisdiction or review is discretionary (see Paragraph 5);

    d. The availability, timing, and procedures for filing a petition for consideration by the PAS official(s), including any opportunity for interlocutory review, and whether filing a petition is a mandatory prerequisite to judicial review (see Paragraphs 6 and 8);

    e. The actions the agency will 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 7);

    f. The form, contents, and timing of notice provided to the parties to a case when proceedings before the PAS official(s) are initiated (see Paragraphs 9–10);

    g. The record for decision making by the PAS official(s) and the opportunity, if any, to submit new evidence or raise new legal issues (see Paragraph 11);

    h. Opportunities for public participation (see Paragraph 12);

    i. Opportunities for oral argument (see Paragraph 13);

j. The process for considering whether participation by a PAS official in a case would violate government-wide or agency-specific ethics laws and regulations, and any standards for recusal (see Paragraph 14);

k. The treatment of decisions by a PAS official(s) as precedential (see Paragraph 15);

l. Any significant delegations of authority to lower-level adjudicators; appellate boards; staff attorneys; clerks and executive secretaries; other support personnel; and in the case of multimember agencies, members individually or panels consisting of fewer than all members (see Paragraphs 17–19);

m. Any delegations of review authority or alternative review procedures in effect when a PAS position is vacant or a collegial body of PAS officials lacks a quorum; and

n. The public availability of decisions issued by a PAS official(s) and supporting materials, and public access to proceedings before a PAS official(s) (see Paragraphs 20–21).

23. An agency should provide updated access on its website to the regulations described in Paragraph 22 and all other relevant sources of procedural rules and related guidance documents and explanatory materials.

Appendix H:
Federal Employee Adverse Actions

This case study provides an overview of whether, when, and how executive branch officials appointed through presidential nomination and Senate confirmation (PAS officials) participate in the adjudication of adverse actions taken against federal employees.[1] Adverse actions include removals, suspensions for more than 14 days, reductions in grade, reductions in pay, and furloughs of 30 days or less.[2]

Individual agencies may take adverse actions against employees under certain circumstances. Employees against whom an adverse action is taken are entitled to appeal to the Merit Systems Protection Board (MSPB). Established in 1978, the MSPB is an "independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems."[3]

Part I provides an overview of the adjudication of adverse actions, its historical development, and the process by which MSPB adjudicates appeals. Part II describes whether, when, and how PAS officials participate in this adjudication as a matter of both law and practice.

I. Background

The Program

The origins of the civil service system dates to the nineteenth century. The Civil Service Commission (CSC) was established in 1871, but funding was intermittent until, spurred on by President Garfield's assassination by a dissatisfied office seeker, Congress passed the Pendleton Civil Service Reform Act in 1883. The Act established a three-member Commission to root out partisanship in federal recruitment and hiring.

Discipline and removal of federal employees remained largely unregulated until 1887, when President McKinley issued an executive order requiring that an agency have "just cause" for removing an employee from the classified service (the predecessor to today's competitive service). The order also required that the agency provide a written statement of reasons and an opportunity for the employee to respond.[4]

The Lloyd-LaFollette Act of 1912 provided statutory removal protections ("no person in the classified service . . . shall be removed [from office] except for such cause as will promote the efficiency of said service") and established a rudimentary process for adjudicating cause. The agency was required to provide the removed employee with a written notice of reasons and a reasonable time to reply in writing and submit supporting materials. The agency could, but was

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[1] "Employees" include employees "in or under an Executive agency" but do not include, among others, agency heads and members of the Senior Executive Service. 5 U.S.C. § 5541(2).
[2] 5 U.S.C. § 7512.
[3] *About MSPB*, U.S. MERIT SYS. PROT. BD., https://www.mspb.gov/about/about.htm (last visited Apr. 2, 2024).
[4] Exec. Order No. 101 (July 27, 1897).

not required, to provide a hearing. Whether or not a hearing occurred, the CSC was required to maintain a record of the proceeding that was available to the CSC and employee.[5]

Calls for additional reform led to passage of the Veterans Preference Act of 1944. The Act provided that agencies could not take adverse actions against covered veterans except in limited circumstances and after providing notice and the right to respond and submit supporting materials. Veterans also had the right to appeal to and appear before the CSC.[6]

In January 1962, President Kennedy issued Executive Order 10987, which effectively extended the protections of the Veterans Preference Act to all competitive-service employees. Under the executive order, employees could appeal adverse actions to an appellate decision maker within their agencies or to the CSC. In 1973, the CSC proposed a new process in which all appeals of adverse action would flow to the CSC.[7]

The CSC came under sustained attack in the wake of Watergate, and civil service reform became a key priority for the Carter Administration.[8] Upon taking office, President Carter established the Personnel Management Project (PMP), tasking it with studying all aspects of the federal civil-service system and making recommendations for action. The PMP concluded that there was an inherent conflict of interest at the CSC, which served simultaneously as a "management agent for a President elected through a partisan process, "the protector of the merit system from partisan abuse," "the provider of services to agency management in implementing personnel programs," and a neutral body that adjudicated "disputes between agency managers and their employees.[9]

Based on the PMP's recommendations, President Carter transmitted to Congress a pair of reorganization plans that would dismantle the CSC. Reorganization Plan No. 1 of 1978 proposed transferring enforcement of federal-sector equal employment opportunity to the EEOC.[10] Reorganization Plan No. 2 of 1978 proposed assigning the CSC's other responsibilities to four new entities: (1) OPM, to manage the federal civil service system; (2) MSPB, to adjudicate appeals by individual employees; (3) OSC, to investigate and prosecute Hatch Act and merit-system violations; and (4) FLRA, to adjudicate matters related to federal labor relations such as union representation and unfair labor practice allegations.[11]

Following a short period of legislative debate, Congress passed the Civil Service Reform Act (CSRA).[12] The CSRA formally abolished the CSC, and MSPB became operational on January 1, 1979. A significant purpose of the CSRA was to streamline federal personnel management.[13] MSPB has carried on the responsibility of maintaining a merit-based civil service and is tasked with, among other things, ensuring effective human capital by hearing appeals for

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[5] 37 Stat. 555 (1912).
[6] 58 Stat. 387 (1944).
[7] *Nomination of Ruth T. Prokop: Hearing Before the Sen. Comm. on Gov't Affs.*, 96th Cong. 39 (1979).
[8] *See* Robert Vaughn, *Civil Service Reform and the Rule of Law*, 8 FED. CIR. B.J. 1, 2 (1999).
[9] PERS. MGMT. PROJECT, PRESIDENT'S REORGANIZATION PROJECT: FINAL STAFF REPORT 231 (1977).
[10] 43 Fed. Reg. 19,807 (May 9, 1978).
[11] 43 Fed. Reg. 36,037 (Aug. 15, 1978).
[12] Pub. L. No. 95-454, 92 Stat. 1111 (1978).
[13] *Jurisdiction*, U.S. MERIT SYS. PROTECTION BD., https://www.mspb.gov/appeals/jurisdiction.htm (last visited Jan. 31, 2024).

adverse actions taken by federal agencies against employees.[14] The CSRA gave the MSPB statutory authority to adjudicate employee appeals; develop its adjudicatory procedures; issue subpoenas; call witnesses; enforce compliance with MSPB decisions; conduct independent, objective studies of the federal merit systems and federal human capital management issues; and review and report on the rules, regulations, and significant actions of OPM.[15]

The Agency

MSPB is an independent federal agency in the executive branch by headed by a Board consisting of three members—a Chair, Vice Chair, and Member—each of whom is appointed by the President and confirmed by the Senate. Designation as Chair is a separate nomination by the President which requires confirmation by the Senate. The Chair, by statute, is the "chief executive and administrative officer of the agency."[16] The President may designate a Vice Chair without Senate action.[17] No more than two Board members may be from the same political party. Board members serve overlapping, nonrenewable seven-year terms and can be removed only for cause.

MSPB is a "quasi-judicial agency" and operates much like a tribunal. According to the agency, "[t]he Board members' primary role is to adjudicate cases brought before them."[18] The Board also develops procedures for conducting hearings, examining evidence, and rendering decisions. A quorum of Board members is required for MSPB to adjudicate. MSPB was without a quorum for five years between 2017 and 2022, resulting in a backlog of appeals of decisions at its headquarters (as opposed to regional or field offices).[19]

Appeals from adverse actions taken against federal employees make up the majority of MSPB's caseload. The Board is authorized to provide relief for prevailing appellants which may include reinstatement, backpay, and attorney's fees. MSPB employs both Administrative Judges (AJs) and Administrative Law Judges (ALJs). AJs typically handle appeals of adverse actions decisions while ALJs typically examine matters arising under the Board's original jurisdiction (e.g., actions brought by the Office of Special Counsel regarding Hatch Act violations, prohibited personnel practices, etc.).

Congress tasked MSPB with "protecting the rights of [federal] employees," providing those employees with "the right to a third-party, post-action review process" of adverse actions.[20]

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[14] U.S. MERIT SYS. PROTECTION BD., STRATEGIC PLAN FOR FY 2022–2026 (2022), available at https://www.mspb.gov/about/annual_reports/MSPB_Strategic_Plan_for_FY_2022_2026_1910964.pdf [hereinafter MSPB STRATEGIC PLAN].
[15] *Id.* at 2–3.
[16] MPSB STRATEGIC PLAN, *supra* note 14, at 3.
[17] *Frequently Asked Questions About the Lack of Quorum Period and Restoration of the Full Board*, U.S. MERIT SYS. PROTECTION BD. (Feb. 27, 2023), available at https://www.mspb.gov/New_FAQ_Lack_of_Quorum_Period_and_ Restoration_of_the_full_board.pdf.
[18] MSPB STRATEGIC PLAN, *supra* note 14, at 3.
[19] *See, e.g.*, Jeremy S. Graboyes & Jennifer L. Selin, Improving Timeliness in Agency Adjudication App. *I* (Dec. 11, 2023) (report to the Admin. Conf. of the U.S.).
[20] MERIT SYS. PROTECTION BD., *Why Federal Employees Have the Right to a Hearing, in* ADVERSE ACTIONS: A COMPILATION OF ARTICLES 53 (2016), available at https://www.mspb.gov/studies/studies/Adverse_Actions_A_Compilation_of_Articles_1361510.pdf.

Adjudication of employee appeals to adverse actions is a major part of MSPB's work and a cornerstone of their mission to protect the federal merit systems and the rights of the federal workforce.[21] A majority of the cases the Board reviews are appeals of adverse actions against federal employees. The Board is authorized to provide relief for prevailing appellants which may include reinstatement, backpay, and attorney's fees.

Other cases within MSPB's appellate jurisdiction include appeals from reductions in force and certain Office of Personnel Management (OPM) determinations (e.g., retirement matters, suitability determinations, employment practices).[22] About two-thirds of the federal government's full-time civilian workforce have appeal rights to MSPB, including competitive-service employees who have completed a probationary period, excepted-service employees with at least two years continuous service, and career appointees in the Senior Executive Service (SES). Probationary employees and applicants for federal employment have very limited appeal rights, and political appointees have none.[23]

MSPB also has original jurisdiction over certain cases, including whistleblower retaliation claims, actions filed by the Office of Special Counsel (OSC) against federal employees alleged to have committed prohibited personnel practices or violated the Hatch Act, actions taken against administrative law judges (ALJs), and requests for an informal hearing by persons removed from the SES for performance deficiencies.[24]

The Adjudication Process

Cases are first brought when a federal employee files an appeal from an adverse action with the MSPB regional or field office having geographical jurisdiction. The appeal is docketed and assigned for adjudication to an administrative judge (AJ) appointed by the Board. The AJ issues an Acknowledgment Order confirming receipt of the appeal and orders the employing agency to file a response to the appeal. Parties may request a decision on the written record or, alternatively, a hearing. Hearings are adversarial proceedings conducted according to trial-like rules of practice, though alternative, less formal procedures exist.[25]

An AJ's initial decision generally becomes the final decision of the Board 35 days after it is issued.[26] Alternatively, a party may file a petition for review (PFR), requesting that the Board review the AJ's (or ALJ's) initial decision. The Board may also review the initial decision on its own motion.

A party may seek judicial review of a final decision, in most cases in the Court of Appeals for the Federal Circuit.[27] There is no exhaustion requirement mandating parties appeal to the Board before seeking judicial review.

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[21] MSPB STRATEGIC PLAN, *supra* note 14.
[22] 5 C.F.R. § 1201.3.
[23] *Jurisdiction*, MERIT SYS. PROTECTION BD., https://www.mspb.gov/appeals/jurisdiction.htm (last visited Jan. 31, 2024).
[24] 5 C.F.R. §§ 1201.2, 1213.
[25] 5 U.S.C. § 1204; 5 C.F.R. §§ 1201.11–1201.113, 1201.121–1201.148.
[26] 5 U.S.C. § 7701(e); 5 C.F.R. § 1201.113.
[27] 5 U.S.C. § 7703.

The regulations governing MSPB adjudication procedure also allow for interlocutory appeals of rulings made by an AJ during a proceeding. Either party may make a motion for certification of an interlocutory appeal; or the AJ may certify an interlocutory appeal to the Board on his or her own motion. If the appeal is certified, the Board will decide the issue and the AJ will act in accordance with the Board's decision.[28]

II. PAS Officials' Involvement in Adjudication

Board members, who are PAS officials, participate indirectly and directly in the adjudication of cases. The Board participates indirectly in the adjudication of cases through the appointment and supervision of AJs, the development of procedural rules, and other managerial controls.

In terms of direct participation, the Board may review an AJ's initial decision upon the request of a petitioner or upon its own motion. Review is discretionary with the Board. A regulation provides a nonexclusive list of situations in which the Board may grant a PFR and describes the showing a petitioner must make:

> (a) The initial decision contains erroneous findings of material fact.
>
> > (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision.
> >
> > (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.
>
> (b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petition must explain how the error affected the outcome of the case.
>
> (c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.
>
> (d) New and material evidence or legal argument that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents

[28] 5 C.F.R. § 1201.91.

> themselves, must have been unavailable despite due diligence when the record closed.[29]

The Board "normally will consider only issues raised in a timely filed [PFR]."[30]

When it reviews a case, the Board relies primarily on the record prepared by the AJ.[31] It may reweigh evidence and "substitute its judgment for that of the AJ,"[32] however, and procedurally it may hear oral arguments, require that briefs be filed, remand for additional testimony or evidence.[33] At the conclusion of proceedings, the Board may issue an "opinion and order," which is considered precedential and ordinarily binding on the Board and lower-level adjudicators in future cases, or a "nonprecedential order," which is not binding and "does not add significantly to the body of MSPB case law."[34]

The Board receives hundreds of PFRs each year. In fiscal year (FY) 2016, lower-level decision makers issued 8,121 initial decisions, 4,502 of which were adverse action cases. Of the 1,022 PFRs filed that year, 629 were adverse action cases. In FY 2016, the Board granted 73 PFRs.[35] In FY 2022, lower-level decision makers decided a total of 4,241 cases, of which 1,633 involved adverse actions.[36] Of the 428 PFRs filed that year, 134 were adverse action cases. The Board granted 22 PFRs.[37]

MSPB faced a major challenge between January 2017 and March 2019, when it had a single member, and between March 2019 and March 2022, when it had no members. Without a quorum, the Board was unable to act on PFRs during these periods. Several measures were implemented during this period, or already in place, that diminished the effects of the lack of a quorum on the adjudication of adverse actions. First, no law or agency rule requires parties to obtain Board review before seeking judicial review. Between 2017 and 2022, parties dissatisfied with an AJ's decision were able to bypass the Board and proceed to the Federal Circuit. Second, the Board had previously delegated authority to the Clerk of the Board to take actions such as granting the withdrawal of a PFR when requested by a petitioner, dismissing PFRs that are moot, ruling on the time for filing pleadings, responding to requests for reconsideration or reopening, issuing show cause orders, ruling on procedural motions, and executing subpoenas. Third, staff

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[29] 5 C.F.R. § 1201.115(a)–(d); *see also Appellant Questions and Answers #21*, U.S. MERIT SYS. PROTECTION BD., https://www.mspb.gov/appeals/appellantqanda.htm (last visited Jan. 31, 2024).
[30] 5 C.F.R. § 1201.115.
[31] U.S. MERIT SYS. PROTECTION BD., JUDGES' HANDBOOK 43 (last updated October 2019), available at https://www.mspb.gov/appeals/files/ALJHandbook.pdf. This also includes the prehearing conference record.
[32] Tierney v. U.S. Dep't of Just., 717 F.3d 1374, 1378 (Fed. Cir. 2013); ADVERSE ACTIONS, *supra* note 20, at 59.
[33] 5 C.F.R. § 1201.117.
[34] *Id*. § 1201.117(c).
[35] U.S. MERIT SYS. PROTECTION BD., ANNUAL REPORT FOR FY 2016 15–16, 26 (Jan. 18, 2017), available at https://www.mspb.gov/about/annual_reports/MSPB_FY_2016_Annual_Report_1374269.pdf.
[36] U.S. MERIT SYS. PROTECTION BD., ANNUAL REPORT FOR FY 2022 10–11, 17 (Apr. 18, 2023), available at https://www.mspb.gov/about/annual_reports/MSPB_FY_2022_Annual_Report_2022671.pdf. "Decided" means the total number of cases, which are then categorized into "dismissed" and "not dismissed." Lastly, the annual report for FY 2022 only includes data for cases decided between March 4 and September 30, 2022, as opposed to other full-year annual reports.
[37] There were 6 instances in which an adverse action case disposition was categorized as "Denied; Further Analysis," which includes cases that were denied on the basis of the issues raised in the PFR, but which the Board considered an issue on those cases *sua sponte*. *Id.* at 17, n.1.

attorneys continued to review case files, prioritize certain caseloads, recommend outcomes, and draft decisions. Upon the resumption of a quorum in March 2022, this function was central to the Board's ability to address the inherited inventory of PFRs.

Indeed, the Board has always depended heavily on staff support to manage its caseload. The Office of the Clerk of the Board (OCB) receives, processes, and certifies to the Office of Appeals Counsel or Office of General Counsel PFRs. The OCB may also rule on certain procedural matters and issues decisions reached and orders made by the Board members. The OCB also certifies records to the courts and other federal administrative agencies and provides other administrative services to the MSPB. The Office of Appeals Counsel (OAC) conducts legal research and recommends decisions on cases in which a party has petitioned for review. The OAC, at one time, included approximately 40 career civil service attorneys and staff and handled 1,000 to 1,600 cases per year. The OAC further supported the Board by preparing, in most cases, either a final order affirming the initial decision, a modified final order affirming the initial decision, or a precedential opinion and order modifying the initial decision. Lastly, the Office of General Counsel (OGC) provides legal services to the Board, including providing legal advice, drafting certain types of Board decisions—such as those pertaining to enforcement of final decisions and settlement agreements, and FOIA appeals—conducting the PFR settlement program, and developing and coordinating the Board's ethics program, legislative policy and strategy, and issuance of regulations.[38]

It is worth noting that two PAS officials, in addition to the Board, have a statutory role in the adjudication of adverse actions. The OPM Director (a PAS official) may intervene as a matter of right in any case in which "the interpretation or application of any civil service law, rule, or regulation" under OPM's jurisdiction is at issue and the OPM Director believe "an erroneous decision would have a substantial impact on any [such] civil service law, rule, or regulation."[39] The Special Counsel (also a PAS official) may also intervene or otherwise participate in any MSPB proceeding with the consent of the employee.[40]

III. Factors Affecting PAS Officials' Involvement in Adjudication

Prior to MSPB's establishment in 1978, there was very little involvement by PAS officials in the adjudication of adverse actions. In removing the adjudicative function from the CSC and reassigning it to an independent, quasi-judicial agency, Congress clearly intended for a body of high-level officials, independent of the CSC and insulated from the President, to oversee the operation of the civil service system through direct participation in the adjudication of individual cases. In the words of the Board's first Chair, Congress intended that "the Board, unlike its predecessor, should be an active adjudicator."[41]

An important way in which the Board has attempted to oversee the civil service system is through the issuance of precedential decisions addressing significant issues. In particularly

[38] U.S. MERIT SYS. PROTECTION BD., Presentation, MSPB Policy and Practice (Apr. 21, 2011), available at https://www.opm.gov/policy-data-oversight/employee-relations/training/presentationmspbpolicypractice.pdf.
[39] 5 U.S.C. § 7701(d)(1).
[40] 5 U.S.C. § 1212(c).
[41] U.S. MERIT SYS. PROTECTION BD., FIRST ANNUAL REPORT (1979), available at https://www.google.com/books/edition/Annual_Report_U_S_Merit_Systems_Protecti/YgVOYFnYUlAC?hl=en&gbpv=0.

significant cases, Board members may order briefing, hear oral arguments, and personally draft opinions.[42] At the same time, the Board has had to face the practical reality that its three members must act on hundreds of PFRs each year, in addition to supervising the agency's operations and carrying out its other statutory responsibilities. To review initial decisions within reasonable timeframes, the first Board developed a system in which staff attorneys briefed Board members and received instructions for drafting opinions for Board approval.[43] While Board members remain "active adjudicators," as described above, the functions and processes used by staff attorneys and other support personnel has evolved and grown over time.

[42] *Id.*
[43] *Id.*

Appendix K
Immigrant and Nonimmigrant Visas

This case study provides an overview of whether, when, and how executive branch officials appointed through presidential nomination and Senate confirmation (PAS officials) participate in the adjudication of immigrant and nonimmigrant visas. By executive-branch policy since 1917 and by statute since 1924, individuals other than U.S. citizens and permanent residents generally have been required to obtain a visa from a consular officer, employed by the Department of State, before arriving in the United States.

Part I provides an overview of the program, its historical development, and the State Department's process for adjudicating cases under it. Part II describes whether, when, and how PAS officials participate in this adjudication as a matter of both law and practice. Part III describes the contextual variables that affect or have affected this participation.

I. Background

The Program

Immigration went largely unregulated by the federal government for the first century of American history.[1] The earliest federal laws related to immigration regulated ships transporting immigrants to the United States,[2] prohibited American ships from transporting contract laborers from China,[3] and encouraged immigration to fill Civil War-era labor shortages.[4] Borders were otherwise wide open, and, except for a brief period during the Civil War, neither a passport nor a visa was required to enter the United States.

Beginning in the 1870s, Congress passed a series of laws imposing a tax on migrants and excluding admission into the United States of certain classes of immigrants, including Chinese laborers, people "likely to become a public charge," people "suffering from a loathsome or a dangerous contagious disease," people with a mental or intellectual disability, people "convicted of a felony or other infamous crime or misdemeanor involving moral turpitude," people practicing polygamy, communists, and anarchists.[5] Laws enacted between 1924 and 1952 prohibited immigration from certain countries and set quotas for immigration from others.[6] The Immigration and Nationality Act of 1952 (INA) abolished racial restrictions,[7] and the Immigration and Nationality Act of 1965 eliminated the "national origins quota system."[8]

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[1] It was not until 1876, after states began passing their own immigration laws, that the Supreme Court ruled that immigration was the responsibility of the federal government. *See* Chy Lung v. Freeman, 92 U.S. 275 (1876).
[2] *E.g.*, 3 Stat. 488a (1819); 10 Stat. 715 (1855).
[3] 12 Stat. 340 (1862).
[4] 13 Stat. 385 (1864); *see generally* JASON H. SILVERMAN, WHEN AMERICA WELCOMED IMMIGRANTS: THE SHORT AND TORTURED HISTORY OF ABRAHAM LINCOLN'S ACT TO ENCOURAGE IMMIGRATION (2020).
[5] *E.g.*, 18 Stat. 477 (1875); 22 Stat. 214 (1882); 22 Stat. 58 (1882); Scott Act, 25 Stat. 504 (1888); 26 Stat. 1084a (1891); 27 Stat. 25 (1892); 32 Stat. 1213 (1903); 34 Stat. 898 (1907); 39 Stat. 874 (1917); 40 Stat. 1012 (1918); 42 Stat. 5 (1921).
[6] *E.g.*, 43 Stat. 153 (1924).
[7] Pub. L. No. 82-414, 66 Stat. 163 (1952).
[8] Pub. L. No. 89-236, 79 Stat. 911 (1965).

Today's system prioritizes immigration by close relatives of U.S. citizens and permanent residents and immigration by skilled workers.[9] Nonimmigrants are also permitted to visit the United States temporarily for certain purposes.[10] The law continues to provide that certain noncitizens are ineligible to be admitted to the United States, for example on health- or security-related grounds.[11]

To enforce these laws, Congress in 1882 created the first immigration bureaucracy within the Treasury Department. Officers at ports of entry were responsible for collecting taxes and inspecting arrivals to determine whether they met the legal requirements for admission into the United States. Immigrants deemed admissible were allowed entry. Immigrants deemed inadmissible were denied entry and, in most cases, deported.[12] An 1891 law made decisions of inspection officers reviewable by the Superintendent of Immigration and the Treasury Secretary, both PAS officials.[13] Reflecting changing views on the objectives of immigration policy, Congress in 1903 transferred these functions to the new Department of Commerce and Labor.[14]

The country's entry into World War I in 1917 prompted new concerns about immigration. In May 1917, President Wilson issued an executive order requiring every noncitizen to present their passport to and obtain a visa from a diplomatic or consular officer before traveling to the United States.[15] Under this policy, diplomatic and consular officers were directed to verify noncitizens' passports and ascertain the reason for traveling to the United States. Officers were instructed to refuse visas to German subjects and citizens of other countries "with which American diplomatic relations are broken" (absent special authorization from the Department), and any other noncitizens they believed were traveling to the United States "for an improper or inimical purpose."[16]

The role of diplomatic and consular officers under this policy was limited, as they lacked authority to refuse a visa on the grounds that an applicant was legally inadmissible. Officers were instructed to advise immigrants of the potential grounds for inadmissibility, but decisions regarding inadmissibility were left to immigration officers in the United States.[17]

After the Attorney General determined there was no legal authority for the President and executive branch to implement this policy, Congress passed the Wartime Measure Act of 1918, which gave the President wartime power to regulate individuals entering and departing from the United States.[18] Exercising this power, President Wilson issued a proclamation designating the Secretary of State "as the official who shall grant, or in whose name shall be granted, permission to aliens to depart from or enter the United States" and providing that "[n]o alien shall receive

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[9] *See* 8 U.S.C. § 1153.
[10] *See id.* § 1184.
[11] *Id.* § 1182.
[12] 22 Stat. 214 (1882).
[13] 26 Stat. 1084a (1891).
[14] 32 Stat. 825 (1903).
[15] Exec. Order No. 2619 (May 11, 1917).
[16] Circular Telegram from Robert Lansing, Sec'y of State, to Diplomatic and Principal Consular Officers in Certain Countries (May 29, 1917), https://history.state.gov/historicaldocuments/frus1918Supp02/d920.
[17] General Instructions from Frank L. Polk, Acting Sec'y of State, to the Diplomatic and Consular Officers (July 26, 1917), https://history.state.gov/historicaldocuments/frus1918Supp02/d922.
[18] Pub. L. No. 65-154, 40 Stat. 559 (1918).

permission to depart from or enter the United States unless it shall affirmatively appear that there is reasonable necessity for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States."[19] Congress extended this authority in 1921, and the policy remained in effect.[20]

The policy became a statutory mandate in 1924, when Congress established the "consular control system." Under this system, noncitizens are statutorily required to obtain a visa from a U.S. consulate abroad before entering the United States. The statute assigned legal responsibility for adjudicating applications to consular officers. Although border patrol officers still retained ultimate responsibility for determining whether a visa-holder could enter the United States, the statute directed consular officers to refuse visas to applicants whom they found inadmissible under the law.[21]

The current consular control system dates to 1952. Under this system, individuals who are neither U.S. citizens nor permanent residents must obtain permission from the U.S. government before arriving in the United States. As a general matter, individuals must apply for a visa from a consular officer at the appropriate U.S. consulate abroad.[22] (Under the Visa Waiver Program, the Secretary of Homeland Security, in consultation with the Secretary of State, may designate countries, nationals of which may seek admission for limited purposes and for up to 90 days without obtaining a visa. Nationals of 41 countries are currently eligible under the program.[23])

Consular officers, stationed at diplomatic posts around the world, adjudicate applications for immigrant and nonimmigrant visas. Immigrant visas are available for close family members of U.S. citizens and permanent residents, qualified employees of U.S. employers, and individuals from countries with low rates of immigration to the United States. Immigrant visas for close family members of U.S. citizens are always available. Most other types of immigrant visas are subject to annual caps. Nonimmigrant visas are available for many categories of visitors, including tourists, business visitors, students, diplomats, crewmembers, journalists, and performing artists.[24] Certain noncitizens are statutorily barred from admission into the United States and are ineligible to receive visas.[25]

Obtaining a visa is a prerequisite to, but not a guarantee of, admission into the United States. Officers of U.S. Customs and Border Patrol (CBP), a subagency of the Department of Homeland Security (DHS), are ultimately responsible for determining whether a visa-holder is admissible. This system, requiring both consular officers and border patrol officers to determine

[19] Proclamation No. 1473 (Aug. 8, 1918), https://history.state.gov/historicaldocuments/frus1918Supp02/d923.
[20] 41 Stat. 1217 (1921).
[21] 43 Stat. 153 (1924).
[22] 8 U.S.C. § 1201 *et seq*.
[23] *Id.* § 1187; *see also U.S. Visa Waiver Program*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/visa-waiver-program (last visited Apr. 2, 2024).
[24] A full list of visa categories is available at https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/all-visa-categories.html.
[25] 8 U.S.C. § 1182.

admissibility, was intended to establish "a double check of aliens by separate independent agencies of the Government."[26]

The Agencies

Consular visa processing takes place within the Department of State. The State Department is a cabinet department headed by the Secretary of State, who is a PAS official. Established in 1789, the State Department has primary responsibility for the foreign affairs function of the federal government. The State Department is headquartered in Washington, D.C., and operates more than 250 diplomatic posts around the world.

Consular officers, stationed at diplomatic posts, have sole statutory authority to adjudicate visa applications.[27] The INA authorizes the Secretary of State to adopt regulations designating "any consular, diplomatic, or other officer of the United States" as a consular officer for purpose of issuing visas.[28] Four classes of individuals are currently eligible to serve as consular officers: (1) commissioned consular officers, who may be PAS officials or appointed by the Secretary of State; (3) the Deputy Assistant Secretary for Visa Services; (4) civil service visa examiners employed by the State Department and certified as qualified by the chief of the relevant consular section;[29] and (4) foreign service officers assigned to positions designated as requiring the performance of consular functions.[30] In practice, the majority of consular officers are career foreign service officers appointed and supervised according to the Foreign Service Act.

The INA grants the Secretary of State broad managerial control over consular officers but explicitly prohibits the Secretary from supervising "those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas."[31] The State Department Basic Authorities Act likewise reiterates that the Secretary "shall not have any authority given expressly to diplomatic or consular officers."[32] This provision has long been interpreted by the State Department and others as prohibiting the Secretary or his or her delegate from formally reviewing consular officers' visa decisions or delegating the power to adjudicate visa applications to any person not designated a consular officer.[33] At the same time, after issuance of a visa, both the consular officer and the Secretary of State have broad discretion to revoke it.[34]

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[26] RUTH ELLEN WASEM, CONG. RSCH. SERV., R41093, VISA SECURITY POLICY: ROLES OF THE DEPARTMENTS OF STATE AND HOMELAND SECURITY 3 (2010) (quoting S. Comm. on the Judiciary, 81st Cong., The Immigration and Naturalization Systems of the United States (Comm. Print 1950)).
[27] *See* 8 U.S.C. § 1201(a)(1).
[28] *Id.* § 1101(a)(9).
[29] Under the regulation, "[t]he designation of visa examiners shall expire upon termination of the examiners' employment for such duty and may be terminated at any time for cause by the Deputy Assistant Secretary." 22 C.F.R. § 40.1(d).
[30] *Id.*
[31] 8 U.S.C. § 11014(a).
[32] 22 U.S.C. § 2651a.
[33] *See, e.g.*, H.R. COMM. ON GOV'T OPERATIONS, 85TH CONG., SURVEY AND STUDY OF ADMINISTRATIVE ORGANIZATION, PROCEDURE AND PRACTICE IN THE FEDERAL AGENCIES 960 (Comm. Print 1957).
[34] 8 U.S.C. § 1201(i).

The Homeland Security Act of 2002 (HSA) expanded the Secretary of State's authority over consular officers, giving him or her authority to "direct a consular officer to refuse a visa to an alien if [he or she] deems such refusal necessary or advisable in the foreign policy or security interests of the United States."[35] The HSA also directs the Secretary to evaluate, in consultation with the Secretary of Homeland Security, "the performance of consular officers with respect to the processing and adjudication of applications for visas in accordance with performance standards developed by the Secretary [of Homeland Security] for these procedures."[36]

The INA directs the Secretary to maintain a Visa Office headed by a Director. (The Department calls the Visa Office "Visa Services" and the Director the "Deputy Assistant Secretary for Visa Services.") Organizationally, Visa Services is a subunit of the Bureau of Consular Affairs, which is headed by an Assistant Secretary (a PAS official).[37] The Assistant Secretary reports to the Under Secretary for Management (also a PAS official).[38]

By statute, the Visa Office includes a General Counsel who is responsible for "maintain[ing] liaison with the appropriate officers of the [Foreign] Service with a view to securing uniform interpretations of the provisions of [the INA]."[39] The General Counsel is appointed by the Secretary and serves under the general direction of the Department's Legal Adviser, who is a PAS official.[40]

The Visa Office also oversees the National Visa Center (NVC), located in Portsmouth, New Hampshire. To improve the efficiency of consular processing, the NVC centralizes fee collection and prepares case files for adjudication by consular officers.[41]

Although this case study focuses on consular processing of visas within the State Department, it is important to note that several other agencies are directly or indirectly involved in the adjudication of visa applications, including:

- **Department of Homeland Security (DHS).** The HSA gives the Secretary of Homeland Security (a PAS official) exclusive authority to issue regulations, through the Secretary of State, "relating to the functions of consular officers of the United States in connection with the granting or refusal of visas, and shall have the authority to refuse visas in accordance with law and to develop programs of homeland security training for consular officers (in addition to consular training provided by the Secretary of State." The Secretary of Homeland Security may not, however, "alter or reverse the decision of a consular officer to refuse a visa to an alien."[42] Under the HSA and a memorandum of understanding signed by the Secretaries of State and Homeland Security, DHS employees may also play a role advising and evaluating

[35] 6 U.S.C. § 236(c)(1).
[36] *Id.* § 236(e)(3).
[37] 8 U.S.C. § 1104(c), (e).
[38] *Id.* § 1104(e).
[39] *Id.* § 1104(c)–(d).
[40] *Id.* § 1104(e).
[41] *National Visa Center*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/immigrate/national-visa-center.html (last visited Apr. 2, 2024).
[42] 6 U.S.C. § 236(b).

consular officers.[43]

- **Department of Labor (DOL).** Before applying for an employment-based immigrant visa, an applicant's prospective employer must obtain a labor certification from the Employment and Training Administration (ETA), a subunit of DOL.[44] Decisions of ETA certifying officers are subject to review by the Secretary of Labor. The Secretary has delegated review authority to the Board of Alien Labor Certification Appeals (BALCA), which consists of administrative law judges within the Labor Department's Office of Administrative Law Judges.[45] Certain BALCA decisions are subject to review by the Secretary,[46] and final decisions are subject to judicial review in the federal courts of appeals.[47]

- **U.S. Citizenship & Immigration Services (USCIS).** After receiving a labor certification from DOL but before applying for an employment-based immigrant visa, an applicant's prospective employer must petition USCIS (a DHS subunit) for the appropriate employment-based preference category.[48] Similarly, before applying for a family-based immigrant visa, an applicant's sponsor must obtain a classification from USCIS that the applicant is an eligible family member.[49] USCIS is also responsible for producing Permanent Resident Cards (Green Cards)[50] and, for applicants refused a visa, adjudicating requests for waiver of ineligibility.[51] Many, but not all, USCIS decisions are subject to review by the Administrative Appeals Office, acting under review authority delegated by the Secretary of Homeland Security.[52] USCIS is headed by a Director who reports to the Deputy Secretary of Homeland Security. The USCIS Director and Deputy Secretary are both PAS officials.[53]

- **Department of Justice (DOJ).** USCIS decisions regarding a petition to classify the status of a relative are subject to review by the Attorney General (a PAS official).[54]

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[43] WASEM, *supra* note 26, at 5–6.
[44] *See* 8 U.S.C. § 1182(a)(5); 22 C.F.R. § 40.51; *see also* Admin. Conf. of the U.S., Recommendation 73-2, *Labor Certification of Immigrant Aliens*, 38 Fed. Reg. 16,840 (June 27, 1973).
[45] 20 C.F.R. §§ 656.26, 656.27.
[46] 85 Fed. Reg. 30,608 (May 20, 2020). *But see* 86 Fed. Reg. 7927 (Feb. 3, 2021) (withdrawing a direct final rule that would have extended discretionary review by the Secretary to H-2B temporary labor certification cases pending before or decided by BALCA).
[47] Reddy, Inc. v. U.S. Dep't of Labor, 492 F.2d 538 (5th Cir. 1974); Yong v. Regional Manpower Administrator, 509 F.2d 243 (9th Cir. 1975); Ratnayake v. Mack, 499 F.2d 1207 (8th Cir. 1974); Sec'y of Labor v. Farino, 490 F.2d 885 (7th Cir. 1973); Naporano Metal & Iron Co. v. Sec'y of Labor, 529 F.2d 537 (3d Cir. 1976); *see also* Anastasius Efstratiades, Note, *Judicial Review of the Administrative Denial of Employment Certification to Aliens*, 7 CASE W. RES. J. INT'L L. 229 (1975).
[48] 8 U.S.C. § 1154.
[49] *Id.* § 1154.
[50] *Green Card*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card (last visited Apr. 3, 2024).
[51] 8 U.S.C. § 1182(d), (g), (h), (i); 7 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL pt. L, ch. 3 (2024), https://www.uscis.gov/policy-manual.
[52] *The Administrative Appeals Office (AAO)*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/organization/directorates-and-program-offices/the-administrative-appeals-office-aao (last visited Apr. 3, 2024).
[53] 6 U.S.C. §§ 113, 271.
[54] *See* U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL ch. 9 (2022), https://www.justice.gov/eoir/book/file/1528926/dl?inline

The Attorney General has delegated review authority to the Board of Immigration Appeals (BIA), a subunit of DOJ's Executive Office for Immigration Review.[55] BIA decisions may be referred to the Attorney General at the Attorney General's request or at the request of DHS or BIA.[56]

- **Customs and Border Patrol (CBP).** Although obtaining a valid visa from a consular officer is a prerequisite to entering the United States, it does not guarantee admission. Upon arriving in the United States, a visa-holder must present the visa to a CBP officer, who ultimately decides whether to grant admission into the country or refuse admission, for example by issuing a notice of expedited removal.[57] Like USCIS, CBP is a subunit of DHS. The agency is headed by a Senate-confirmed Commissioner who reports to the Secretary and Deputy Secretary of Homeland Security.[58]

The Adjudication Process

The INA,[59] State Department regulations,[60] and the Foreign Affairs Manual (FAM)[61] outline the basic procedures and substantive legal requirements that consular officers follow in adjudicating applications for immigrant and nonimmigrant visas.

In the case of an application for an immigrant visa, USCIS forwards the approved petition for an alien relative or alien worker to NVC for processing. NVC collects visa application fees and supporting documentation to reduce the development burden on consular officers.[62] Supporting documentation varies but typically includes records such as a valid passport, civil documents (e.g., birth certificate, marriage certificate, adoption documentation, prison records), financial documents (to demonstrate that the applicant is unlikely to become a public charge), and medical examination forms.[63] Once NVC completes development (and, for numerically limited visa categories, when a visa number becomes available), it schedules an interview appointment with a consular officer.[64]

Nonimmigrant visa applicants generally apply with the consular post of jurisdiction and schedule an interview, if required, with a consular officer.[65] Under the Intelligence Reform and

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[55] 8 C.F.R. § 1003.1(b)(5).
[56] *Id.* § 1003.1(h).
[57] 6 U.S.C. § 211(c)(8).
[58] *Id.* §§ 211, 271.
[59] 8 U.S.C. §§ 1201, 1202.
[60] 22 C.F.R. ch I, subch. E.
[61] The FAM is available at https://fam.state.gov.
[62] *Immigrant Visa Process*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process (last visited Apr. 3, 2024).
[63] 8 U.S.C. § 1202; 22 C.F.R. §§ 41.104–41.105, 42.64–42.66.
[64] *Immigrant Visa Process*, *supra* note 62.
[65] *Requirements for Immigrant and Nonimmigrant Visas*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/travel/international-visitors/visa-waiver-program/requirements-immigrant-and-nonimmigrant-visas (last visited Apr. 3, 2024).

Terrorism Prevention Act of 2004, consular officers must conduct an in-person interview with most applicants for nonimmigrant visas between the ages of 14 and 79.[66]

For both immigrant and nonimmigrant visas, the adjudication process is essentially bureaucratic and investigative in nature. The consular officer is responsible for "conducting as complete a clearance as necessary to establish the eligibility of an applicant to receive a visa."[67] Adjudication involves a review of supporting documentation, a review of case notes and other information maintained by the consulate, and, if required, an in-person interview with the applicant.[68] Consular officers may also receive information from third parties, such as local law enforcement.[69] In certain cases, the consular officer may need to obtain an advisory opinion from the Visa Office.[70] Before granting a visa, the consular officer must also check the State Department's visa lookout system and any other system that collects information about the excludability of applicants and certify that there is no basis for excluding the applicant.[71]

The nature of factfinding can vary according to the type of visa an applicant seeks. Adjudication of immigrant visa applications has been described as "objective and formal" because the family relationship or labor certification either exists or it does not, and the applicant either overcomes the grounds for exclusion or does not."[72] Adjudication of nonimmigrant visas, on the other hand, "necessarily relies on a determination of an applicant's intentions and good faith, so as to ensure that the applicant will leave the United States before a visa expires."[73] Factfinding can be fairly subjective, relying on consular officials' interview observations, intuitions, and familiarity with "the characteristics and idiosyncrasies of the local culture."[74]

After completing all necessary procedures, the consular officer either issues or refuses the visa. If a consular officer refuses a visa, he or she typically provides oral and written notice to the applicant of the refusal.[75] The written notification typically identifies the legal basis for refusal and, for immigrant visas, the legal basis for refusal and any missing or additional required evidence to demonstrate eligibility.[76]

There is no formal administrative process for appealing a refusal. Several options are available, however, depending on the visa type and basis for refusal:

- The applicant may reapply.[77]

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[66] 8 U.S.C. § 1202(h)(1).
[67] 9 FAM 301.2-2(c).
[68] *Id.* § 301.2-2(e).
[69] *Id.* § 301.5-2(f).
[70] *Id.* § 304.1-3.
[71] *Id.* § 307.3; *see also* RUTH ELLEN WASEM, CONG. RSCH. SERV., R43589, IMMIGRATION: VISA SECURITY POLICIES 9–10 (2015).
[72] James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 12 (1991).
[73] *Id.*
[74] *Id.* at 53.
[75] 9 FAM 504.11-3(A)(1).
[76] *Id.* 504.11-3(A)(1).
[77] *Id.* 403.10-3(A)(1)(e).

- The applicant may submit additional evidence, at which point the consular officer may reopen and readjudicate the case.[78]

- An applicant refused an immigrant visa may request reconsideration within one year of the refusal.[79]

- The consular officer must send the case to his or her supervising consular officer. If the supervisor disagrees with the refusal, he or she may submit the case to the Department or assume responsibility for the case and reverse the refusal. In either case, the FAM advises the supervisor to "discuss the case fully with the refusing officer before taking either action."[80] The supervisory review process has been described as "more akin to a managerial review than an appellate review."[81]

- An applicant may seek an advisory opinion from the Office of the Legal Adviser for Consular Affairs. Advisory opinions are binding on consular officers as to questions of law but are otherwise merely advisory.[82]

- An applicant may apply for a waiver of ineligibility from USCIS.[83]

Decisions of consular officers are subject to very limited judicial review under the doctrine of consular nonreviewability.[84]

II. PAS Officials' Involvement in Adjudication

For purposes of this study, there are two notable aspects of the visa adjudication process. First, the INA assigns responsibility for adjudication to consular officers. Second, the law provides no explicit avenue for adjudication or review by the Secretary of State or any other higher-level official.

Coupled with the limited availability of judicial review, observers have long commented on the remarkable nature of this arrangement. In 1953, the President's Commission on Immigration and Naturalization (Perlman Commission) heard repeated testimony from figures like Professors Henry Hart and Louis Jaffe[85] that "such administrative 'absolutism' was unparalleled in the whole range of American law."[86] The Commission concluded that consular

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[78] *Id.* 504.11-4(A).
[79] 22 C.F.R. § 42.81(e).
[80] 9 FAM 504.11-3(A)(3); *see also* 22 C.F.R. § 42.81(c); 9 FAM 601.4-2.
[81] U.S. CIVIL RIGHTS COMM'N, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 52 (1980) [hereinafter TARNISHED GOLDEN DOOR]; *see also* PRESIDENT'S COMM'N ON IMMIGR. & NATURALIZATION, WHOM SHALL WE WELCOME 149–150 (1953) [hereinafter WHOM SHALL WE WELCOME].
[82] 9 FAM 103.4; *see also infra* note 100 *and accompanying text*.
[83] *Visa Denials*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visa-denials.html (last visited Apr. 2, 2024).
[84] *See, e.g.*, Kerry v. Din, 576 U.S. 86 (2015); Kleindienst v. Mandel, 408 U.S. 753 (1972).
[85] At the time, Professor Jaffe was Chairman of the Committee on Immigration of the American Bar Association's Administrative Law Section.
[86] WHOM SHALL WE WELCOME, *supra* note 81, at 146.

officers occupy a "unique position in American law and practice."[87] In 1975, Professor Charles Gordon wrote that "[t]his remarkable provision purports to deny to a Cabinet Officer the authority to control the activities of subordinate officials."[88] In a 1989 study for the Administrative Conference of the United States (ACUS), Professor James Nafziger likewise observed that "[t]he immunity of consular discretion from more formal administrative review is unusual within the federal government."[89]

PAS officials and their delegates do play other important roles in the visa process, however. First, the INA delegates to the Secretary of State the decision to determine who should have legal authority to adjudicate visa applications.[90] At least some individuals authorized to adjudicate under the current regulation are either PAS officials, political appointees, or close contacts of political appointees (i.e., commissioned consular officers and the Deputy Assistant Secretary for Visa Services).[91] Most individuals eligible to serve as consular officers are career members of the foreign service. Such individuals are generally subject to supervision by the Secretary, and the Secretary (or delegates) exercise control over the assignment of responsibilities, including visa adjudication, to employees of the Department.[92] At the same time, there are statutory limits on appointment, performance management, and removal of career foreign service officers.[93]

Second, as described earlier, both the Secretary of State and the Secretary of Homeland Security, through delegates, play a potentially important role in training consular officers and closely evaluating their work and overall performance. The State Department has also implemented additional quality assurance programs, including the supervisory review process and advisory opinion process, which, if implemented effectively, may provide senior officials with information useful in refining substantive policy or improving training.

Third, consular officers are bound by procedural and substantive regulations adopted under the authority of the Secretary of State and Secretary of Homeland Security. Under the Visa Waiver Program and other authorities, PAS officials can remove entire classes of potential visa applications from adjudication by consular officers.[94] Consular officers are also guided by the FAM, which "represents the Department's principal attempt to structure consular discretion."[95] The Assistant Secretary for Consular Affairs has "overall substantive and coordinating responsibility" for sections of FAM related to the management and work of consular officers.[96]

Fourth, at least for immigrant visas, the most important documentation needed to prove admissibility is prepared by USCIS staff, who are supervised by the USCIS Director and whose decisions are subject to review by BIA and the Attorney General. Consular officers are also

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[87] *Id.* at 146.
[88] Charles Gordon, *The Need to Modernize Our Immigration Laws*, 13 SAN DIEGO L. REV. 1, 9 (1975).
[89] Nafziger, *supra* note 72, at 24.
[90] *See supra* notes 19–21.
[91] 22 C.F.R. § 40.1(d).
[92] 22 U.S.C. § 3982.
[93] *Id.* ch. 52.
[94] *See, e.g.*, 22 C.F.R. § 41.2.
[95] Kim R. Anderson & David A. Gifford, *Consular Discretion in the Immigrant Visa-Issuing Process*, 16 SAN DIEGO L. REV. 87, 152 (1978).
[96] 1 FAM 251.1(h).

prohibited from granting a visa to any individual listed in the State Department's visa lookout system or any other system that collects information about the excludability of applicants.[97]

Fifth, various PAS officials or their delegates do have some authority to take action in cases decided or pending decision by a consular officer. As noted earlier, the HSA permits the Secretary of State to "direct a consular officer to refuse a visa to an alien if [he or she] deems such refusal necessary or advisable in the foreign policy or security interests of the United States." The Secretary of State may revoke an issued visa "at any time, in his discretion."[98] And applicants who are refused a visa may apply for a waiver of ineligibility from USCIS.[99]

Additionally, Visa Office attorneys, under the supervision of the Office's General Counsel and the Department's Legal Adviser, may "request a consular office in an individual case or in specific classes of cases to submit a report if a[n immigrant or nonimmigrant] visa has been refused." The Department may furnish an advisory opinion to the consular officer "for assistance in considering the case further." Rulings concerning legal interpretations, "as distinguished from an application of the law to the facts," are binding on consular officers in specific cases. Even if a consular officer believes that "action contrary to an advisory opinion" is warranted, he or she must resubmit the case to the Department with an explanation of the proposed action.[100]

And sixth, visa-holders are subject effectively to mandatory de novo readjudication by CBP officers upon arrival in the United States.[101]

III. Factors Affecting PAS Officials' Involvement in Adjudication

There is some precedent for participation by PAS officials and other high-level political appointees in visa adjudication, at least during wartime. In 1918, President Wilson designated the Secretary of State "as the official who shall grant, or in whose name shall be granted, permission to aliens to depart from or enter the United States."[102] Although the 1924 Act did not expressly prohibit administrative review of consular officers' decisions, the State Department reportedly neither reviewed refusals nor directed consular officers to grant visas.[103]

Between 1941 and 1948, federal law provided that "in any case in which a diplomatic or consular officer denies a visa or other travel document . . . , he shall promptly refer the case to the Secretary of State for such further action as the Secretary may deem appropriate."[104] Also during World War II, the Board of Appeals on Visa Cases, which consisted of two members

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[97] 9 FAM 307.3-1.
[98] 8 U.S.C. § 1201(i).
[99] *See Visa Denials*, *supra* note 83.
[100] 22 C.F.R. §§ 41.121(d), 42.81(d).
[101] *See* Harry N. Rosenfield, *Consular Non-Reviewability: A Case Study in Administrative Absolutism*, 41 A.B.A. J. 1109, 1110 (1955) [hereinafter Rosenfield, *Consular Non-Reviewability*]; Harry N. Rosenfield, *Necessary Administrative Reforms in the Immigration and Nationality Act of 1952*, 27 FORDHAM L. REV. 145, 151 (1958) [hereinafter Rosenfield, *Necessary Administrative Reforms*].
[102] Proclamation No. 1473 (Aug. 8, 1918), https://history.state.gov/historicaldocuments/frus1918Supp02/d923.
[103] Rosenfield, *Consular Non-Reviewability*, *supra* note 101, at 1110.
[104] 55 Stat. 252 (1941).

appointed by the President, reviewed 22,600 appeals and overturned 26 percent of visa refusals.[105]

The current system derives its legal basis from section 104(a) of the INA, adopted in 1952, which authorizes the Secretary of State to oversee "the powers, duties, and functions of diplomatic and consular officers of the United States, except those powers, duties, and functions conferred upon consular officers relating to the granting or refusal of visas."[106]

The legislative intent underlying this provision is unclear. A statement in a report of the Senate Judiciary Committee suggests that some may have seen a lack of administrative review as placing "additional barriers in the way of undesirable aliens, additional fences of protection which the alien must surmount."[107] Professor Gordon wrote in 1975:

> While the purpose of this provision is not explained in the legislative reports, I believe its underlying motivations were a desire to preclude judicial review and a belief that the consul would be disposed to act less generously than his superiors.[108]

Professor Nafziger offered two additional possibilities:

> Congress may have wished to protect the Secretary of State from complaints by foreign officials unable to obtain visas; section 104(a) enables the Secretary to disclaim responsibility for a politically delicate exclusion by explaining that he has no power to review the denial. Alternatively, Congress may have been concerned that the Department would be deluged, given the number of prospective petitioners for review [109]

Professor Nafziger ultimately concluded that these rationales were "mostly speculative," however, theorizing instead that section 104(a) might have been intended "not to immunize visa determinations from review, but rather to confirm by implication, the power of the Attorney General, rather than the Secretary of State, to undertake the review."[110] He pointed to a statement in a report of the House Judiciary Committee that, despite the language of section 104(a), the Secretary of State would have:

> ample authority to provide . . . for a system of cooperation between consular officers stationed abroad and the Department, so as to be able to advise and assist

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[105] Nafziger, *supra* note 72, at 85–86; WHOM SHALL WE WELCOME, *supra* note 81, at 148–49.
[106] 8 U.S.C. § 1104(a).
[107] WHOM SHALL WE WELCOME, *supra* note 81, at 146.
[108] Gordon, *supra* note 88, at 9.
[109] Nafziger, *supra* note 72, at 24–25.
[110] *Id.* Another provision of the INA charged the Attorney General—today the Secretary of Homeland Security—with administering and enforcing the provisions of the Act and all other laws governing immigration and naturalization except insofar as it expressly conferred certain powers, functions, and duties on other named officers. *See* 8 U.S.C. § 1103(a).

> such officers in reaching their decision . . . in more complex individual cases pending before them.[111]

Regardless of the precise legislative intent, the State Department, courts, and outside observers have, since 1952, interpreted section 104(a) to preclude any formal administrative process—involving the Secretary or otherwise—for reviewing refusals.[112]

This lack of formal administrative review has been the subject of sustained criticism, with bills introduced in most Congresses since the 1970s to establish one. Common critiques leveled against the system have included: (1) that the law gives lower-level officials too much discretion to grant and refuse visas; (2) that there is a lack of uniformity across consular officers' decisions; (3) that the current system deprives at least some people of fundamental fairness (particularly in cases of attempted family reunification); (4) that quality assurance methods such as supervisory review are not always available or effective; and (5) that the consular control system, at least as practiced, is nontransparent.[113]

Critics of the current system assert that, especially in the absence of meaningful judicial review, a process of formal administrative review is needed to promote rule-of-law values such as accuracy, consistency, fairness, and transparency. In drafting the INA, Congress considered but rejected the creation in the State Department of "a semijudicial board, similar to the Board of Immigration Appeals, with jurisdiction to review consular decisions pertaining to the granting or refusal of visas."[114] Since then, other proponents of a formal administrative review process have included the President's Commission on Immigration and Naturalization (1953),[115] the American Bar Association's (ABA's) Administrative Law Section (1955) and Board of Governors (1956, 1973),[116] Senator Ted Kennedy (1970),[117] the Association of Immigration and Nationality Lawyers (1978),[118] the U.S. Civil Rights Commission (1980),[119] and a minority of members of the U.S. Select Commission on Immigration and Refugee Policy (1981).[120] In 1989, ACUS recommended the State Department "after appropriate study, develop and submit for Congressional review a proposed process for administrative review of consular visa actions."[121]

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[111] Nafziger, *supra* note 72, at 24–25.
[112] *See* 9 FAM 103.4-1; Nafziger, *supra* note 72, at 16–17.
[113] *See, e.g.*, Sharon R. Muse, *The Need for Review of Consular Decisions in Visa Determinations*, 13 ADELPHIA L.J. 111 (1999–2000); Rosenfield, *Necessary Administrative Reforms*, *supra* note 101; Leon Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 SAN DIEGO L. REV. 887 (1989).
[114] H.R. REP. NO. 82-1365, at 36 (1952).
[115] WHOM SHALL WE WELCOME, *supra* note 81, at 152.
[116] TARNISHED GOLDEN DOOR, *supra* note 81, at 135 n.2; *Joint Hearings Before the Subcomm. on Immigr. & Refugee Policy of the S. Comm. on the Judiciary & Subcomm. on Immigr., Refugees & Int'l Law of the H. Comm. on the Judiciary*, 97th Cong. 281 (1981) (statement of David Carliner); Rosenfield, *Consular Non-Reviewability*, *supra* note 101, at 1183.
[117] S. 3202, 91st Cong. § 3, 115 Cong. Rec. 36,967 (1969) (statement of Sen. Kennedy); *see also* Edward M. Kennedy, *Immigration Law: Some Refinements and New Reforms*, 4 INT'L MIGRATION REV. 4 (1970).
[118] TARNISHED GOLDEN DOOR, *supra* note 81, at 48.
[119] *Id.* at 53–54.
[120] SELECT COMM'N ON IMMIGR. & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 255 (1981) [hereinafter U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST].
[121] Admin. Conf. of the U.S., Recommendation 89-9, *Processing and Review of Visa Denials*, 54 Fed. Reg. 53,496 (Dec. 29, 1989).

And, as noted earlier, bills introduced in most Congresses since the 1970s would have created such a process for at least some types of visas.

These proposals exhibit notable structural variations, assigning different roles to PAS officials within and outside the State Department. For example:

- In 1932, the House and Senate Committees on Immigration and Naturalization reportedly "approved bills to authorize review by the Secretary of State of visa denials in the United States whose petitions for preference quota visas had been approved by the Attorney General."[122]

- The Commission on Organization of the Executive Branch of the Government (Hoover Commission, 1949 and 1955) and the Commission on Government Security (Wright Commission, 1957) recommended transferring the State Department's visa-issuing function to DOJ, primarily for reasons of public administration and organizational effectiveness.[123] Then, as today, DOJ decisions in immigration-related cases have been subject to review by the Attorney General and his or her delegates.

- The President's Commission on Immigration and Naturalization (Perlman Commission, 1953) recommended consolidating "control and supervision over the entire field of immigration and naturalization" in an independent Commission on Immigration and Naturalization. The proposed Commission would be headed by three, five, or seven PAS officials. The Commission would appoint an Administrator of Immigration and Naturalization responsible for "visa issuance overseas" and functions then exercised by DOJ's Immigration and Naturalization Service (the predecessor to USCIS, CBP, and Immigration and Customs Enforcement). The proposed Commission would also include an independent Board of Immigration and Visa Appeals responsible for hearing appeals in exclusion, deportation, and visa cases. The Board would have "final authority . . . subject only to a limited appeal to the proposed Commission in cases involving the exercise of discretion, but not in questions of law or fact, whenever that Commission agrees to accept such appeals."[124]

  The Perlman Commission explained that this overall organizational structure would "produce much more effective and coordinate administration and would assure the required high-level consideration of allocations to be made within the unified quota system." It would also "bring the immigration process into line with the separation of functions contemplated by the Administrative Procedure Act, generally recognized as the norm of fair administrative organization."[125]

- Senator Kennedy proposed establishing a Board of Visa Appeals within the State Department's Bureau of Security and Consular Affairs but independent of the Visa Office. The Board would consist of five members appointed by the Secretary of State.

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[122] Rosenfield, *Consular Non-Reviewability*, *supra* note 101, at 1112.
[123] *See* Rosenfield, *Necessary Administrative Reforms*, *supra* note 101, at 147–49 (1958); REP. OF THE COMM'N ON GOV'T SEC. 572–78 (1957).
[124] WHOM SHALL WE WELCOME, *supra* note 81, at 140–43.
[125] *Id.* at 141–42.

Although Board practice would follow rules adopted by the Secretary, Board decisions would be "final and conclusive on all questions of law and fact relating to the issuance or revocation of a visa and shall not be subject to review by any other official, department, agency, or establishment of the United States."[126] Bills to establish such a Board were introduced in several subsequent Congresses.[127]

- In testimony before the U.S. Civil Rights Commission, multiple witnesses identified as a structural problem the fact that the Secretary of State lacked legal authority to review consular officers' decisions or "direct a consular officer to grant or refuse a visa." Among other reforms, the Commission in 1980 recommended:

> Congress should amend the Immigration and Nationality Act to vest the visa-issuing authority in the Secretary of State and to further authorize the Secretary of State to create a Board Visa Appeals, similar in function to the Board of Immigration Appeals.
>
> The Board of Visa Appeals should be vested with the jurisdiction to hear appeals of consular visa denials wherein the action, findings, and/or conclusions of the consular officer with respect to a visa application are alleged to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The function of such a Board would be particularly important in immigrant visa cases that affect the reunification of United States citizens and legal residents with families abroad and the loss of technical and professional skills by American businesses. Any aggrieved party, including American citizens, legal residents, and businesses, should have standing to file an appeal from an adverse consular visa decision. The Board, through a majority vote, should have the power to affirm, to remand for further factfinding, or to reverse a consular visa refusal in any case. The Board should deliver its decision in writing and transmit copies to the Bureau of Consular Affairs of the Department of State and to the denied visa applicant or other aggrieved party(ies) who filed the appeal. In unusual circumstances, the Secretary of State for good and compelling reasons should have the authority to overrule a decision of the Board of Visa Appeals.[128]

- Bills introduced throughout the 1980s would have created a seven-member U.S. Immigration Board, along with an administrative law judge system, within the Justice Department. Board members would be PAS officials, and Board decisions would be binding on immigration officials across multiple agencies, including consular officers.[129]

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[126] S. 1373, 92d Cong. § 3 (1971).
[127] H.R. 1024, 95th Cong. (1977); H.R. 702, 94th Cong. (1975); H.R. 846, 93d Cong. (1973); *see also* Anderson & Gifford, *supra* note 95, at 158.
[128] TARNISHED GOLDEN DOOR, *supra* note 81, at 135–36.
[129] Immigration Reform and Control Act of 1983, S. 529 & H.R. 1510, 98th Cong., 1st Sess. § 122a (1983).

- Bills introduced in the late 1980s would have created a Visa Review Board in the State Department with authority to review and overrule refusals of certain classes of visas. The Board would include regular members serving on a full-time basis and ad hoc members appointed by the Secretary "from among senior officers of the Department of State or from persons not employed by the Department."[130]

- Bills introduced in most Congresses since the early 1990s would have directed the Secretary of State to establish a Board of Visa Appeals within the State Department with authority to review and remand or overrule consular decisions regarding family-based visas. The Board would consist of five members appointed by the Secretary, no more than two of whom could be consular officers. Board practice would follow regulations adopted by the Secretary that were not inconsistent with the formal adjudication provisions of the Administrative Procedure Act.[131]

At least partly in response to such criticisms,[132] the State Department developed two quality assurance measures: (1) the supervisory review process,[133] and (2) the advisory opinion process.[134] The State Department also identified as priorities improving training for consular officers, issuing "more specific guidelines," and more effectively managing the performance of consular officers.[135] Those who have defended the current system, including the U.S. Select Commission on Immigration Refugee Policy,[136] have typically asserted that such measures strike the appropriate balance between rule-of-law values such as accuracy, consistency, fairness, and transparency, on the one hand, and administrative efficiency on the other.

Several arguments have been advanced against a formal review system—whether or not involving PAS officials. First, the potential volume of appeals, and the "prospect of overburdening the State Department," has been "*the* major practical justification, and at least partially explains INA section 104's mysterious insulation of denials from supervision by the Secretary of State."[137] Second, consular processing often involves determinations about an applicant's credibility and demeanor based on a brief interview and preexisting knowledge of local conditions; such determinations may not benefit from review by officials who have not interacted personally with the applicant and are not stationed in the consular district.[138] Third, budgetary[139] and staffing realities, and the need to processes cases quickly, mean that the written record of a visa refusal is often very limited; implementing processes that would result in a record sufficient for meaningful administrative review might increase wait times.[140] Fourth,

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[130] H.R. 2567, 100th Cong., 1st Sess. (1987).
[131] H.R. 264, 111th Cong. (2009); H.R. 750, 110th Cong. (2007).
[132] *See* Anderson & Gifford, *supra* note 95, at 107.
[133] *See supra* notes 80–81.
[134] *See supra* notes 70, 82.
[135] TARNISHED GOLDEN DOOR, *supra* note 81, at 48–49; *see also* U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, *supra* note 120, at 253–55.
[136] U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, *supra* note 120, at 253–55.
[137] Nafziger, *supra* note 72, at 56–58.
[138] *Id.* at 58–59.
[139] Consular processing is largely financed through user fees.
[140] Nafziger, *supra* note 72, at 58–59.

concerns have been raised about the potential cost of an appellate review system.[141] And fifth, at least historically, it might have been practically difficult for a centralized appellate body to review decisions made by officers at hundreds of diplomatic posts around the world.

[141] U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, *supra* note 120, at 255.

Appendix M
Appeals from Decisions Rendered by Bureau of Indian Affairs Officials[1]

This case study provides an overview of whether, when, and how executive branch officials appointed through presidential nomination and Senate confirmation (PAS officials) participate in the adjudication of appeals from decisions rendered by the Department of Interior's (Department) Bureau of Indian Affairs (BIA or Bureau). Established in 1970, the Interior Board of Indian Appeals (IBIA or Board) serves as the primary appellate review body with the authority to issue final decisions for the Department of the Interior in appeals involving Indian matters.

Part I provides an overview of the program, its historical development, and procedures for adjudication. Part II describes whether, when, and how PAS officials participate in this adjudication as a matter of both law and practice. Part III describes the contextual variables that affect or have affected this participation.

I. Background

The Program

In 1824, Secretary of War John C. Calhoun established the Bureau of Indian Affairs (BIA) within the Department of War in an attempt to centralize the federal government's administration of Indian affairs.[2] Eight years later, Congress established BIA through statute[3] and subsequently transferred the Bureau to the Department of the Interior.[4] Originally designed to implement and oversee the federal government's trade and treaty relations with Indian tribes, BIA's responsibilities now extend to enhancing the quality of life, promoting economic opportunity, and protecting and improving the trust assets of American Indians, Indian tribes, and Alaska Natives.[5]

In 1970, the Secretary of the Interior consolidated various Departmental operations into an Office of Hearings and Appeals (OHA) in order to promote efficiency and fairness in the Department's quasi-judicial and appellate functions.[6] In that Order, the Secretary established the Interior Board of Indian Appeals. When created, IBIA was intended to review the Department's decisions relating to Indian probate cases.[7] In addition to these matters, the Commissioner of

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[1] Excluding probate, White Earth Reservation Land Settlement Act, and Indian Self-Determination and Education Assistance Act decisions.
[2] William S. Belko, *John C. Calhoun and the Creation of the Bureau of Indian Affairs: An Essay on Political Rivalry, Ideology, and Policymaking in the Early Republic*, 105 S.C. Hist. Mag. 170 (2004).
[3] 4 Stat. 564.
[4] 9 Stat. 395. The agency's name officially because the Bureau of Indian Affairs in 1947. What is the BIA's History?, BUREAU OF INDIAN AFF., DEP'T OF THE INTERIOR, https://www.bia.gov/faqs/what-bias-history.
[5] *Mission Statement*, BUREAU OF INDIAN AFF., DEP'T OF THE INTERIOR, https://www.bia.gov/bia.
[6] OFF. OF INSPECTOR GEN., DEP'T OF THE INTERIOR, FINAL SPECIAL REPORT ON CASE WORK LOAD MANAGEMENT AT THE HEARINGS DIVISION, OFFICE OF HEARINGS AND APPEALS, DEPARTMENT OF THE INTERIOR (1) (1996).
[7] Kathryn A. Lynn, *The Interior Board of Indian Appeals*, 2004 NO. 3 RMMLF-INST PAPER NO. 10A (2004). See also, *Finding Indian Decisions of the Department of the Interior Prior to the Creation of the Interior Board of*

Indian Affairs would occasionally refer other issues to the Board.[8] Such referrals demonstrated the usefulness of IBIA and, in 1975, the Department expanded the Board's jurisdiction to include appeals of BIA decisions.[9]

As a result of this expansion, the substance of IBIA cases largely reflects the diversity of BIA authority.[10] IBIA considers appeals from a variety of decisions, including those regarding the use of Indian trust lands; the use of mineral resources; conveyances of rights-of-way on Indian lands; land sales, exchanges, and other encumbrances; trespass; taking land into trust; and disputes over the recognition of tribal officials for government-to-government relations between the Department and a tribe.[11] Currently, IBIA decisions constitute final Department action on administrative appeals of BIA officials; decisions and orders of ALJs and Indian probate judges; and other matters referred to it by the Secretary of the Interior, the Assistant Secretary – Indian Affairs, and the Director of Office of Hearings and Appeals.[12]

The Agency

IBIA is a component of the Department of the Interior's Office of Hearings and Appeals (OHA). OHA is the authorized representative of the Secretary of the Interior for the purpose of hearing, considering, and deciding matters involving the hearing, appeals, and other review functions of the Secretary.[13] OHA contains ALJs and AJs who are authorized to conduct Departmental hearings required under 5 U.S.C. § 554 and other statutes and regulations. The Secretary assigns all ALJs and AJs to the Office[14] and the Secretary's letters of appointment are made public on OHA's website.[15]

The Office is headed by a Director who reports to the Deputy Assistant Secretary – Administrative Services, who reports to the Assistant Secretary – Policy, Management and Budget (a PAS official).[16] In addition to management oversight, the Director decides appeals to

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Indian Appeals in 1970, OFF. HEARINGS & APP., DEP'T OF THE INTERIOR, https://www.doi.gov/oha/organization/ibia/IbiaOldDecisions.

[8] *E.g.*, Villa Vallerto v. Patencio, 2 IBIA 140, App. A (1974) (transferring appeal by Villa Vallerto from the Sacramento Area Director's cancellation of a lease governing a portion of land held in trust).

[9] Except for tribal enrollments. Press Release, U.S. Dep't of the Interior, New Regulations Authorize Appeals to Interior Board of Indian Appeals (May 8, 1975), https://www.bia.gov/as-ia/opa/online-press-release/new-regulations-authorize-appeals-interior-board-indian-appeals.

[10] *Appeals from Administrative Decisions Issued by the Bureau of Indian Affairs*, OFF. HEARINGS & APP., DEP'T OF THE INTERIOR, https://www.doi.gov/oha/organization/ibia/Appeals-from-Administrative-Decisions-Issued-by-the-Bureau-of-Indian-Affairs.

[11] *About the Interior Board of Indian Appeals*, OFF. HEARINGS & APP., DEP'T OF THE INTERIOR, https://www.doi.gov/oha/organization/ibia

[12] 43 C.F.R. § 4.1. Other than those involving the Five Civilized Tribes of Indians. Furthermore, except as otherwise permitted by the Secretary or Assistant Secretary, IBIA does not adjudicate tribal enrollment disputes; matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority; or appeals from decisions pertaining to final recommendations or actions under the jurisdiction of the former Minerals Management Service, unless the decision is based on interpretation of federal Indian law. 43 C.F.R. § 4.330.

[13] 43 C.F.R. § 4.1.

[14] 43 C.F.R. § 4.2.

[15] *Appointment Memos*, OFF. HEARINGS & APP., DEP'T OF THE INTERIOR, https://www.doi.gov/oha/appointment-memos

[16] 43 C.F.R. § 4.1.. *See also* 43 U.S.C. § 1453; *Office of Hearings and Appeals*, OFF. HEARINGS & APP., DEP'T OF THE INTERIOR, https://www.doi.gov/oha.

the Secretary that do not fall within the appellate review jurisdiction of OHA established review boards.[17] OHA is comprised of the office of the Director and four units located in seven office locations.[18]

One such unit is IBIA. The Board consists of designated AJs, one of whom is Chief;[19] the Director as an ex officio member; and alternate members who may serve in place of or addition to regular members.[20] The Director, being ex officio, may participate in consideration in any appeal and sign the resulting decision.[21] If the Director exercises this authority, the Director must provide interested parties and appropriate personnel notice of such action in writing.[22]

Currently, IBIA consists of three administrative judges, one docket attorney, and one paralegal specialist.[23] In 2023, IBIA received 65 cases, concluded 95, and had 139 pending.[24]

The Adjudication Process

Unless otherwise provided by law, any interested party affected by a decision of BIA officials or administrative law judges may appeal that decision to IBIA.[25] The Board exercises the inherent authority of the Secretary of the Interior and is not limited in its scope of review; IBIA may adopt, modify, reverse, or set aside any proposed finding, conclusion, or order of a BIA official or ALJ.[26]

Interested parties affected by a decision of BIA officials or ALJs have 30 days after receipt of the decision to file notice of appeal to IBIA.[27] If the interested party is Indian or an Indian tribe not represented by counsel, the official who issued the appealed decision must, upon request, aid the party in preparing the appeal.[28] During this time, BIA decisions are not effective and may not be considered final so as to constitute final agency action subject to judicial

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[17] OFFICE OF THE SECRETARY, DEP'T OF THE INTERIOR, BUDGET JUSTIFICATION AND PERFORMANCE INFORMATION FISCAL YEAR 2024: DEPARTMENTWIDE PROGRAMS, DO-82 (2023). Cases decided by the Director's Office include employee debt collection and waiver cases; property board of survey appeals; quarters rental rate adjustment appeals; Uniform Relocation Assistant Act payment appeals; acreage limitation appeals under the Reclamation Reform Act; civil penalty assessments under the Endangered Species Act; Archeological Resources Protection Act; and National Indian Gaming Commission appeals. *Id*. at DO-83.

[18] OFFICE OF THE SECRETARY, DEP'T OF THE INTERIOR, BUDGET JUSTIFICATION AND PERFORMANCE INFORMATION FISCAL YEAR 2024: DEPARTMENTWIDE PROGRAMS, DO082 (2023).

[19] The chief AJ is responsible for the internal management and administration of the Board, including the assignment of AJs to cases. 43 C.F.R. § 4.2.

[20] 43 C.F.R. § 4.2(a).

[21] 43 C.F.R. § 4.2(b).

[22] 43 C.F.R. § 4.5(c).

[23] *About the Interior Board of Indian Appeals*, OFF. HEARINGS & APP., DEP'T OF THE INTERIOR, https://www.doi.gov/oha/organization/ibia

[24] OFFICE OF THE SECRETARY, DEP'T OF THE INTERIOR, BUDGET JUSTIFICATION AND PERFORMANCE INFORMATION FISCAL YEAR 2024: DEPARTMENTWIDE PROGRAMS, DO-85 (2023).

[25] 43 C.F.R. § 4.331. Decisions which are subject to appeal by higher official within BIA must first be appealed to that official. 25 C.F.R. § 2.100; 43 C.F.R. § 4.331(a).

[26] 43 C.F.R. §§ 4.312; 4.337(b).

[27] 43 C.F.R. § 4.332(a).

[28] 43 C.F.R. § 4.332(c).

review.[29] Unappealed decisions become effective on the day after expiration of this time for appeal.[30]

Within 20 days of IBIA's receipt of notice of appeal, the official whose decision has been appealed must assemble and transmit the record of the decision to the Board.[31] During this time, the Assistant Secretary – Indian Affairs may decide to review the appeal.[32] If the Assistant Secretary does not exercise jurisdiction in this regard, the Board will assign a docket number to the case and provide a docketing notice to the parties specifying the procedural regulations that will govern the appeal and the time within which to file briefs.[33]

In any proceeding before IBIA, BIA is considered an interested party.[34] Any other interested person or tribe who seeks to intervene, join other parties, appear as amicus curiae, or otherwise obtain an order related to the appeal must apply in writing to the Board stating grounds.[35] IBIA will then grant permission or relief as requested and, in so doing, will construe regulations on the intervention or joinder liberally.[36]

Within 30 days of receiving a docketing notice, the appellant may file an opening brief.[37] Opposing parties or counsel then have 30 days from receiving that brief to file an answer brief.[38] The appellant may then file a reply within 15 days of the answer brief.[39]

Upon consideration of the matter, IBIA may make a final decision or, if the record indicates a need for further inquiry to resolve genuine issues of material fact, may require a hearing with or without oral argument.[40] Hearings are conducted by a OHA ALJ.[41] After the hearing, the ALJ will recommend findings of fact and conclusions of law and provide a copy of those recommendations to each party of the proceeding, the BIA official involved, and the Board.[42] The ALJ must also transmit to IBIA the entire record of the proceeding, including a transcript of the hearing and all documents and requests filed.[43] This record shall be the sole bases for the IBIA's decision insofar as issues of material fact, supplemented as necessary by

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[29] 43 C.F.R. § 4.21(a)(1). Unless Director or Board determines that public interest requires a decision, or any part of decision, be in full force and effect immediately. *Id*. See also 43 C.F.R. § 4.314(a) (providing an exception for those decisions made effective pending IBIA review).
[30] 43 C.F.R. § 4.21(a)(2). Unless a petition for stay pending appeal is filed together with timely notice. *Id*.
[31] 43 C.F.R. § 4.332(c).
[32] 43 C.F.R. § 4.332(b).
[33] 43 C.F.R. § 4.336.
[34] 43 C.F.R. § 4.311(c). As a result, the Board may request that BIA submit a brief in any case before it. *Id*.
[35] 43 C.F.R. § 4.313(a).
[36] *Id*.
[37] 43 C.F.R. § 4.311(a).
[38] *Id*.
[39] 43 C.F.R. § 4.311(b).
[40] 43 C.F.R. § 4.337(a). The Director of OHA may also grant opportunity for oral argument. 43 C.F.R. § 4.25.
[41] 43 C.F.R. § 4.337(a). There can be no interlocutory appeals from an ALJ's ruling unless a party first obtains permission from the Board and an ALJ has certified the ruling (or abused their discretion in refusing to do so). 43 C.F.R. § 4.28.
[42] 43 C.F.R. § 4.338(a).
[43] 43 C.F.R. §§ 4.24(a)(1); 4.338(a).

public records of the Department of the Interior.[44] Any party to the proceeding may file with IBIA exceptions to or other comments on the ALJ's decision within 30 days.[45]

The Department has adopted regulations to ensure fairness during these proceedings. Ex parte contact is prohibited[46] and any deciding official within OHA (including ALJs, AJs, and Board Members) must withdraw from a case if circumstances would require withdrawal under recognized cannons of judicial ethics.[47] Parties may file a motion seeking disqualification of a deciding official and then the Director will determine whether disqualification is warranted.[48]

Unless otherwise stated, an IBIA decision constitutes final agency action and is immediately effective; no further administrative appeal is available or required for exhaustion of administrative remedies.[49] Parties may file requests for reconsideration, but IBIA will only grant them in extraordinary circumstances.[50] Unless otherwise ordered by the Board, such reconsideration will not stay the effect or finality of the IBIA's decision.[51]

In the event that a party appeals a final agency action to federal court and the case is remanded for further Department proceedings, the parties may submit recommended procedures for the Department to comply with the order.[52] IBIA will then review the court order and parties' recommendations, enter special orders governing the handling of matters, and remand the case to an ALJ or BIA official.[53]

II. PAS Officials' Involvement in Adjudication

Ultimately, the Secretary of the Department of the Interior – a PAS official[54] – has authority over all BIA decisions. In delegating authority through both regulation and guidance, the Department has made clear that the Secretary has authority to take jurisdiction of any stage of any case, including any administrative law judge or appellate review board, and render a final decision in the matter.[55] Similarly, the Secretary may review any decision of any employee in the Department, including administrative law judges, and may direct such employee to reconsider a decision.[56] In the event the Secretary assumes jurisdiction, the Secretary must

[44] 43 C.F.R. § 4.24(a)(2); (b). No decision after hearing or on appeal shall be based on any record, statement, file, or similar document which is not open to inspection by the parties, except for documents or other evidence received or reviewed under regulations that limit disclosure of confidential information. *Id*. at § 4.24(a)(4).
[45] 43 C.F.R. § 4.339.
[46] 43 C.F.R. § 4.27(b).
[47] 43 C.F.R. § 4.27(c)(1).
[48] 43 C.F.R. §§ 4.27(c)(3); 4.317(b).
[49] 43 C.F.R. §§ 4.21(d); 4.312; 4.314.
[50] 43 C.F.R. § 4.21(d). Unless so ordered, filing and pendency of request for reconsideration does not operate to stay effectiveness of decision. *Id*.
[51] 43 C.F.R. § 4.315.
[52] To the extent the court's directive and time limits will permit. 43 C.F.R. § 4.29.
[53] 43 C.F.R. §§ 4.29; 4.316.
[54] 43 U.S.C. § 1451.
[55] 43 C.F.R. §4.5(a)(1). After holding any such hearings as required by law. *Id*.
[56] *Id*.

request the administrative record pertaining to the decision, notify appropriate agency personnel and interested parties in writing, and issue a written decision.[57]

Secretaries vary in how frequently they exercise jurisdiction in BIA appellate matters[58] Historically, "[i]f you look at the history and talk to former Secretaries. . .you find that the attention that the Bureau of Indian Affairs gets from the Secretary and Secretariat has always been at sort of a lower degree than some of the other bureaus."[59] Thus, it is important to look to the authority the Secretary has delegated to other PAS officials. Within the Department, the Deputy Secretary,[60] Assistant Secretaries,[61] and Solicitor (who provides legal counsel).[62] are appointed by the president and confirmed by the Senate.

In turn, these officials are authorized to delegate their powers and duties to the Director or BIA officers in charge of any branch, division, office, or agency.[63] As a result, BIA's Director, a PAS official,[64] manages and oversees BIA's policy processes. The Director also appoints BIA Assistant and Deputy Commissioners.[65]

Currently, BIA consists of four units. The Office of Indian Services provides general support for the promotion of safe and quality living environments, tribal government, and welfare.[66] The Office of Justice Services is the Bureau's primary law enforcement office and holds jurisdiction over crimes committed within Indian Country.[67] The Office of Trust Services provides tribal governments and allottees assistance in managing, protection, and developing their trust lands and natural resources.[68] Finally, BIA maintains 12 regional offices which help the Bureau deliver program services within a defined geographical area.[69]

III. Factors Affecting PAS Officials' Involvement In Adjudication

The contextual history that prompted the development of appellate review procedures of decisions by BIA officials is important for understanding PAS' officials' involvement in IBIA adjudication.

A brief historical summary of the Department's practices with respect to public land cases provides a useful background for understanding the development of procedures for appeals from decisions rendered by BIA officials. Since its creation, the Department has provided a right of

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[57] 43 C.F.R. §4.5(c).
[58] Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 261 (1996).
[59] Establish an Additional Assistant Secretary of the Interior, Hearings Before the Committee on Interior and Insular Affairs, U.S. Senate 1971.
[60] 43 U.S.C. § 1452.
[61] 43 U.S.C. § 1453-1454.
[62] 43 U.S.C. § 1455.
[63] 25 U.S.C. §§ 1; 1a.
[64] 25 U.S.C. § 1.
[65] 25 U.S.C. § 2a
[66] *Office of Indian Services*, BUREAU OF INDIAN AFF., DEP'T OF THE INTERIOR, https://www.bia.gov/bia/ois.
[67] *Office of Justice Services*, BUREAU OF INDIAN AFF., DEP'T OF THE INTERIOR, https://www.bia.gov/bia/ojs. *See also* 18 U.S.C. § 1151.
[68] *Office of Trust Services*, BUREAU OF INDIAN AFF., DEP'T OF THE INTERIOR, https://www.bia.gov/bia/ots.
[69] *Regional Offices*, BUREAU OF INDIAN AFF., DEP'T OF THE INTERIOR, https://www.bia.gov/regional-offices.

appeal to the Secretary from decisions of subordinate employees and, in the first hundred years of the agency's existence, decisions in these matters did not constitute final agency action until the Secretary, Under Secretary, or an Assistant Secretary actually signed the decisions themselves.[70]

However, by the mid-1960s, public and political pressure on the Department with respect to the management of public lands put a spotlight on the Department's administration of key public lands statutes, including the Department's adjudication procedures.[71] In 1964, Congress established a Commission of 19 members to review and analyze public land laws and regulations and to make recommendations for future action.[72] While the Department's management of tribal lands was largely excluded from the Commission's study,[73] the Commission identified several shortcomings in the Department's overall decision-making process, particularly with respect to informal and formal adjudication. For example, the Commission identified systemic problems in the development of an administrative record, particularly for those matters left to the Secretary's discretion.[74] The Commission called the Department's administrative review systems "largely illusory because those who sat in judgment on 'appeal' were part of the establishment that had made, [advised], or participated in the initial decision."[75] At the same time, the Commission was cognizant of diluting the Secretary's managerial and supervisory authority and saw the Secretary and other political appointees as being an important component of administrative accountability to the public.[76] In large part as a response to the Commission's investigation, the Department created OHA and adopted new procedures for appellate review from decisions of the Department's bureaus and offices.[77]

At the same time as the Commission was investigating the Department's administration of public lands law, the Department came under increased scrutiny for the management and policies of the BIA. Adopting strategies of the civil rights movement, Native Americans began to adopt "fish-ins" and other demonstrations in protests of federal government's relationship with and treatment of the tribes and their members.[78] In 1968, a group of activists formed the American Indian Movement to mobilize these efforts, famously calling for a cross-country journey to Washington, DC.[79] The Trail of Broken Treaties symbolically retraced the Trail of Tears and, upon their arrival in D.C. in 1972, organizers had planned to meet with several government officials to discuss the Native American rights movement.[80] However, officials at

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[70] INTERIOR BD. OF LAND APP., OFF. HEARINGS & APP., DEP'T OF THE INTERIOR, ADMINISTRATIVE REVIEW OF BUREAU DECISIONS 1 (2015).
[71] Milton Pearl, *The Public Land Law Review Commission: An Overview*, 6 LAND & WATER LAW REVIEW, 7, 8-9 (1970).
[72] Pub. L. No. 88-606, 78 Stat. 982 (1964).
[73] PUB. LAND L. REV. COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION x (1970).
[74] *Id*. at 253.
[75] *Id*. at 254.
[76] *Id*.
[77] INTERIOR BD. OF LAND APP., OFF. HEARINGS & APP., DEP'T OF THE INTERIOR, ADMINISTRATIVE REVIEW OF BUREAU DECISIONS 1 (2015).
[78] VINE DELOIRA, BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE 25-28 (2010).
[79] *The Trail of Broken Treaties*, 1972, NAT'L PARK SERV., DEP'T OF THE INTERIOR, https://www.nps.gov/articles/000/trail-of-broken-treaties.htm.
[80] *Id*.

the Departments of the Interior, Labor, and Commerce cancelled these scheduled meetings and it was later revealed that BIA officials were actively working against the movement.[81] In response, hundreds of Native Americans initiated a sit in of BIA headquarters and ultimately occupied the offices for six days.[82]

After the Trail of Broken Treaties, the Department reorganized BIA.[83] Understandably, "all [BIA] issues became political issues" and the Department struggled to find the appropriate balance between delegation of authority to area offices, which were more closely connected to the tribes, and BIA leaders in the central office.[84] Reorganization and other management initiatives occurred throughout the 1970s as the Department sought to find the right balance between program operations, administration, and responsiveness.[85]

By 1975 and continuing throughout the 1980s, most initial BIA administrative decisions were made by administrators in BIA's regional offices, with a right to appeal to the head of the BIA's area office and then to the Commissioner in BIA headquarters.[86] When the Commissioner issued a decision on an appealed case, the Commissioner specified whether the decision was based on an interpretation of law or an exercise of discretion. If the decision was based on an interpretation of the law, it could be appealed to IBIA.[87] If the decision was based on an exercise of discretion, the Commissioner's decision constituted final agency action.[88] During this period, several appeals filed within the Department alleged that the Commissioner had incorrectly interpreted what constituted interpretations of law and what constituted an exercise of discretion.[89]

Additionally, complaints began to arise regarding the length of the appeal process.[90] In part as a result of these concerns, the Director of OHA pushed the Department's appellate review boards (including IBIA) to issue fewer full opinions and more summary dispositions.[91] Then, in 1987, the Assistant Secretary of Indian Affairs decided that BIA appeals specifically could be handled more expeditiously through wholesale revision of regulations governing procedures for appellate review.[92] Two years later, the Department issued a final rule eliminating appellate

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[81] *Id*.
[82] *Id*.
[83] THEODORE W. TAYLOR, THE BUREAU OF INDIAN AFFAIRS (2019).
[84] Steve Nickeson, *The Structure of the Bureau of Indian Affairs*, 40 LAW & CONTEMP. PROBS. 61, 67, 70-72 (1976).
[85] THEODORE W. TAYLOR, THE BUREAU OF INDIAN AFFAIRS (2019). Substantively, the most notable and significant means for effecting change was the Self-Determination and Education Assistance Act of 1971, which gave Indian tribes the authority to contract with the federal government to operate programs serving their tribal members and other eligible persons. Pub. L. No. 93-638 (1975); Duane Champagne, *Organizational Change and Conflict: A Case Study of the Bureau of Indian Affairs*, 7 AM. INDIAN CULTURE & RSCH. J. 3,3 (1983).
[86] Kathryn A. Lynn, *The Interior Board of Indian Appeals*, 2004 NO. 3 RMMLF-INST PAPER NO. 10A (2004).
[87] *Id*.
[88] *Id*.
[89] *See* Alleutian/Pribilof Isalnds Association, Inc. v. Acting Deputy Assistant Secretary – Indian Affairs (Operations), 9 IBIA 254 (1982).
[90] Kathryn A. Lynn, *The Interior Board of Indian Appeals*, 2004 NO. 3 RMMLF-INST PAPER NO. 10A (2004).
[91] Lilias Jones Jarding, *The Department of the Interior's Appeals Process and Native American Natural Resource Policy,* 27 POL'Y STUD. J. 217, 222 (1999).
[92] Kathryn A. Lynn, *The Interior Board of Indian Appeals*, 2004 NO. 3 RMMLF-INST PAPER NO. 10A (2004).

review by BIA's central office and provided that the decisions of area directors could be appealed directly to IBIA.[93]

However, these procedural revisions provided that, upon notice of appeal to IBIA, the Assistant Secretary – Indian Affairs would have the authority to issue a decision or assign responsibility to issue a decision to a Deputy.[94] Some commenter during the rulemaking process objected to this authority or suggested that the Assistant Secretary's decision in this regard should be subject to review by IBIA.[95] The Department rejected these suggestions, stressing that certain appeals involve policy matters most appropriately placed in the hands of a political appointee.[96]

In 2003, the Department again reorganized BIA in order to promote efficiency, effectiveness, and accountability.[97] The most significant of these changes related to the execution of the Secretary's authority with respect to Indian trusts and resulted in new delegations of authority within BIA and, consequently, new reporting structures.[98] These reorganizations were designed to place the majority of land- and resource-based BIA decisions into the hands of regional officers, with appeals going through BIA's chain of command and ultimately resting with the Assistant Secretary for resolution.[99]

Yet field training in regional offices recognized that BIA decisions were increasingly scrutinized and stressed the importance of administrators distinguishing between discretionary and mandatory decision-making for preventing appeal.[100] If a regional administrator was unclear as to the difference, they were advised to seek opinions from the Solicitor's Office.[101] Perhaps as a result, in the resulting years, more and more decisions were made in BIA headquarters rather than regional offices.[102]

By 2022, it became clear that additional revisions to the Department's procedural regulations regarding appeal from BIA decisions were needed to clarify the mechanisms for

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[93] Appeals from Administrative Actions, 54 Fed. Reg. 6,478, 6,478 (Feb. 10, 1989).
[94] Appeals from Administrative Actions, 54 Fed. Reg. 6,478, 6,482-83 (Feb. 10, 1989).
[95] Appeals from Administrative Actions, 54 Fed. Reg. 6,478, 6,479 (Feb. 10, 1989).
[96] *Id*.
[97] Press Release, U.S. Dep't of the Interior, Indian Affairs, BIA, OST Reorganization Formalized in New Departmental Manual (April 25, 2003), https://www.bia.gov/as-ia/opa/online-press-release/indian-affairs-bia-ost-reorganization-formalized-new-departmental. These changes also corresponded with and resulted from court monitoring in the Cobell v. Norton litigation. *Oversight Hearing on the Department of the Interior Trust Management Before the S. Comm. on Indian Affairs*, 109th Cong. (2005) (statement of James Cason, Associate Deputy Secretary).
[98] Press Release, U.S. Dep't of the Interior, Indian Affairs, BIA, OST Reorganization Formalized in New Departmental Manual (April 25, 2003), https://www.bia.gov/as-ia/opa/online-press-release/indian-affairs-bia-ost-reorganization-formalized-new-departmental.
[99] *The Current Reorganization of Trust Management at the Bureau of Indian Affairs and the Office of the Special Trustee Before the H. Comm. on Resources*, 108th Cong. (2004).
[100] *See, e.*g., https://www.doi.gov/oha/ibia/Survey-of-Interior-Board-of-Indian-Appeals-Case-Law-on-Land-Acquisition
[101] *Id*.
[102] Appeals from Administrative Actions, 87 Fed. Reg. 73,688 (Dec. 1, 2022); Appeals from Administrative Actions, 88 Fed. Reg. 53,774, 53,774-53,775 (Aug. 9, 2023).

appealing decisions and reflect organizational changes.[103] Specifically, the Department sought to clarify the process by which the Assistant Secretary – Indian Affairs (rather than IBIA) takes jurisdiction of an appeal and the process employed whenever the Assistant Secretary exercises that authority.[104] In tribal consultation on the proposed regulations, concerns were raised over allowing the Assistant Secretary to exercise jurisdiction over appeals. One comment asserted that, historically, "exercise of this jurisdiction has thwart[ed] the administrative appeal process and is an inefficient use of resources," and "has led to abuses of authority."[105] The Department acknowledged these concerns but ultimately kept PAS review. Coming full circle from the Public Land Law Review Commission's report, the Department pointed to the need for political accountability and highlighted the "key role" federal courts play in checking improper uses of agency authority.[106]

[103] Appeals from Administrative Actions, 87 Fed. Reg. 73,688 (Dec. 1, 2022); Appeals from Administrative Actions, 88 Fed. Reg. 53,774, 53,774-53,775 (Aug. 9, 2023).
[104] Appeals from Administrative Actions, 87 Fed. Reg. 73,688, 73,690 (Dec. 1, 2022).
[105] Appeals from Administrative Actions, 87 Fed. Reg. 73,688, 73,691 (Dec. 1, 2022).
[106] *Id*. *See also* PUB. LAND L. REV. COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION 254 (1970).

Appendix N:
Longshore and Harbor Workers' Compensation

This case study provides an overview of whether, when, and how executive branch officials appointed through presidential nomination and Senate confirmation (PAS officials) participate in the adjudication of claims under the Longshore and Harbor Workers' Compensation Act (Longshore Act).[1] Established in 1927 and administered by the Department of Labor (DOL), the Longshore Program provides compensation, medical care, and vocational rehabilitation services to maritime employees injured or killed on the navigable waters of the United States, as well as employees working on adjoining piers, docks, and terminals.[2] Although the Longshore Program is administered by DOL, most benefits are paid by employers or their insurance carriers.[3]

Part I provides an overview of the program, its historical development, and procedures for adjudication. Part II describes whether, when, and how PAS officials participate in adjudication as a matter of both law and practice. Part III describes the contextual variables that affect or have affected this participation.

Background

The Program

Prior to 1927, longshore and harbor workers were not covered by any workers' compensation system. While most states had enacted workers' compensation laws, the Supreme Court held that these state laws did not apply to maritime workers. In *Southern Pacific Co. v. Jensen*,[4] the Supreme Court held that state workers' compensation systems did not have jurisdiction over individuals working on the navigable waters of the United States because the Constitution gave exclusive authority over all civil causes of admiralty and maritime jurisdiction to the federal government. The Court cited Article III, § 2, which provides that the judicial power of the federal government extends "to all Cases of admiralty and maritime Jurisdiction," and Article I, § 8, which grants Congress the power to make all laws necessary and proper for executing the powers of the federal government. The Court also cited the Judiciary Act of 1789, which gave federal district courts exclusive jurisdiction over most "civil causes of admiralty and maritime jurisdiction."[5]

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[1] 33 U.S.C. §§ 901 *et seq.*

[2] Congress extended the Longshore Act to include other types of employment through the Defense Base Act (42 U.S.C. §§ 1651 *et seq.*,), Outer Continental Shelf Lands Act (43 U.S.C. §§ 1331 *et seq.*), and Non-Appropriated Fund Instrumentalities Act (5 U.S.C. §§ 8171 *et seq.*). The Longshore Act extensions provide covered employees with the same benefits pursuant to the Longshore Act and their claims are adjudicated in the same way.

[3] *See* SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R41506, THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT (LHWCA): OVERVIEW OF WORKERS' COMPENSATION FOR CERTAIN PRIVATE-SECTOR MARITIME WORKERS (2021).

[4] 244 U.S. 205 (1917).

[5] 1 Stat. 73 (1789) (codified at 28 U.S.C. § 1333) ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled . . . .").

Following *Jensen*, Congress amended the Judiciary Act to include a savings clause exempting claims under state workers' compensation systems from district courts' exclusive jurisdiction. However, in *Knickerbocker Ice Co. v. Stewart*,[6] the Supreme Court ruled that the attempted amendment was an unconstitutional delegation of Congress' legislative authority to the states and "defeat[ed] the purpose of the Constitution respecting the harmony and uniformity of the maritime law."[7]

Congress passed the Longshore Act in 1927, creating a uniform federal workers' compensation program for longshore and harbor workers.[8] The Act provided compensation to maritime workers in the event "of disability or death . . . if the disability or death result[ed] from an injury occurring on the waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings [could] not validly be provided for by State law."[9]

The Agency

Congress initially assigned administration of the Longshore Act to the U.S. Employees' Compensation Commission.[10] Established in 1916 to administer the Federal Employees' Compensation Act (FECA), the Commission was an independent agency composed of three members appointed by the President by and with the advice and consent of the Senate.[11]

The Longshore Act directed the Commission to create compensation districts and appoint to each district at least one deputy commissioner.[12] Claims were filed with the deputy commissioner in the compensation district where the injury or death occurred.[13] The deputy commissioner had "full power and authority to hear and determine all questions in respect of such claim."[14] After the opportunity for a hearing, the deputy commissioner would issue the compensation order, either rejecting the claim or making an award.[15] There was no provision for administrative review of deputy commissioners' orders. Compensation orders were reviewable only in federal district court through injunction proceedings against the deputy commissioner who issued the order.[16] Unless such proceedings were initiated, the deputy commissioner's order was final after 30 days.[17]

President Truman abolished the Commission as part of Reorganization Plan No. 2 of

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[6] 253 U.S. 149 (1920).
[7] *See also Washington v. Dawson & Co.*, 264 U.S. 219 (1924).
[8] Longshoremen's and Harbor Workers' Compensation Act of 1927, Pub. L. No. 69-803, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901–950) [hereinafter Longshore Act]; *see also The Longshoremen's and Harbor Workers' Compensation Act of 1927*, 28 COLUM. L. REV. 1 (1928), https://doi.org/10.2307/1113140.
[9] Longshore Act § 3(a).
[10] *Id.* § 39(a).
[11] U.S. DEP'T OF JUSTICE, MONOGRAPH NO. 21, REPORT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION 1 n.1 (1940), available at https://babel.hathitrust.org/cgi/pt?id=umn.31951d004622974&seq=1.
[12] Longshore Act §§ 39(b) and 40(a).
[13] *Id.* § 13(a).
[14] *Id.* § 19(a).
[15] *Id.* § 19(c).
[16] *Id.* § 21(b).
[17] *Id.* § 21(a).

1946, transferring its functions to the Bureau of Employees' Compensation within the new Federal Security Agency. Four years later, through Reorganization Plan No. 19 of 1950, President Truman transferred administration of the Longshore Program to the Secretary of Labor, a PAS official,[18] with whom it has remained ever since.[19]

There have been several important structural changes to the Longshore Program. The Bureau was subsumed within the Wage and Labor Standards Administration (later renamed the Employment Standards Administration (ESA)) in the 1960s and replaced by the Office of Worker's Compensation Programs (OWCP) in the 1970s.[20] The ESA was headed by the Assistant Secretary of Labor for Employment Standards, who was appointed by the President by and with the advice and consent of the Senate. In 2009, the ESA was dissolved into its four component parts, including OWCP.[21] This reorganization was intended to improve program efficiency by "eliminating a layer of review and decision-making," allowing agency leadership "to more quickly attend to policy matters in each program without having an added organization component review between the program heads and senior leadership."[22] Today, the OWCP Director reports directly to the Secretary of Labor.[23]

Jurisdictional confusion, coverage problems, and inadequate benefit amounts led Congress to significantly amend the Longshore Act in 1972.[24] Congress reassigned the authority

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[18] 29 U.S.C. § 551.

[19] Reorganization Plan No. 2 of 1946 § 3, 60 Stat. 1095 (1946); Reorganization Plan No. 19 of 1950, § 1, 64 Stat. 1271 (1950). *See also* 20 C.F.R. § 1.6(a)-(b) ("Administration of the Federal Employees' Compensation Act and the Longshore and Harbor Workers' Compensation Act was initially vested in an independent establishment known as the U.S. Employees' Compensation Commission. By Reorganization Plan No. 2 of 1946 (3 CFR, 1943–1949 Comp., p. 1064; 60 Stat. 1095, effective July 16, 1946), the Commission was abolished and its functions were transferred to the Federal Security Agency to be performed by a newly created Bureau of Employees' Compensation within such Agency. By Reorganization Plan No. 19 of 1950 (15 FR 3178, 3 CFR, 1949–1954 Comp., page 1010, 64 Stat. 1271), said Bureau was transferred to the Department of Labor (DOL), and the authority formerly vested in the Administrator, Federal Security Agency, was vested in the Secretary of Labor. By Reorganization Plan No. 6 of 1950 (15 FR 3174, 3 CFR, 1949–1953 Comp., page 1004, 64 Stat. 1263), the Secretary of Labor was authorized to make from time to time such provisions as he shall deem appropriate, authorizing the performance of any of his functions by any other officer, agency, or employee of the DOL. In 1972, two separate organizational units were established within the Bureau: an Office of Workmen's Compensation Programs (37 FR 20533) and an Office of Federal Employees' Compensation (37 FR 22979). In 1974, these two units were abolished and one organizational unit, the Office of Workers' Compensation Programs, was established in lieu of the Bureau of Employees' Compensation (39 FR 34722).").

[20] Functions of Office of Workmen's Compensation Programs, 37 Fed. Reg. 20533 (Sept. 30, 1972).

[21] 20 C.F.R. §1.1; *see also* Delegation of Authorities and Assignment of Responsibilities to the Director, Office of Workers' Compensation Programs, 74 Fed. Reg. 58834 (Nov. 13, 2009), https://www.federalregister.gov/documents/2009/11/13/E9-27336/delegation-of-authorities-and-assignment-of-responsibilities-to-the-director-office-of-workers (last visited Apr. 10, 2024).

[22] *History* of *OWCP,* U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/owcp/owcphist (last visited Feb. 15, 2024).

[23] *See* Privacy Act of 1974; Publication of Five New Systems of Records; Amendments to Five Existing Systems of Records, 77 Fed. Reg. 1728, 1729 (Jan. 11, 2012) ("The Employment Standards Administration (ESA) was dissolved on November 8, 2009. ESA's four sub-agencies: the Office of Federal Contract Compliance Programs, the Office of Labor Management Standards, the Wage and Hour Division, and the Office of Workers' Compensation Programs are now independent agencies that report directly to the Secretary of Labor.").

[24] *See* The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (amending 33 U.S.C. §§ 901-50 (1970)); *see also* STAFF OF S. COMM. ON LABOR AND PUBLIC WELFARE,

for conducting formal hearings from deputy commissioners to administrative law judges (ALJs)[25] and established the Benefits Review Board (BRB) within DOL to review ALJ decisions.

Today, three DOL subcomponents have primary responsibility for adjudicating Longshore Act claims: (1) OWCP, (2) the Office of ALJs (OALJ), and (3) the BRB.[26]

Headed by a Director,[27] OWCP is responsible for administering four federal workers' compensation programs.[28] OWCP administers the Longshore Act through its Division of Longshore and Harbor Workers' Compensation (DLHWC). Headquartered in Washington, D.C., the DLHWC has 11 district offices nationwide, which are consolidated into three compensation districts.[29] The primary functions of the district offices are to mediate claims, monitor benefits provided by employers or their insurance carriers, and ensure injured workers receive required medical treatment.[30]

OALJ is responsible for formally adjudicating claims arising under a number of DOL-administered programs, including the Longshore Program. Claims under the Longshore Act constitute OALJ's third largest workload; OALJ decided 1,267 Longshore Act claims in fiscal year 2023, down from 1,342 Longshore Act cases the year before.[31] OALJ is headed by a Chief Judge who reports directly to the Secretary of Labor. Headquartered in Washington, D.C., OALJ is divided into separate operations for adjudication of its different workloads. The operation that adjudicates claims under the Longshore Act consists of a national office, headed by an Associate Chief Judge, and four district offices, each managed by a District Chief Judge. [32] Each district

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92D CONG., LEGISLATIVE HISTORY OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972 (Comm. Print 1972), available at https://books.google.com/books?id=3CoFPsnyeTIC&pg=PP1 [hereinafter LEGISLATIVE HISTORY OF THE LONGSHORE ACT].

[25] While the 1972 amendments used the term "hearing examiners," all references to hearing examiners were later substituted for the term "administrative law judges" by Pub. L. 95–251, 92 Stat. 183 (1978).

[26] *See* 20 C.F.R. § 1.2(e) ("The Secretary of Labor has delegated authority and assigned responsibility to the Director of OWCP for the Department of Labor's programs under . . . The Longshore and Harbor Workers' Compensation Act, as amended and extended (33 U.S.C. 901 et seq.), except: 33 U.S.C. 919(d) with respect to administrative law judges in the Office of Administrative Law Judges; [and] 33 U.S.C. 921(b) as it pertains to the Benefits Review Board…").

[27] According to the United States Government Policy and Supporting Positions, or Plum Book, the current OWCP Director, Christopher Godfrey, is a noncareer appointee in the senior executive service. *See Plum Data*, U.S. OFF. OF PERS. MGMT., https://www.opm.gov/about-us/open-government/plum-reporting/plum-data/.

[28] In addition to the Longshore Act, OWCP administers programs under the Federal Employees' Compensation Act; the Black Lung Benefits Act, and the Energy Employees Occupational Illness Compensation Program Act. An organization chart for the OWCP is available at https://www.dol.gov/agencies/owcp/owcpchrt.

[29] *See Division of Federal Employees', and Longshore and Harbor Workers' Compensation (DFELHWC)*, U.S. DEP'T. OF LABOR, https://www.dol.gov/agencies/owcp/dlhwc/lscontac.

[30] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-90-76BR, WORKERS' COMPENSATION: THE IMPACT OF 1984 AMENDMENTS ON THE LONGSHORE PROGRAM (1990).

[31] QUARTERLY REPORT ON CASE INVENTORY FOR 4TH QUARTER FY 2023 14-17, U.S. DEP'T OF LABOR (2023), available at https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/Reporting/OALJ_Quarterly_Reporting-FY23-QTR4.pdf.

[32] An organization chart for OALJ is available at https://www.dol.gov/sites/dolgov/files/OALJ/OALJ_OrgChart.pdf.

office has several ALJs, appointed by the Secretary, who hear and decide cases.[33]

The BRB reviews ALJ orders under several workers' compensation programs, including the Longshore Program.[34] BRB members are appointed and subject to removal by the Secretary of Labor.[35] By statute, the BRB consists of five permanent members, one of whom is designated as Chairman and Chief Judge and reports directly to the Secretary.[36] In calendar year 2023, the BRB issued 62 decisions under the Longshore Program, seven of which were published.[37] BRB decisions are not subject to review by any PAS official within the executive branch and are reviewable only in the federal courts of appeals. Organizationally, the BRB is located within the Office of the Deputy Secretary. Like the Secretary, the Deputy Secretary is appointed by the President by and with the advice and consent of the Senate.[38] The Deputy Secretary of Labor provides leadership and management to DOL's subcomponents and oversees the administration of DOL's adjudicatory boards, including the BRB.[39] In this role, the Deputy Secretary is authorized to "promulgate such rules and regulations as may be necessary or appropriate for effective operation of the [BRB] as an independent quasi-judicial body."[40]

The Adjudication Process

A worker seeking compensation under the Longshore Act must file a claim with the OWCP district director[41] for the compensation district in which the injury occurred.[42] If the employer denies liability for benefits and files a Notice of Controversion of Right to Compensation, the claim is subject to a three-step administrative adjudication process.

First, the OWCP district director will attempt to resolve the claim through an informal conference.[43] Informal conferences provide the parties with an opportunity to mediate disputes through guided discussions in the hopes of resolving issues quickly and without the need for

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[33] *See About the Office of Administrative Law Judges*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/oalj/about/ALJMISSN (last visited Apr. 10, 2024).
[34] *See* 33 U.S.C. §§ 901–950; 20 C.F.R. § 802.101; 20 C.F.R. § 801.103; *see also* 20 C.F.R. § 801.104.
[35] 33 U.S.C. § 921(b)(1); 20 C.F.R. § 801.201(a); *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir. 1983).
[36] An organization chart for BRB is available at https://www.dol.gov/agencies/brb/orgchart. *See also BRB Mission Statement,* U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/brb/mission (last visited Apr. 10, 2024).
[37] *Benefits Review Board: LHCA Published 2023 Decisions*, U.S. DEP'T OF LABOR https://www.dol.gov/agencies/brb/decisions/lngshore/published/2023main (last visited Apr. 10, 2024); *Benefits Review Board: Index of Unpublished Longshore Decisions*, U.S. DEP'T OF LABOR https://www.dol.gov/agencies/brb/decisions/lngshore/unpublished (last visited Apr. 10, 2024).
[38] 29 U.S.C. § 552.
[39] U.S. DEP'T OF LABOR, TRANSITION DOCUMENT 6, available athttps://www.dol.gov/sites/dolgov/files/general/foia/presidential-transition-docs/2021/OSEC-TransitionDocument-2020-11-03.pdf.
[40] 20 C.F.R. § 801.104.
[41] For administrative purposes, the term district director is substituted in DOL regulations for the term deputy commissioner used in the statute. *See* 20 C.F.R. §§ 701.301(a)(7) and 702.105.
[42] 33 U.S.C. § 919(a); 20 C.F.R. § 702.221(a).
[43] 20 C.F.R. § 702.311. However, parties can request the matter be referred to OALJ without an informal conference if they believe that it will not resolve the dispute. *See Office of Administrative Law Judges: Information for Longshore Claimants*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/oalj/topics/information/Information_for_Longshore_Claimants (last visited Apr. 10, 2024).

formal proceedings.[44] If the district director cannot resolve the claim informally, any party can request a formal hearing before an ALJ.[45]

To initiate a formal hearing, the district director refers the claim to OALJ.[46] Hearings are conducted de novo by ALJs in accordance with the formal-adjudication provisions of the Administrative Procedure Act.[47] At the hearing, the ALJ inquiries fully into all matters at issue and accepts relevant evidence and testimony from witnesses.[48] After the hearing has concluded, the ALJ has 20 days to prepare the compensation order, either rejecting the claim or making an award, and send it to all parties and their representatives, as well as the district director that administrated the claim.[49] Compensation orders become effective 30 days after being filed in the office of the district director, unless they are appealed.[50]

Appeals of ALJ orders are considered by the BRB.[51] By statute, the BRB is vested with final decision-making authority over Longshore Act claims.[52] The BRB is authorized to hear appeals from questions of law or fact and may stay awards pending final decision if "irreparable injury" would happen to the employer or their insurance carrier.[53] The BRB restricts its review to the record before the ALJ and accepts as conclusive all findings of fact that are supported by substantial evidence.[54] The BRB usually decides cases in panels of three; each panel must consist of two permanent members and any two members of a panel constitutes a quorum.[55] Any party can request reconsideration of a panel decision by all the permanent members of the BRB; when the permanent members of the BRB are sitting en banc, three permanent members constitutes a quorum.[56] The BRB's decisions are reviewable in the federal court of appeals for the circuit where the claimant's injury occurred.[57] If judicial review is not sought, the BRB's decision becomes final after 60 days.

PAS Officials' Involvement in Adjudication

The Longshore Act vests final decision-making authority in the BRB.[58] The Act does not give any direct adjudicative review authority to the Secretary of Labor, the Deputy Secretary of Labor, or any other PAS official. The entire adjudication process for Longshore Act claims is

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[44] 20 C.F.R. §§ 702.311 *et seq*.
[45] 33 U.S.C. § 919(d); 20 C.F.R. §§ 702.316 and 702.317.
[46] 20 C.F.R. §§ 702.316, 702.317; 20 C.F.R. § 702.331; 20 C.F.R. § 701.301(a)(9).
[47] 20 C.F.R. § 702.332.
[48] 20 C.F.R. §§ 702.338 *et seq*.
[49] 20 C.F.R. §§ 702.348, 702.349.
[50] 20 C.F.R. § 702.350.
[51] 20 C.F.R. pt. 802.
[52] 33 U.S.C. § 921.
[53] 33 U.S.C. § 921(b)(3); 20 C.F.R. §§ 802.103, 802.105.
[54] 33 U.S.C. § 921(b).
[55] 33 U.S.C. § 921(b)(5); 20 C.F.R. § 801.301(b).
[56] 33 U.S.C. § 921(b)(5); 20 C.F.R. §§ 801.301(a), 802.407(b).
[57] 33 U.S.C. § 921(c). If the claimant is successful, but the employer fails to comply with the compensation, the award beneficiary or the district director who made the order may apply for enforcement in the federal district court where the injury at issue occurred. *See* 33 U.S.C. § 921(d).
[58] 33 U.S.C. § 921(c) (stating that "any person" affected by a Benefits Review Board decision may seek judicial review in the Courts of Appeals); *see also United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1984 (2021) (noting that BRB members "appear to serve" at the Secretary of Labor's pleasure).

explicitly delegated, by statute, to non-PAS officials within OWCP, OALJ, and the BRB. In certain appeals of Longshore Act claims, attorneys in the Division of Black Lung and Longshore Legal Services, within the Office of the Solicitor, represent OWCP in administrative proceedings before the BRB.[59] However, the Solicitor of Labor, who is appointed by the President by and with the advice and consent of the Senate, does not actively participate in these administrative appeals proceedings and instead is represented by non-PAS officials who appear on her behalf.

PAS officials participate only indirectly in adjudication under the Longshore Act. As originally enacted, the Employees' Compensation Commission was responsible for administering the Longshore Act but had no statutory authority to review specific decisions of the deputy commissioners. Nevertheless, Congress authorized the Commission to appoint the deputy commissioners and prescribe rules and regulations for the administration of the Longshore Act. This empowered the Commission to provide uniform rules of procedure for operation by the deputy commissioners; issue rulings and regulations on general questions and interpretations of law that, absent a controlling court decision, were binding on the deputy commissioners; and informally review and criticize the deputy commissioners' decisions for legal error.[60] In practice, because this authority related to matters of law, it was exercised by the Chief Counsel as the Commission's law officer instead of the Commission itself.[61] Given that many of the deputy commissioners were not lawyers, it was also common practice for them to ask the Chief Counsel's office for advice when a particular case presented a novel or difficult question of law or policy.[62]

Today, ALJs and BRB members are appointed by the Secretary, and BRB members are subject to at-will removal by the Secretary. Organizationally, the Secretary placed the BRB within the Office of the Deputy Secretary. This "was deemed necessary because the Board's functions are quasi-judicial in character and involve review of decisions made in the course of the administration of the several Acts by the Employment Standards Administration which is headed by an Assistant Secretary."[63] In doing so, the Secretary, consistent with Congress' intent, intended to insulate the BRB from those officials whose decisions would be subject to its review, namely the Assistant Secretary of the ESA.[64] The BRB remains under the Deputy Secretary of Labor, despite the elimination of the ESA and the Office of the Assistant Secretary in 2009, at which time the authorities and responsibilities for administering the Longshore Act were

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[59] *Office of the Solicitor: Division of Black Lung and Longshore Legal Services*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/sol/divisions/black-lung-longshore-legal-services (last visited Apr. 10, 2024) ("Division attorneys represent OWCP in appellate litigation before the Benefits Review Board and the U.S. Courts of Appeals. Division attorneys regularly participate in appeals to defend the agency's interests and present the agency's interpretations of the statutes and their implementing regulations."); *see, e.g.*, Ramsey v. Ports Am. Gulfport, Inc., No. 23-0007 (Ben. Rev. Bd. 2024), available at https://www.dol.gov/sites/dolgov/files/BRB/decisions/lngshore/unpublished/Jan24/23-0007.pdf.

[60] MONOGRAPH NO. 21, *supra* note 11, at 8 n.11, 67, 72–77; *see also* 36 Op. Att'y Gen. 465 (1931).

[61] MONOGRAPH NO. 21, *supra* note 11, at 67–68.

[62] *Id.* at 68–69.

[63] *Kalaris v. Donovan,* 697 F.2d 376 (1983); *see also* Benefits Review Board Notice of Establishment, 38 Fed. Reg. 90 (Jan. 3, 1973); Rules of Practice and Procedure, 38 Fed. Reg. 6171 (March 7, 1973).

[64] *Kalaris*, 697 F.2d 376.

delegated to the Director of OWCP, who now reports directly to the Secretary of Labor.[65] The Deputy Secretary is authorized to promulgate procedural rules for performance of the BRB's review functions and any rules and regulations necessary or appropriate for effective operation of the BRB.[66]

Factors Affecting PAS Officials' Involvement in Adjudication

Historically, two factors appear to have shaped the role that PAS officials play in adjudication under the Longshore Act. First, there was clearly a desire to have a process that was informal and as expeditious as possible. As the Attorney General's Committee on Administrative Procedure explained:

> The growth of this informal system of review and admonition [of the deputy commissioners' decisions] suggests consideration of the wisdom of the statute in providing for almost complete decentralization. Presumably the statute made the deputy's determinations final for the reason that the injured employee often enjoys no more than a marginal financial status; speed and simplicity are of the essence if the matter is to be determined before he has exhausted his meager resources and fallen back on public or private charity. Provision for appeal, whether mandatory or discretionary, would, it was felt, put a burden on claimants disproportionate to its possible benefits . . . . On questions of law the problem is whether the advantages of the existing system of ex parte review in the way of speed and simplicity outweigh the fact that the parties have neither opportunity for argument to the reviewing body nor the benefit of a determination by the Commission itself as distinguished from the Chief Counsel's office. So far as accuracy and uniformity go, it should be noted that the present combination of advice and instruction to deputies in advance of decision with an informal review thereafter appears to be sufficient to eliminate most instances of flagrant error, to restrict minor errors, and to promote a reasonable degree of uniformity among the deputies. It is far from clear that consideration by the non-expert Commission would add a great deal to the conclusions of its chief law officer and his staff . . . [and] the paramount consideration may be that of convenience to claimants. Delay and expense would seem to be the inevitable results if an additional step were inserted in the existing procedure. There is much to be said for the present system, in which without cost or expense to the parties, and without any delay in the effective date of the deputy's order except in the rare instances when it is subsequently vacated, every record is reviewed on the Commission's own initiative and the deputy commissioner, to the extent necessary, is thereafter urged in the direction of accuracy and uniformity.[67]

The 1972 amendments to the Longshore Act, which established a right to an ALJ hearing and BRB review, represented a shift toward greater formality. This formality was the result of a desire to provide a separation of functions between the administration and adjudication of claims

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[65] *See Delegation of Authorities and Assignment of Responsibilities to the Director, Office of Workers' Compensation Programs*, *supra* note 21; *see also Privacy Act of 1974; Publication of Five New Systems of Records; Amendments to Five Existing Systems of Records, supra* note 23.
[66] 20 C.F.R. §§ 801.104, 801.302.
[67] MONOGRAPH NO. 21, *supra* note 11, at 74–77.

and "make clear that all hearings under the Act are to be conducted in conformity with the Administrative Procedure Act."[68] Having found that administration of the Longshore Act had "suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings," Congress reassigned responsibility for conducting hearings from deputy commissioners to ALJs and created an "independent" quasi-judicial body, the BRB, to serve as the final step of the administrative appeals process.[69]

At the same time, Congress apparently did not intend for adjudication under the Longshore Program to be wholly independent of the Secretary. The BRB was established within DOL, and the Secretary was empowered to appoint and remove BRB members and establish procedural rules governing BRB proceedings. Congress considered but never enacted legislation that would have established the BRB as an independent agency separate from DOL.[70]

[68] LEGISLATIVE HISTORY OF THE LONGSHORE ACT, *supra* note 24, at 300; notably, when the Employees' Compensation Commission was abolished in 1946, a three-member board of appeals was created to hear and decide appeals under FECA. Consistent with the Administrative Procedure Act, which was enacted a month prior, the purpose was to "provide the advantages of a single official in charge of operations while affording claimants the protection of a three-member board for the final decision of appeals on claims." However, the newly created appellate board could not hear appeals under the Longshore Act, which, at that time, were required by statute to be heard and decided by the federal district courts.

[69] S. REP. NO. 92-1125, at 13 (1972); H.R. REP. NO. 92-1441, at 11 (1978).

[70] *Kalaris*, 697 F.2d 376.

Appendix P
Old-Age, Survivors, and Disability Insurance

This case study provides an overview of whether, when, and how executive-branch officials appointed through presidential nomination and Senate confirmation (PAS officials) participate in the adjudication of cases under the Old-Age, Survivors, and Disability Insurance (OASDI) program.

Enacted in 1935 and significantly expanded since, OASDI is a social insurance program, funded primarily through payroll taxes, that provides monthly payments to older adults and disabled persons who are insured, as well as certain dependents and survivors of insured workers. The program is administered by the Social Security Administration (SSA), which began operation in 1935 as the Social Security Board (SSB).

Part I provides an overview of the OASDI program, its historical development, and procedures for adjudication. Part II describes whether, when, and how PAS officials participate in this adjudication as a matter of both law and practice. Part III describes the contextual variables that affect or have affected this participation.

I. Background

The Program

OASDI, often referred to simply as "social security," began in 1935 as a program of old-age (retirement) benefits. The program has grown over the past nine decades to become the modern OASDI program. Survivors insurance first became available in 1939, and disability insurance first became available in the mid-1950s.

Under the OASDI program, covered wage earners pay payroll taxes to the government, earning up to four quarters of coverage per year based on covered earnings. SSA maintains earnings records for covered workers. Wage earners become insured for different benefit types when they have earned a sufficient number of quarters of coverage. Wage earners are entitled to benefits if they are insured and meet other benefit-specific eligibility criteria—for example, if they have a "disability" as defined in the Social Security Act. Certain family members may also be entitled to benefits based on a wage earner's record.

OASDI has expanded in several important ways since it was created in 1935. In terms of coverage, only about 56 percent of the U.S. workforce worked in covered jobs in 1935. Today, more than 94 percent of jobs are covered under the program. In terms of benefits offered by the program, social security was limited initially to retirement benefits but now provides monthly cash payments to survivors of insured wage earners, disabled wage earners, and disabled dependents of wage earners. Geographically, the program has expanded to include all states and U.S. territories. Most notably for purposes of this study, participation has grown enormously. In 1945, there were about 46.4 million covered workers and 1.1 million beneficiaries. In 1970, there were about 93 million covered workers and about 25.2 million beneficiaries, roughly 2.6 million of whom were disabled workers and dependents. And in 2022, there were about 66 million

beneficiaries, of whom roughly 8.8 million were disabled workers and dependents.[1] In recent years, SSA has awarded retirement benefits to about 1.6 million people each year. The number of disabled-worker benefit applications SSA receives annually reached a peak of almost 3 million in 2010 and was about 1.8 million in 2022.[2]

The Agency

In addition to establishing the old-age benefits program, the Social Security Act of 1935 created a new independent agency, SSB, to administer it. SSB was headed by a three-member Board whose members were appointed by the President by and with the advice and consent of the Senate. Board members served staggered six-year terms, and no more than two members could be of the same political party. One member, designated by the President, served as Chairman. In managing the old-age benefits program, the Act assigned the Board responsibility for maintaining earnings for all workers covered under the Act and, beginning in January 1942, accepting applications for old-age benefits, determining applicants' entitlement, and managing monthly payments to beneficiaries.[3]

In addition to administering the old-age benefits program, SSB was also assigned responsibility for administering several major new programs that provided grants-in-aid to state governments for old-age assistance, unemployment compensation, aid to dependent children, and aid to the blind. The Act also charged the Board with "studying and making recommendations as to the most effective methods of providing economic security through social insurance, and as to legislation and matters of administrative policy concerning old-age pensions, unemployment compensation, accident compensation, and related subjects."[4] A committee established by President Roosevelt had been instrumental in developing the Social Security Act, and Congress anticipated that the Board would remain active in the further development of a comprehensive social security system. (The Board's second Chairman, Arthur Altmeyer, played a particularly prominent role in advocating for legislative changes.[5])

The agency underwent several significant structural changes in its first two decades. In 1939, President Roosevelt moved SSB, along with several other agencies, into the new Federal Security Agency (FSA). The FSA was headed by an Administrator appointed by the President by and with the consent of the Senate. Although the Board continued to administer the old-age insurance program, it did so under the Administrator's direction and supervision. The reorganization also authorized the Administrator to assign administrative duties to the SSB's Chairman individually rather than to the Board as a whole.[6]

In 1946, President Truman abolished the three-member Board and transferred its functions to the FSA Administrator.[7] In his message transmitting the reorganization plan to

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[1] *Social Security Beneficiary Statistics*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/STATS/OASDIbenies.html (last visited Oct. 6, 2023).
[2] SOC. SEC. ADMIN., SSA PUB. NO. 13-11700, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETING, 2023 (Nov. 2023), https://www.ssa.gov/policy/docs/statcomps/supplement/2023/supplement23.pdf.
[3] Pub. L. No. 74-271, 49 Stat. 620 (1935).
[4] *Id*. § 702
[5] *See generally* ARTHUR J. ALTMEYER, THE FORMATIVE YEARS OF SOCIAL SECURITY (1966).
[6] Reorganization Plan No. 1 of 1939, 4 Fed. Reg. 2727, 2728 (July 1, 1939).
[7] Reorganization Plan No. 2 of 1946, 11 Fed. Reg. 7873, 7873 (July 20, 1946).

Congress, Truman explained: "A full-time board in charge of a group of bureaus within an agency is at best an anomaly."[8] The Administrator established the position of Commissioner for Social Security, who supervised the new SSA, and delegated to the Commissioner responsibility for overseeing the social security-related functions assigned to him by law.[9]

President Eisenhower abolished the FSA in 1953, moving SSA and several other agencies to the new, cabinet-level Department of Health, Education, and Welfare (HEW). Under this reorganization, the Commissioner became a position requiring appointment by the President by and with the consent of the Senate. The Commissioner was directed to "perform such functions concerning social security and public welfare as the Secretary may prescribe."[10] The Secretary delegated to the Commissioner responsibility for overseeing the social security-related functions assigned to him by law, except (as discussed below) responsibility for hearings.[11]

SSA remained in HEW (later renamed the Department of Health and Human Services (HHS)) until 1995, when Congress reestablished SSA as an independent agency. SSA was headed by a single Commissioner, to whom Congress transferred all functions of the HHS Secretary relating to the OASDI program. By statute, the Commissioner serves a fixed six-year term and is removable by the President only for cause.[12] Following the Supreme Court's decisions in *Seila Law v. CFPB*[13] and *Collins v. Yellen*,[14] both the Office of Legal Counsel and Ninth Circuit issued opinions finding the removal restriction unconstitutional.[15]

Aside from the Commissioner, only two other agency officials required (and continue to require) Senate confirmation: the Deputy Commissioner and the Inspector General.[16]

It is important to note that the agency—independent SSA and its predecessors—have always administered other programs in addition to OASDI. As noted earlier, when Congress created the SSB in 1935, it assigned the agency responsibility for managing grants-in-aid to the states for old-age assistance, unemployment compensation, aid to dependent children, and aid to the blind. SSB also supervised the U.S. Employment Service between 1939 and 1942. Over its history, SSA has also played a role in administering Medicare, the black lung benefits program, grants to the states for aid to the permanently and totally disabled, and several other programs. Although many of these programs have since been reassigned to other agencies, those providing grants to the states for old-age assistance, aid to the blind, and aid to the permanently and totally

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[8] Special Message to the Congress Transmitting Reorganization Plan 2 of 1946 (May 16, 1946), https://www.trumanlibrary.gov/library/public-papers/117/special-message-congress-transmitting-reorganization-plan-2-1946 (last visited Feb. 7, 2024).
[9] *Organizational History*, SOC. SEC. ADMIN., https://www.ssa.gov/history/orghist.html (last visited Feb. 7, 2024).
[10] Reorganization Plan No. 1 of 1953, 18 Fed. Reg. 2053, 2053 (Apr. 11, 1953). For a political account, see DOMINICK PRATICO, EISENHOWER AND SOCIAL SECURITY: THE ORIGINS OF THE DISABILITY PROGRAM 32–34 (2001).
[11] *See infra* notes 34–36 and accompanying text.
[12] 42 U.S.C. § 902(a)(3).
[13] 140 S. Ct. 2183 (2020).
[14] 141 S. Ct. 1761 (2021).
[15] Kaufmann v. Kijakazi, 32 F.4th 843 (9th Cir. 2022); Constitutionality of the Commissioner of Social Security's Tenure Protection, 45 Op. O.L.C. 1, 2021 OLC LEXIS 10 (July 8, 2021).
[16] 42 U.S.C. § 902(b), (e).

disabled later became the supplemental security income, which SSA has administered since its creation in 1972.

The Adjudication Process

Since 1939, when Congress substantially overhauled the Social Security Act, the agency—the Board and successively the FSA Administrator, HEW Secretary, HHS Secretary, and SSA Commissioner—has been required to follow a basic process for adjudicating claims for benefits. First, the Act directs the agency to "make findings of fact, and decisions as to the rights of any individual applying for a payment under [the OASDI program]."[17] Second, the Act directs the agency, whenever requested by an applicant or another person adversely affected by a decision, to "give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, . . . on the basis of evidence adduced at the hearing, affirm, modify, or reverse [its] findings of fact and such decision."[18]

The Act grants the agency broad discretion to craft appropriate procedures for adjudicating claims, including informal evidentiary rules. It has also permitted the agency to delegate many of its statutory functions, including the duty to render initial decisions and hear appeals, to "any member, officer, or employee" of the agency.[19]

Anticipating it would receive a very high volume of applications from across the country, the Board quickly established a decentralized, multistage process for adjudicating claims. Staff at hundreds of field offices across the country were charged with receiving applications and helping claimants complete their applications and obtain evidence necessary to prove entitlement. Staff within the Bureau of Old-Age Insurance (later renamed the Bureau of Old-Age and Survivors Insurance) were responsible for rendering and reviewing initial decisions. Claimants dissatisfied with an initial decision were entitled (but not required) to request reconsideration by a separate cadre of Bureau staff. Bureau staff at both the initial and reconsideration levels were instructed to refer difficult questions of law or policy and certain recurring factual questions regarding coverage to specialized units within the Bureau and, in some cases, to the office of the agency's General Counsel.[20]

When Congress amended the Social Security Act in 1939 to grant dissatisfied claimants the right to a hearing before the Board, the Board convened a group of agency officials, assisted by an outside consultant (Ralph Fuchs[21]), to devise a new hearings and appeals system. Under that system, the Board established a new Office of Appeals Council (OAC) to hold hearings, render decisions on the basis of evidence adduced at hearings, and review hearing decisions. Organizationally, OAC was independent of the Bureau and reported directly to the Board. It

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[17] 42 U.S.C. § 405(b)(1).
[18] *Id.*
[19] *Id.* § 405(a), (*l*); *see also* H.R. REP. NO. 76-728, at 44 (1939).
[20] ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES: MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, pt. 3, at 6–14 (1941) [hereinafter MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE].
[21] Ralph Fuchs served as a member of the Attorney General's Committee on Administrative Procedure and later served as a public member of the first temporary Administrative Conference.

consisted initially of a three-member Appeals Council and a dozen referees stationed around the country. Appeals Council members and referees were all employees of the agency.

Referees had primary responsibility for conducting hearings and rendering decisions, though Appeals Council members were also "authorized to serve as referees" and encouraged to "exercise such authority from time to time as a means of keeping them in touch with the problems connected with conducting hearings and developing the records."[22] The Appeals Council, acting as a collegial body, was responsible for reviewing referees' decision on appeal or on its own motion. The Appeals Council was also responsible for "giving adequate direction and supervision to the hearing and review organization," with the Chairman responsible for "coordinating and directing the work of the referees," "keeping the Appeals Council and the Board continuously advised of the operation of the hearing and review system," "suggesting improvements," and "transmitting suggestions and directions to the personnel in the field."[23] Absent timely appeal or review, decisions at each stage of the administrative review process became the final decision of the Board. Judicial review was available in the district courts following exhaustion of administrative remedies through the Appeals Council.

With some modifications, this system remains in place today. SSA regulations continue to prescribe a five-stage administrative review process consisting of (1) an initial determination, (2) reconsideration, (3) a hearing before an ALJ, (4) AC review, and (5) federal court review.[24] Significant developments include: In 1946, after Congress enacted the Administrative Procedure Act (APA), SSA began assigning cases to hearing examiners—later retitled administrative law judges (ALJs)—for hearing.[25] Congress established the disability program in 1954. Ever since, in most cases in which a claimant applies for benefits based on a disability, employees of state agencies rather than SSA officials adjudicate whether the claimant meets the statutory definition for disability. In 1959, SSA amended its regulations to require claimants to obtain a reconsideration determination before requesting a hearing. The Appeals Council gradually expanded from a three-member body to a much larger body; today, members decide appeals in two- or three-member panels. And in 2017, SSA dissolved OAC,[26] placing the hearing-level operation under the supervision of the Deputy Commissioner for Hearings Operations and the Appeals Council under the supervision of the Deputy Commissioner for Analytics, Oversight, and Review.

For purposes of this study, the most notable feature of the process for adjudicating OASDI claims is the current and historical absence of an explicit role for any PAS official—including the Board, HEW Secretary, HHS Secretary, and SSA Commissioner—in the adjudication of individual cases.

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[22] MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE, *supra* note 20, at 14–23.
[23] *Id*.
[24] 20 C.F.R. § 404.900.
[25] SSA has taken the position that it is not required to conduct hearings under the OASDI according to the APA's formal adjudication provisions. *See* 85 Fed. Reg. 73,138, 73,138–43 (Nov. 16, 2020).
[26] OAC underwent several names changes during its history. Other names for the component were the Bureau of Hearings and Appeals, the Office of Hearings and Appeals, and the Office of Disability Adjudication and Review.

PAS Officials' Involvement in Adjudication

PAS officials from the Board to the current Commissioner have relied almost exclusively on methods other than direct participation in individual adjudications to achieve the objectives that agency-head review serves in other programs, such as policymaking, political accountability, ensuring accuracy and interdecisional consistency, managing the agency's adjudicative system, and ensuring organizational effectiveness. Such methods have included the adoption of substantive and procedural regulations and the issuance of rulings that are binding on all agency components, robust quality assurance systems (with occasional congressional encouragement), the organization and periodic restructuring of the components involved in adjudication, the appointment and supervision of senior officials responsible for managing adjudicative components, and, since 2018, the direct appointment by the Commissioner of ALJs and Appeals Council members.

Factors Affecting PAS Officials' Involvement in Adjudication

There was certainly no expectation that the Board would play any significant role in rendering initial determinations or conducting hearings given the sheer volume of applications the Board expected to receive, the nationwide distribution of claims, and the expectation that an economic security program should decide claims expeditiously.[27] (In contrast, Board members personally presided over hearings regarding the withdrawal of grants-in-aid to states.[28])

Given these factors and the Board's responsibility for overseeing several other major programs, Congress clearly expected that the Board would delegate responsibility for rendering initial determinations and conducting hearings. Committee reports associated with the 1939 amendments make clear that the statutory authority to delegate certain functions included the power to "conduct hearings" and "make determinations of the right to benefits."[29]

As to the role assumed by the Appeals Council, a committee convened to implement the hearing process required by the 1939 amendments considered but ultimately decided against assigning any appellate function to the Board. As the Board explained in the January 1940 document establishing the hearings and appeals system:

> During the developmental stage, it was suggested, the Social Security Board might constitute itself the Appeals Council for all old-age and survivors insurance cases, employing a special executive officer to advise it and to give administrative direction to the hearing and review system. In view of the Board's other duties, however, it was felt that it could not carry the load involved in reviewing referees' decisions as well as determining policies and procedures of operation. Once assumed, moreover, the function might be difficult to delegate to a subordinate agency thereafter. With the establishment of a separate Appeals Council it is anticipated that it will work in close conjunctions with the Social Security Board, both with respect to the developmental steps required to establish and implement

[27] *See* MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE, *supra* note 20, at 36–38 (describing the practical "requirements of the administrative task" considered by the Board in establishing the hearing and review system).
[28] *Id.* at 29–30.
[29] H.R. REP. NO. 76-728, *supra* note 19, at 44.

> an efficient hearing and review organization and with regard to substantive issues arising in cases before it where these involve fundamental policies concerning the old-age and survivors insurance program. Only by such means will it be possible to effect a consistently integrated process for hearing and reviewing cases which will obviate the necessity for the Social Security Board's exercising its implicit reserve powers to the extent of calling particular pending cases before it.[30]

Since 1940, the agency has never proposed providing an explicit or routine role for PAS officials in the adjudication of individual cases, nor has there been any notable external push to involve the Commissioner or any other PAS official in the adjudication of individual cases.[31]

A more limited role for PAS officials has been considered on a few occasions. In its monograph on the Board's operation, the Attorney General's Committee on Administrative Procedure explained that Bureau staff were permitted to refer difficult or unresolved policy questions up the agency's chain of command, even to the Board. The Committee noted, however, that "customarily problems of policy which are referred to the Board itself [were] separated out of the individual cases in which they arise and [were] presented in the form of abstract questions."[32] The Board also apparently contemplated the possibility that it might be called upon to decide cases in which the Bureau disputed a decision of the Office of Appeals Council, though it is unclear it ever played such a role.[33]

When the HEW Secretary assumed statutory authority for the social security program, he "delegated to the [Senate-confirmed] Commissioner of Social Security all of the functions vested in him by the Social Security Act and Reorganization Plans, except the functions relating to hearings and appeals and judicial review . . . ."[34] Instead, the Secretary by regulation delegated the hearings and appeals functions directly to the OAC's successor, the Office of Hearings and Appeals (OHA). As a 1960 study of the operation of SSA's "hearing and decisional machinery" found:

> It is the understanding within the Department that by this delegation, the Secretary has granted all of his authority relating to departmental hearings and appeals. In a recent test situation, General Counsel, Bureau, and OHA concurred in the conclusion that the Secretary himself may not change a decision of [the

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[30] MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE, *supra* note 20, at 56.

[31] In the wake of *United States v. Arthrex*, 141 S. Ct. 1970 (2021), some have suggested that SSA ALJs might be unconstitutionally appointed principal officers because their decisions are not reviewed by a PAS official. *See, e.g.*, Jimmy Hoover, *In Arthrex, Justices Deal New Blow to Agency Independence*, LAW360 (June 22, 2021); Richard Pierce, *The Combination of* Lucia*,* Edmond*, and Political Polarity Is a Disaster*, YALE J. REG. NOTICE & COMMENT (Feb. 4, 2020), https://www.yalejreg.com/nc/the-combination-of-lucia-edmond-and-political-polarity-is-a-disaster-by-richard-j-pierce-jr/; Jasper L. Tran, *Unconstitutional Appointment of Patent Death Squad*, GEO. WASH. L. REV. ON THE DOCKET (June 29, 2021), https://www.gwlr.org/unconstitutional-appointment-of-patent-death-squad/. An important distinction between the administrative patent judges at issue in *Arthrex* and SSA ALJs is that while the Patent Act seemingly prevents any PAS official in the executive branch from reviewing administrative patent judges' decisions, the Social Security Act clearly does not preclude the Commissioner from reviewing ALJs' decisions.

[32] MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE, *supra* note 20, at 10.

[33] *Id*. at 55.

[34] CHARLES A. HORSKY & AMY R. MARTIN, THE OPERATION OF THE SOCIAL SECURITY ADMINISTRATION HEARING AND DECISIONAL MACHINERY 252 (1960).

> Appeals Council]. The [Appeals Council] decision is the final and conclusive Departmental decision in a case.[35]

The Commissioner had other powers to supervise OHA, including the authority to allocate responsibilities within the component and to approve "rules" (but not "regulations") governing the performance of the hearings and appeals functions.[36]

On one occasion, shortly after Congress reestablished SSA as an independent agency and transferred administration of the OASDI program from the HEW Secretary, Commissioner Shirley Chater exercised her "implicit reserve powers" to intervene in the adjudication of a case. That case involved a claim for survivor's benefits on behalf of a child, Judith Hart, conceived through gamete intrafallopian transfer three months after the death of her father (the wage earner). After receiving a General Counsel's opinion, a Regional Commissioner denied the claim. An ALJ awarded the claimant survivor's benefits on appeal. The Appeals Council reviewed the ALJ's decision on its own motion and reversed, finding that the claimant was not the wage earner's child under state law and was therefore not entitled to survivor's benefits under the Social Security Act.[37]

While the claim was pending before a federal district court on appeal in March 1996, but before the trial took place, Commissioner Shirley Chater announced that SSA would award the child survivor's benefits.[38] In her statement, Commissioner Chater explained:

> This case raises significant policy issues that were not contemplated when the Social Security Act was passed many years ago. Recent advances in modern medical practice, particularly in the field of reproductive medicine, necessitate a careful review of current laws and regulations to ensure they are equitable in awarding Social Security payments such as this.
>
> This review has begun. Resolving these significant policy issues should involve the executive and legislative branches, rather than the courts.
>
> In the interim, after consulting with the Department of Justice, we believe it would be inappropriate to deny benefit payments to [the claimant] at this time. . . .
>
> Therefore, I have asked the Court to return the case to Social Security at which point I will order the immediate payment of benefits to [the claimant].[39]

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[35] *Id.* at 256.
[36] *Id.* at 259, 267.
[37] Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L. REV. 251, 251–56 (1999).
[38] *Id.*
[39] The statement is quoted in Janet J. Berry, *Life After Death: Preservation of the Immortal Seed*, 72 TUL. L. REV. 231, 245–46, 246 n.131 (1997); *see also* John A. Gibbons, Comment, *Who's Your Daddy: A Constitutional Analysis of Post-Mortem Insemination*, 14 J. CONTEMP. HEALTH L. & PROBS. 187, 205–06 (1997); Robert J. Kerekes, *My Child . . . but Not My Heir: Technology, the Law, and Post-Mortem Conception*, 31 REAL PROP. PROB. & TRUST J. 213, 239–40 (1996); Robert Rains, *DOMA and the Social Security Act: An Odd Couple Begetting Disfavored*

Three aspects of the Hart case are worth noting. First, Commissioner Chater limited her order to Judith Hart's claim and declined to give it precedential effect.[40] Indeed, many cases involving similar fact patterns have continued to percolate up through SSA's administrative review process and the federal courts in the three decades since. This suggests that Commissioner Chater did not view adjudication as an appropriate means for policymaking. For example, although SSA regulations authorize the Commissioner to designate and orders and opinions issued in the adjudication of claims as precedential, neither Commissioner Chater nor any other Commissioner appears to have done so since 1992.[41]

Second, the case attracted an inordinate amount of media attention, which may have influenced Commissioner Chater's decision to intervene in the case.

And third, atypically for SSA appeals, the case involved "significant policy questions." The vast majority of appeals center on whether a claimant has proven that he or she meets the legal definition for having a disability. Disputes in such cases are typically factual rather than legal in nature. In his 1990 study of the Appeals Council, Charles Koch observed:

> Despite a dense thicket of statutory, regulatory, and case law, SSA adjudicators generally feel that their sole task is to apply known law to new facts, not to make policy, extrapolate decisions in unforeseen areas, or enlarge the various slots into which cases are pigeonholed . . . [The] nature of the typical disability case necessarily tilts the system in the direction of fine-grained attention to the intimate facts on the record, rather than to the reform of social policy.[42]

Involvement of a PAS official may offer little value in this context. As Rebecca Eisenberg and Nina Mendelson have written, "when the issues in an adjudication are essentially factual—as they often are, for example, in Social Security disability cases—agency-head review may offer few distinctive benefits compared to other modes of review, including so-called 'quality assurance' approaches."[43]

Children, 55 ST. LOUS U. L.J. 811, 822 (2011); Monica Shah, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547, 561–62 (1996).

[40] Laurence C. Nolan, *Critiquing Society's Response to the Needs of Posthumously Conceived Children*, 82 OR. L. REV. 1067, 1080–81 (2003).

[41] 20 C.F.R. § 402.35.

[42] Charles A. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple*, 17 FLA. ST. L. REV. 199, 228 (1990).

[43] Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 64 (2023).

Appendix R
Payment of Prevailing Wage Rates by Federal Contractors (Davis-Bacon Act)

This case study provides an overview of whether, when, and how executive branch officials appointed through presidential nomination and Senate confirmation (PAS officials) participate in the enforcement of the Davis-Bacon labor standards.[1] Enacted in 1931 and administered by the Department of Law (DOL), the Davis-Bacon Act, as amended, requires the payment of minimum prevailing wages to laborers and mechanics working on federal contracts in excess of $2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings and public works.[2]

Part I provides an overview of the program, its historical development, and DOL's process for adjudicating cases under it. Part II describes whether, when, and how PAS officials participate in this adjudication as a matter of both law and practice. Part III describes the contextual variables that affect or have affected this participation.[3]

Background

The Program

The Davis-Bacon Act of 1931 is a Depression-era statute "designed to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area."[4] During a time of severe economic downturn and increased federal construction projects, itinerant contractors were frequently underbidding local contractors by importing cheap labor or undercutting the local wage structure.[5] This enabled outside, exploitative contractors to win government contracts as the lowest bidder, which undermined the federal building program, caused labor strife, and led to broken contracts.[6] To address this growing problem, Congress passed the Davis-Bacon Act to provide local contractors with a fair opportunity to compete for federal construction contracts and ensure local laborers working on the sites were paid fair wages.

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[1] 40 U.S.C. §§ 3141 *et seq*.

[2] Congress has extended the Davis-Bacon prevailing wage provisions to "Related Acts," under which federal agencies assist construction projects through grants, loans, loan guarantees, and insurance. *See* https://sgp.fas.org/crs/misc/IF11927.pdf for a list of the Related Acts.

[3] Under the Davis-Bacon Act, the DOL is responsible for enforcing both prevailing wage rate determinations (i.e., determinations of what the prevailing wage rate is) and determinations of liability and debarments for violations of the Davis-Bacon labor standards (i.e., a contractor's failure to pay workers the prevailing wage rate). This study focuses on the latter.

[4] STAFF OF H. COMM. ON EDUC. AND LABOR, 87TH CONG., LEGISLATIVE HISTORY OF THE DAVIS-BACON ACT 1 (Comm. Print 1962), available at https://books.google.com/books?id=RUjhYOwIBt0C&pg=PA1 [hereinafter LEGISLATIVE HISTORY OF THE DAVIS-BACON ACT].

[5] *Id.*

[6] Lisa Morowitz, *Government Contracts, Social Legislation and Prevailing Woes: Enforcing the Davis Bacon Act*, 9 Buff. Envtl. L.J. 29, 32 (1989) (discussing the origins and statutory history of the Davis-Bacon Act), available at: https://digitalcommons.law.buffalo.edu/itpi/vol9/iss1/6.

The Davis-Bacon Act was the first federal prevailing wage law applicable to non-government workers. The Act directs DOL to determine prevailing wage rates for each construction occupation used in different types of construction in specific localities. The Act also requires that every federal construction contract stipulate that the contractor or subcontractor pay laborers and mechanics at least the locally prevailing wage, including fringe benefits. Violations of the Davis-Bacon labor standards can result in withholding of contract payments for unpaid wages and damages, contract termination, contractor liability for any resulting costs to the government, and debarment from future contracts for a three-year period.

The Agency

Before 1950, individual agencies were responsible for enforcing the requirements of the Davis-Bacon Act. To provide more consistent and effective enforcement of the Act, Reorganization Plan No. 14 of 1950 directed the Secretary of Labor, a PAS official,[7] to prescribe enforcement standards and conduct independent investigations. Federal contracting agencies remained responsible for actual performance of enforcement activities, including investigating complaints of violations.[8]

The Secretary initially delegated responsibility for administering the Davis-Bacon program to the Solicitor of Labor.[9] The Solicitor is appointed by the President by and with the advice and consent of the Senate. In 1971, responsibility under the Act passed to the new Employment Standards Administration (ESA).[10] ESA was headed by the Assistant Secretary of Labor for Employment Standards, who was also a PAS official. In 2009, ESA was dissolved into its four component parts, including the Wage and Hour Division (WHD). Today, WHD is responsible for administering and enforcing the Davis-Bacon Act and several other federal labor laws that establish minimum standards for wages and working conditions.[11]

WHD is headed by an Administrator, who is appointed by the President by and with the advice and consent of the Senate and reports directly to the Secretary.[12] WHD has five regional offices and 54 district offices nationwide, as well as a national office in Washington, D.C. WHD conducts investigations to ensure compliance with contracts covered under the Davis-Bacon Act and notifies contractors and subcontractors of any violations.

Following the issuance of Reorganization Plan No. 14 of 1950, Secretary Maurice Tobin adopted a rule authorizing the Secretary, upon request by an agency, to direct that a hearing be held before a hearing examiner (i.e., an ALJ) "[i]n the event of disputes concerning the payment

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[7] 29 U.S.C. § 551.
[8] Harry S Truman, *Special Message to the Congress Transmitting Reorganization Plan 14 of 1950*. Online by Gerhard Peters and John T. Woolley, The American Presidency Project https://www.presidency.ucsb.edu/node/230800 (last visited Apr. 11, 2024).
[9] *A General Investigation of the Davis-Bacon Act and its Administration: Hearings Before the Special Subcomm. on Labor of the H. Comm. on Educ. and Labor*, 87th Cong. 74, 905 (1962), available at https://books.google.com/books?id=jehZrC405RMC&pg=PP7.
[10] Secretary of Labor's Order 13-71 Delegation of Authority and Assignment of Responsibility, 36 Fed. Reg. 8755 (May 12, 1971).
[11] Secretary's Order 01-2014 Delegation of Authority and Assignment of Responsibility to the Administrator, Wage and Hour Division, 79 Fed. Reg. 77527 (Dec. 24, 2014).
[12] 29 U.S.C. § 204.

of prevailing wage rates or proper classifications which involve significant sums of money, large groups of employees, or novel or unusual situations." The examiner's decision was final unless a party filed a timely petition for review by the Secretary.[13]

By 1962, there was substantial congressional interest in formalizing the process for adjudicating matters following a violation determination by the Solicitor. Secretary Arthur Goldberg and Solicitor Charles Donahue testified before a House subcommittee about a proposal for the creation of an internal review mechanism within DOL's structure to review certain challenges of determinations made under the Davis-Bacon Act. As a Congressional Research Service (CRS) report describes it, the proposal was contentious:

> It quickly became apparent that creation of a review mechanism would be controversial. Various proposals, each with a constituency of its own, were presented. Some thought review by a panel within DOL would be adequate. Others argued that such a system would never be wholly free from the hand of the Secretary whose staff's decisions were being reviewed. Judicial review was urged, but it was argued that it would be unworkable: that it would be cumbersome and costly, and that decisions would not be timely, an inconvenience to all involved and, possibly, causing delay of vital federal projects. Review by GAO was yet another option; but that, in itself, became a matter of controversy since the Comptroller General and DOL seem frequently to have been at odds over Davis-Bacon administration. If there were to be an in-house board, various practical administrative questions would need to be dealt with. For example, who would appoint its members? Where would it be housed? What would be its relationship to the Secretary, to the Administrator of the Wage and Hour Division within DOL, and to the Office of the Solicitor within DOL? If internal administrative appeal and review did not resolve a matter in dispute, would there be further options?[14]

Hearings continued through 1962 and 1963 without a finalized legislated review procedure. In January 1964, Secretary Willard Wirtz issued regulations establishing a formal review procedure by the newly created Wage Appeals Board (WAB). The revised regulations specified that a hearing examiner's decision on payment and classification disputes was subject to review by the Solicitor of Labor, and that the Solicitor's decision was subject to discretionary review by the WAB, which provided the final opportunity for administrative review.[15]

The WAB consisted of three members appointed by the Secretary, who reported directly to the Secretary. The Board was authorized to:

> act as the authorized representative of the Secretary of Labor in deciding . . . appeals taken in the discretion of the Board, in debarment cases arising under 29 CFR Part 5; [and] disputes coming before the Board, in its discretion, concerning the payment of prevailing wage rates or proper classifications which involve significant sums of money, large groups of employees, or novel or unusual situations . . . On any question of law, the

[13] 29 C.F.R. § 5.10(b) (1951).
[14] WILLIAM G. WHITTAKER, CONG. RSCH. SERV., 94-408, THE DAVIS-BACON ACT: INSTITUTIONAL EVOLUTION AND PUBLIC POLICY 15 (2007).
[15] 29 C.F.R. § 5.11(b) (1964).

Board shall act on the advice of the Solicitor.

The Board was authorized to recommend rules of practice and procedure to the Secretary, but the Secretary was ultimately responsible for adopting such rules.[16]

In June 1964, in testimony before the House subcommittee, Solicitor Charles Donahue "assured the Members that DOL's review process was in place and functioning." Some members viewed the Secretary's establishment of the new process "as a preemptive strike, since legislation to create a review procedure had been under active consideration by the Subcommittee through several years."[17] In amending the Davis-Bacon Act that year, Congress ultimately chose not to include language dealing with a review procedure, and the administratively created process remained in place.

The WAB remained a feature of adjudication under the Davis-Bacon Act until 1996, when the Secretary combined the WAB, the Board of Service Contract Appeals, and the Office of Administrative Appeals into a single Administrative Review Board (ARB). This change was intended to address inefficiencies and delays in the administrative appeals process.[18] The ARB retains much of the same authority, responsibility, and structure as the WAB, albeit with less discretion to hear appeals and an increased number of members. Most significantly, the ARB remains an administrative creation under the Secretary of Labor, who appoints all ARB members and has the sole discretion to remove ARB members at any time, before their terms expire.[19]

Today, four DOL components are involved in the adjudication of claims under the Davis-Bacon Act: (1) WHD, (2) the Office of ALJs (OALJ), (3) the ARB, and (4) the Secretary.

Following an investigation and violation determination by WHD, contractors can request a hearing before an ALJ through OALJ.[20] OALJ hears and decides challenges arising under more than 80 labor-related statutes, including the Davis-Bacon Act. OALJ is headed by a Chief Judge who reports directly to the Secretary of Labor. Headquartered in Washington, D.C., OALJ is divided into separate operations for the adjudication of its cases. Each operation consists of a national office, headed by an Associate Chief Judge, and four district offices, each managed by a District Chief Judge. Each district office has several ALJs, all of whom are appointed by the Secretary. ALJ decisions may be appealed to the ARB.[21]

Like its predecessor, the WAB, the ARB's existence is neither compelled nor governed by statute. The Secretary has granted authority and assigned responsibility to the ARB to issue

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[16] Secretary's Order No. 32-63 Wage Appeals Board Establishment and Functions, 29 Fed. Reg. 118 (Jan. 4, 1964).
[17] WHITTAKER, *supra* note 14, at 16. The CRS report quotes one member as saying: "I think that the Department just saw the handwriting on the wall." *Id*.
[18] Secretary's Order 2–96: Authority and Responsibilities of the Administrative Review Board, 61 Fed. Reg. 19978 (May 3, 1996).
[19] Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 Fed. Reg. 69378, 69379 (Nov. 16, 2012); *see also* Secretary's Order 01-2020-Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 85 Fed. Reg. 13186, 13188 (Mar. 6, 2020).
[20] *See* 29 C.F.R. pt. 6.
[21] *See* 29 C.F.R. pt. 7.

agency decisions after review or on appeal of matters arising under a wide range of worker protection laws, including the Davis-Bacon Act.

The ARB today consists of a maximum of five members, referred to as administrative appeals judges, who are appointed by the Secretary, with one designated as Chair and another designated as Vice Chair.[22] Members are appointed to terms of four years or less, but the Secretary has discretion to extend terms or remove any member prior to the end of their term.[23] The Deputy Secretary of Labor provides leadership and management to the DOL's subcomponents and oversees the administration of the DOL's adjudicatory boards, including the ARB.[24] The Deputy Secretary is appointed by the President by and with the advice and consent of the Senate.[25] The ARB reports to the Secretary through the Deputy Secretary.[26]

In 2020, Secretary Eugene Scalia issued an order granting the Secretary discretionary authority to review ARB decisions. This change was intended to assist the Secretary in properly supervising and directing actions of "exceptional importance" and in "promot[ing] good governance within the Department."[27]

The Adjudication Process

Violations of the Davis-Bacon labor standards are found through investigations conducted by either the contracting agency or WHD. Many investigations are initiated by confidential complaints filed by affected workers. When a violation is found by WHD, it will notify the contractor or subcontractor of its findings, including any determinations that workers are owed back wages and whether there is reasonable cause to believe the contractor or subcontractor may be subject to debarment.[28]

Contractors and subcontractors can request a hearing on liability determinations and debarments through OALJ.[29] In addition to contractors and subcontractors, their responsible officers and any other notified parties, which may include firms, corporations, partnerships, or associations that the contractors, subcontractors, or responsible officers are known to have an interest, can request a hearing as to whether debarment action should be taken.[30] Upon receipt of a timely request for hearing, the WHD Administrator refers the case to OALJ.[31] Unless the parties enter into consent findings and agree to an order disposing of the proceeding, a formal hearing is held, during which the ALJ accepts evidence and testimony from witnesses.[32] The

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[22] Secretary's Order No. 01-2020, *supra* note 19; *see also Administrative Revie Board: Organizational Chart*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/arb/orgchart (last visited Apr. 11, 2024).
[23] Secretary's Order No. 01-2020, *supra* note 19.
[24] U.S. DEP'T OF LABOR, 2020 PRESIDENTIAL TRANSITION MATERIALS, OFFICE OF THE SECRETARY 6 (2020), available at https://www.dol.gov/sites/dolgov/files/general/foia/presidential-transition-docs/2021/OSEC-TransitionDocument-2020-11-03.pdf.
[25] 29 U.S.C. § 552.
[26] Secretary's Order No. 01-2020, supra note 19, at 13186.
[27] Rules Concerning Discretionary Review by the Secretary, 85 Fed. Reg. 30608, 30611 (May 20, 2020).
[28] 29 C.F.R. § 5.11(b).
[29] 29 C.F.R. § 5.11(b)(2).
[30] 29 C.F.R. § 5.12(b)(1).
[31] 29 C.F.R. § 6.30(a).
[32] *See* 29 C.F.R. pt. 6 for OALJ rules of practice for Davis-Bacon proceedings.

parties may submit proposed findings and conclusions along with a supporting brief within 20 days after the transcript of testimony is filed.[33] Within a reasonable time thereafter, or within 30 days of receiving an agreement containing consent findings and order disposing of the disputed matter in whole, the ALJ issues a decision, which is subject to review by the ARB.[34]

Any aggrieved party may appeal an ALJ's ruling to the ARB.[35] If a petition for review is filed, the ALJ's decision is inoperative unless and until the ARB either declines review or affirms the decision.[36] Certain determinations by WHD are appealable directly to the ARB, such as coverage and interpretation matters, general wage determinations, and refusal-to-pay cases involving only issues of law.[37]

Since 2020, a decision of the ARB is final after 28 days unless reviewed by the Secretary. Any party to a case or the ARB itself can request further review by the Secretary.[38] The Secretary can also decide to review a decision of the ARB on her own motion. In cases decided by the Secretary, the decision is made solely based on the administrative record, the petition and briefs filed with the ARB, and any amicus briefs permitted by the Secretary. The Secretary transmits her decision to the ARB, which is responsible for publishing it and transmitting it to the parties.[39] Decisions of the ARB are final agency actions that may be reviewable under the APA in federal district court.[40]

PAS Officials' Involvement in Adjudication

The Secretary of Labor has the authority and responsibility to decide appeals of administrative decisions under the Davis-Bacon Act. Until 2020, the Secretary participated only indirectly in the adjudication of cases, delegating responsibility for final decision making to others. Before 1964, responsibility was delegated to the Solicitor of Labor; contractors who were found to have violated the Act were given an opportunity to appear before a regional attorney in the Office of the Solicitor to protest the charges.[41] Between 1964 and 1996, the authority to issue final agency decisions was delegated to the WAB. Since 1996, the Secretary has delegated final decisional authority to the ARB.[42] In 2020, Secretary's Order 01-2020 was issued to provide for

[33] 29 C.F.R. § 6.33(a).
[34] 29 C.F.R. § 6.33(b).
[35] 29 C.F.R. § 6.34.
[36] 29 C.F.R. § 6.33(b)(1).
[37] *See* 29 C.F.R. §§ 6.30(a) and 7.9; *see also* U.S. DEP'T OF LABOR, PREVAILING WAGE RESOURCE BOOK, INVESTIGATIVE PROCEDURES UNDER DBA/DBRA/CWHSSA 24, *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/Tab11.pdf.
[38] Petitions for further review by the Secretary, and briefs in opposition, are filed with, reviewed by, and acted on by the ARB. If the majority of the ARB agrees that the petition presents a question of law that is of exceptional importance and warrants secretarial review, the ARB refers it to the Secretary, who has the sole discretion to decline, accept, or take no action on the ARB's referral. *See* Secretary's Order No. 01-2020, *supra* note 19, at 13188.
[39] *Id.*
[40] *See* 5 U.S.C. §§ 702, 704.
[41] *A General Investigation of the Davis-Bacon Act and its Administration*, *supra* note 9, at 906–907.
[42] Secretary's Order 2–96, *supra* note 18.

discretionary secretarial review of the ARB's decisions, allowing the Secretary to directly participate in the adjudication of certain cases.[43]

When the rule was changed to provide for discretionary secretarial review, DOL anticipated that it would not be used often. As of January 2024, the Secretary has exercised the discretionary authority to undertake further review of four ARB decisions, including one case arising under the Davis-Bacon Act that involved prevailing wage rates and surveys.[44] Of the four decisions, three were undertaken for review by former Secretary of Labor Martin Walsh, while one was reviewed by current Acting Secretary Julie Su.

In appeals of labor standards violations and debarments before OALJ and the ARB, the WHD's determination is defended by attorneys in the regional offices of the Solicitor, on behalf of the WHD Administrator. However, neither the Solicitor nor the WHD Administrator actively participate in enforcement proceedings themselves but instead are represented by non-PAS officials who appear on their behalf.

Factors Affecting PAS Officials' Involvement in Adjudication

It is clear from the legislative history that Congress passed the Davis-Bacon Act in 1931 as an "emergency measure" due to increased complaints and concerns over itinerant, exploitative contractors.[45] Despite reservations about the effectiveness of the bill, it was passed to avoid delays in enactment. Unsurprisingly, the need for corrective action became apparent soon after the Act went into effect, leading to significant legislative changes. However, the original Act provided "that if there was any dispute as to what the prevailing wages were which could not be resolved by the contracting officer, the matter was to be conclusively determined by the Secretary of Labor."[46] Despite significant amendments to the Davis-Bacon Act, the role of the Secretary in deciding disputes arising under the Act has remained and expanded into enforcement of the Act's provisions and labor standards.

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[43] Secretary's Order 01-2020, *supra* note 19, at 13186; *see also* Rules Concerning Discretionary Review by the Secretary, *supra* note 27, at 30608.

[44] Office of Federal Contract Compliance Programs, U.S. Dep't of Labor v. Convergys Customer Management Group, Inc., now known as Concentrix CVG Customer Management Group, Inc., ARB Case No.: 2022-0020, Secretary's Decision and Order (Dep't of Labor, July 1, 2022), available at https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/OFC/22_020_OFCS.pdf; District Council of Iron Workers of the State of California and Vicinity v. Wage and Hour Division, U.S. Dep't of Labor, ARB Case No.: 2020-0035, Secretary's Decision and Order of Remand (Dep't of Labor, July 15, 2022), available at https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/DBA/2020-0035-DBAS.pdf; Office of Federal Contract Compliance Programs, U.S. Dep't of Labor v. WMS Solutions, LLC, ARB Case No.: 2020-0057, Secretary's Decision and Order of Remand (Dep't of Labor, Dec. 23, 2022), available at https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/OFC/2020-0057-OFCS.pdf; Administrator, Wage and Hour Division, U.S. Dep't of Labor v. Graham and Rollins, Inc., ARB Case No.: 2021-0047, Secretary's Decision and Order (Dep't of Labor, Aug. 9, 2023), available at https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/TNE/2021-0047-TNES.pdf. Index of Secretarial and Administrative Review Board decisions from May 1996 to present is available at https://www.dol.gov/agencies/oalj/PUBLIC/ARB/REFERENCES/CASELISTS/ARBINDEX.

[45] LEGISLATIVE HISTORY OF THE DAVIS-BACON ACT, *supra* note 4, at 2.

[46] *Id.* at 1.

Specifically, in Reorganization Plan No. 14 of 1950, President Truman authorized the Secretary of Labor to coordinate the administration and enforcement of the Davis-Bacon Act. The goal was to rebuild and strengthen DOL as "the central agency of the Government for dealing with labor problems" and provide more effective, uniform, and adequate protections for workers.[47]

As previously discussed, the Secretary delegated the responsibilities under the Reorganization Plan to the Office of the Solicitor. During the 1962 House subcommittee hearings, in response to questioning about the new internal review board envisioned by DOL, the Solicitor's testimony indicated that it would be independent from the Solicitor's office in order to separate the powers and functions of administration of the Act from adjudication, and to avoid the accusation that the Solicitor was essentially defending himself.[48] The Solicitor also testified about the significantly increased workload given the growth of federally-financed and assisted construction activity. For example, the number of enforcement cases grew from 153 in FY 1953 to over 1,600 in FY 1962. Similarly, the amount of recovered unpaid wages and the number of underpaid workers nearly tripled from FY 1953 to FY 1962, and the number of debarred contractors went from 6 in FY 1953 to at least 50 in FY 1962.[49] The heavy growth in Davis-Bacon enforcement activities and the call for a separation of functions may explain why the Secretary delegated final decisional authority to the WAB in 1964.

In 2020, Secretary Eugene Scalia reclaimed some decisional authority and established discretionary secretarial review of ARB decisions as "an additional mechanism by which the Secretary may fulfill his responsibility to oversee and direct the actions of the department."[50] While the Secretary preserved the ARB's existing processes for considering and deciding cases, the change allowed for more explicit PAS oversight and accountability of the ARB's decisions.

[47] *Special Message to the Congress Transmitting Reorganization Plan 14 of 1950*, *supra* note 8.
[48] *A General Investigation of the Davis-Bacon Act and its Administration*, *supra* note 9, at 909.
[49] *Id.* at 79.
[50] Press Release, Dep't of Labor, U.S. Secretary of Labor Eugene Scalia Signs First Secretary's Orders and Announces Department Management Decisions (Feb. 21, 2020), available at https://www.dol.gov/newsroom/releases/osec/osec20200221.

Appendix S:
Securities Fraud Enforcement

This case study provides an overview of whether, when, and how executive branch officials appointed through presidential nomination and Senate confirmation (PAS officials) participate in the U.S. Security and Exchange Commission's (SEC's) adjudication of securities fraud cases. The SEC enforces numerous federal laws that govern the securities industry, including provisions that prohibit fraud in the purchase or sale of securities.

Part I provides an overview of the SEC's securities fraud authority, its historical development, and the SEC's process for adjudicating cases under it. Part II describes whether, when, and how PAS officials participate in this adjudication as a matter of both law and practice. Part III describes the contextual variables that affect or have affected this participation.

I. Background

The Program

After the stock market crash of 1929, Congress enacted the Securities Act of 1933 (Securities Act) to ensure that investors receive information concerning securities offered for public sale and to prohibit deceit, misrepresentation, and other fraud in the sale of securities.[1] This law governed companies that issued and sold securities, often called the "primary" securities market. Congress subsequently enacted the Securities Exchange Act of 1934 (Exchange Act), which created the SEC and also gave it the power to regulate brokerage firms and other participants in the "secondary" securities markets.[2]

Section 10(b) of the Exchange Act, which is often called the "catch-all" federal securities fraud provision,[3] makes it unlawful:

> To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[4]

The primary SEC regulation implementing Section 10(b) of the Exchange Act is Rule 10b-5.[5] Rule 10b-5 provides that it is unlawful, in connection with the purchase or sale of any security,

> (a) To employ any device, scheme, or artifice to defraud,

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[1] Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74; *The Laws That Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/about-securities-laws (last visited Apr. 5, 2024).
[2] Securities Exchange Act of 1934, Pub. L. No. 73- 291, 48 Stat. 881; U.S. SEC. & EXCH. COMM'N, *supra* note 1.
[3] CHRIS D. LINEBAUGH, JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., IF11422, FEDERAL SECURITIES LAWS: AN OVERVIEW (2020).
[4] 15 U.S.C. § 78j(b).
[5] 17 C.F.R. § 240.10b-5.

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person[.]

Courts have interpreted Rule 10b-5 as including an element of scienter (i.e., a showing of intent to defraud).[6] Major types of securities fraud under Rule 10b-5 include: (1) material misrepresentations or omissions related to the purchase or sale of securities and (2) insider trading.[7]

The SEC also enforces other civil fraud provisions of the federal securities laws that apply in more specific circumstances, such as those applying only to specific securities market participants.[8] Some of these of these provisions also include an element of scienter, but others may be premised on a showing of negligence.[9] This case study does not address criminal securities fraud violations, which are prosecuted in federal courts by the Department of Justice.[10]

The Agency

The SEC is an independent federal agency that was established in 1934. The SEC's mission is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.[11] The SEC achieves its mission through the enforcement of registration, reporting, and disclosure requirements that apply to a wide range of securities market participants.[12] Unlike some other financial regulatory agencies, SEC authority generally does not extend to ensuring the "safety and soundness" of regulated parties, such as limiting risks that those parties may take.[13]

SEC authority has expanded in recent decades. SEC administers provisions of the Sarbanes-Oxley Act of 2002, which includes provisions that enhance corporate responsibility and financial disclosures in response to the accounting scandals of the early 2000s.[14] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), enacted after the 2008 financial crisis, gives SEC new regulatory authority over certain securities and enhances its power to pursue remedies for violations.[15]

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[6] Richard A. Booth, *Deconstructing Scienter*, 16 VA. L. & BUS. REV. 1, 15 (2021).
[7] Todd Kowalski, et al., *Securities Fraud*, 60 AM. CRIM. L. REV. 1245, 1247 (2023).
[8] *See* David Rosenfeld, *Civil Penalties Against Public Companies in SEC Enforcement Actions: An Empirical Analysis*, 22 U. PA. J. BUS. L. 135, 166-167 (2019).
[9] *Id.*
[10] Kowalski, *supra* note 7, at 1290.
[11] *About the SEC*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about (last visited Apr. 5, 2024).
[12] U.S. SEC. & EXCH. COMM'N, *supra* note 1.
[13] MARK LABONTE, CONG. RSCH. SERV., R44918, WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK 18 (2020).
[14] U.S. SEC. & EXCH. COMM'N, *supra* note 1.
[15] *Id.*

The SEC is comprised of up to five Commissioners who are appointed by the President on the advice and consent of the Senate.[16] The Commissioners serve staggered five-year terms, and no more than three commissioners may belong to the same political party.[17] A quorum of the Commission is generally considered to be three Commissioners and, where action of the Commission is required, the action must pass by a majority of participating Commissioners.[18]

The agency has numerous divisions and operating offices, both at the headquarters and regional levels.[19] The SEC components most relevant to this case study are the Division of Enforcement (DE) and the Office of Administrative Law Judges (OALJ). DE and OALJ are led and staffed by non-PAS officials.[20]

Subject to some exceptions, the Exchange Act authorizes the Commission to delegate any of its functions to a division of the Commission, an individual Commissioner, an administrative law judge (ALJ), or an employee or employee board.[21] However, the Commission can review any action it has delegated on its own initiative or on petition of a party, and the vote of one Commissioner is sufficient to bring the matter to the Commission for review.[22] The Commission's adjudication-related delegations are discussed below.

The SEC administers its authorities through a mix of rulemaking, examination and enforcement, administrative adjudication, and federal court litigation. The SEC's securities fraud program provides an example of how the agency relies upon this broad set of authorities. The SEC promulgates regulations implementing and interpreting statutory fraud provisions, it investigates possible violations of these requirements, and it has the power to enforce these rules through instituting an administrative proceeding or by filing suit in federal court.[23]

In recent years, the SEC has filed more than 700 new enforcement actions annually.[24] SEC enforcement filings have grown over the past three decades.[25] Some filings are "primary" enforcement actions where the SEC is seeking penalties, injunctions, or other relief in cases it has not previously pursued.[26] Other filings are "follow-on" actions where the agency is pursuing additional remedies (such as barring a party from working in the securities industry) based on previously completed enforcement actions.[27] In either case, enforcement actions may involve

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[16] U.S. SEC. & EXCH. COMM'N, *supra* note 11.
[17] GARY SHORTER, CONG. RSCH. SERV., IF11714, INTRODUCTION TO FINANCIAL SERVICES: THE SECURITIES AND EXCHANGE COMMISSION 1 (2020).
[18] 17 C.F.R. § 200.41.
[19] *See Headquarters Divisions and Offices*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/divisions (last visited Apr. 5, 2024); *SEC Regional Offices*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/regional-offices (last visited Apr. 5, 2024).
[20] *See* 17 C.F.R. § 200.30-4; 17 C.F.R. § 200.30-10.
[21] 17 U.S.C. § 78d-1(a).
[22] 17 U.S.C. § 78d-1(b).
[23] *See* Kowalski, *supra* note 7, at 1306-07 (outlining SEC rulemaking and enforcement initiatives).
[24] *See*, *e.g.*, *SEC Announces Enforcement Results for Fiscal Year 2023*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/news/press-release/2023-234 (last visited Apr. 5, 2024).
[25] Sonia A. Steinway, Comment, *SEC "Monetary Penalties Speak Very Loudly," but What Do They Say? A Critical Analysis of the SEC's New Enforcement Approach*, 124 YALE L.J. 209, 211 (2014) (Figure 1).
[26] Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 934-935 (2016).
[27] *Id.*

"strict liability" offenses (such as failures to file required reports) or scienter-based offenses (such as securities fraud).[28] Enforcement cases can also be categorized as default actions (where the charged party does not respond and the agency prevails by default), settled actions (where the parties settle before the agency initiates an administrative proceeding or litigation, and contested actions (where the parties actively contest the case in an adjudicatory proceeding).[29]

The SEC may file enforcement actions administratively or in federal district court. Primary actions addressing strict liability offenses, as well as follow-on actions involving previously adjudicated violations, are generally filed administratively.[30] However, the SEC brings primary actions involving securities fraud and other significant violations in both forums.[31] The SEC has filed an increasing proportion of cases administratively in the past decade, but there is debate about the scope of that increase and significant disagreement about whether that increase is desirable.[32] During this time, the SEC has likely been bringing more high-profile securities fraud actions administratively, although this increase is difficult to quantify based on existing aggregate data.[33]

The Adjudication Process

The SEC has expansive power to investigate and adjudicate violations of federal securities law.[34] The Commission has delegated responsibility for supervising and conducting the agency's initial enforcement activities to the Director of the Division of Enforcement (DE Director).[35] DE staff initially undertake informal investigations of possible violations through DE's own market surveillance efforts, through referral from other SEC components or other state or federal regulatory agencies, or through tips or other information received from regulated parties or other members of the public.[36]

If DE staff determine after informal investigation that further investigation would have the potential to address conduct that violates federal securities laws, they next open a Matter Under Inquiry (MUI).[37] MUIs are preliminary actions for further developing the facts of the case and determining whether opening a formal investigation would be a good use of agency

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[28] *Id.*
[29] *Id.*
[30] Urska Velikonja, *Politics in Securities Enforcement*, 50 GA. L. REV. 17, 33 (2015).
[31] Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 50 (2016).
[32] *See* Mark, *supra* note 31 (describing rise); Velikonja, *supra* note 30 (questioning scope of rise); Drew Thornley & Justin Blount, *SEC In-House Tribunals: A Call for Reform*, 62 VILL. L. REV. 261 (2017) (critiquing rise); *Remarks to the American Bar Association's Business Law Section Fall Meeting*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/news/speech/2014-spch112114ac (last visited Apr. 5, 2024) (defending rise in 2014 speech by then-Director of SEC's Division of Enforcement).
[33] David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1173-74 (2016).
[34] Thomas C. Pearson and Gideon Mark, *Investigations, Inspections, and Audits in the Post-SOX Environment*, 86 NEB. L. REV. 43, 73 (2007).
[35] 17 CFR § 200.19b.
[36] U.S. SEC. & EXCH. COMM'N, DIVISION OF ENFORCEMENT, OFFICE OF CHIEF COUNSEL, ENFORCEMENT MANUAL 7-12 (NOV. 28, 2017).
[37] *Id.* at 12.

resources.[38] SEC policy is that MUIs should generally be closed or converted into a formal investigation within 60 days.[39]

The DE Director is responsible for recommending to the Commission whether the agency should undertake formal investigation after an MUI.[40] The Commission votes on whether to approve or reject the DE Director's recommendation for a formal investigation.[41] If the Commission votes to approve the recommendation, DE conducts the formal investigation during which it has the power to subpoena documents and testimony.[42]

After formal investigation, DE presents its findings to the Commission for review, and the Commission has the power to decide whether to authorize DE to file a case in federal court or institute an administrative proceeding.[43] However, if DE and the subject of the investigation instead agree to settle the case and the Commission approves the settlement,[44] the agency instead issues a press release announcing the result and the Commission issues an order outlining the settlement terms.[45] The agency also has the alternative option of filing the settlement in federal court for approval by an Article III judge.[46]

If DE and the party have not agreed to a settlement and Commission authorizes an administrative proceeding, the proceeding is then overseen by an ALJ from the SEC's OALJ.[47] After considering necessary motions from the parties and conducting an on-the-record hearing, the ALJ issues an initial decision.[48] The Commission may review the ALJ's initial decision on petition of either party or on its own motion.[49] If the Commission reviews the initial decision, it may affirm it, reverse it, or remand it to the ALJ for additional proceedings.[50] If neither party

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[38] *Id.* at 13.
[39] *Id.* at 14. Between 1992 and 2010, it appears that SEC has opened more than 1000 MUIs per year on average and closed approximately 45% of them during that time without opening a formal investigation. Velikonja, *supra* note 30, at 19 n.8. Research was not able to uncover more recent figures on MUIs.
[40] U.S. SEC. & EXCH. COMM'N, *supra* note 36, at 18. *See also* 17 C.F.R. § 200.19b.
[41] U.S. SEC. & EXCH. COMM'N, *supra* note 36, at 23. *See also* 17 C.F.R. § 200.19b. Before issuance of a formal order, DE staff generally provide a "Wells Notice" to target of the investigation outlining the violations being investigated and providing an opportunity for the party to respond. U.S. SEC. & EXCH. COMM'N, *supra* note 36, at 19-22.
[42] *See generally* 17 C.F.R. § 200.30-4.
[43] *How Investigations Work*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/enforcement/how-investigations-work (last visited Apr. 5, 2024).
[44] *See* Urska Velikonja, *Securities Settlements in the Shadows*, 126 YALE L.J. F. 124, 127-29 (2016) (describing SEC settlement practices).
[45] *See*, *e.g.*, *Linus Financial Agrees to Settle SEC Charges of Unregistered Offer and Sale of Securities*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/news/press-release/2023-171 (last visited Apr. 5, 2024) (example SEC press release announcing settlement).
[46] Velikonja, *supra* note 44, at 128.
[47] *Id.* The SEC's Chief ALJ selects the presiding ALJ. 17 C.F.R. § 200.30-10. Whether the SEC must conduct an on-the-record hearing is generally statute-specific, but administrative securities fraud cases that do not settle are generally handled in accordance with the APA's formal adjudication provisions. *See* Kowalski, *supra* note 7, at 1292.
[48] 17 C.F.R. § 200.30-9.
[49] 17 C.F.R. § 201.360.
[50] U.S. SEC. & EXCH. COMM'N, *supra* note 43.

seeks the Commission's review and the Commission does not choose to review it, the ALJ's initial decision becomes final and is deemed the action of the Commission.[51]

II. PAS Officials' Involvement in Adjudication

SEC Commissioners are the sole PAS officials in the agency.[52] The Commission's involvement in SEC adjudications is distinctive in four respects. First, Congress has given the Commission broad authority to delegate the agency's functions, including investigating violations and conducting administrative adjudications, to non-PAS officials.[53] Second, the Commission has delegated all key investigative and adjudicative functions to non-PAS officials.[54] Third, Commission approval of the actions of non-PAS officials is required at key stages of the investigative process leading up to an administrative proceeding.[55] Fourth, even where such Commission approval is not required, the Commission retains authority to review any investigative or adjudicative function it has delegated.[56]

The Commission's power to delegate its authority, and the non-PAS officials to whom that authority is delegated, are well documented. The Exchange Act authorizes the Commission to delegate any of its functions to nearly any SEC official, and the agency has had this express statutory authority since its inception in 1934.[57] The Commission has delegated investigative functions to the DE Director by regulation,[58] and the DE Director's further delegation of that authority to DE staff is outlined in the SEC's enforcement manual.[59] In cases where the investigation moves to an administrative proceeding, SEC regulations delegate responsibility for those proceedings to ALJs. Under the regulations, the agency's Chief ALJ selects the ALJ who will preside over the case, and the AJL has authority to make the initial decision that becomes final in absence of further action by the Commission.[60]

Although the Commission has delegated significant authority, it has also retained significant authority to approve actions of non-PAS officials' actions at key stages of the proceedings. Specifically, the DE Director must obtain the Commission's approval before proceeding at two key stages. First, the DE Director must obtain the Commission's approval to undertake a formal investigation.[61] The Commission's decision here is significant because it provides DE with power to subpoena documents and testimony, and practically speaking it commits the agency to bringing the matter to a formal conclusion (either through a public settlement, or through an administrative adjudication or suit in federal court).[62] Second, at the

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[51] 17 C.F.R. § 201.360.
[52] STAFF OF S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, 116TH CONG., POLICY AND SUPPORTING POSITIONS 192 (Comm. Print 2020).
[53] 17 U.S.C. § 78d-1(a).
[54] See supra section I.C.
[55] *Id.*
[56] 17 U.S.C. § 78d-1(b).
[57] 17 U.S.C. § 78d-1(a).
[58] 17 C.F.R. § 200.30-4.
[59] *See generally* U.S. SEC. & EXCH. COMM'N, *supra* note 36.
[60] 17 C.F.R. § 200.30-9, 200.30-10 & 201.110.
[61] U.S. SEC. & EXCH. COMM'N, *supra* note 36, at 17.
[62] Ralph C. Ferrara & Philip S. Khinda, *SEC Enforcement Proceedings: Strategic Considerations for When the Agency Comes Calling*, 51 ADMIN. L. REV. 1143, 1154 (1999).

conclusion of the formal investigation, the Commission must approve the DE Director's recommendation regarding whether to proceed with a settlement, an administrative proceeding, or a court action.[63] The procedures for these Commission approvals are largely reflected in the agency's enforcement manual, but they do not appear to be specifically addressed in any statute or regulation.

Finally, even where the Commission has not retained authority to approve the actions of non-PAS officials, the Commission still has power to review any action it has delegated. As explained above, the Exchange Act authorizes the Commission to review any delegated action on its own initiative or on petition of a party.[64] The agency has promulgated a regulation implementing this provision in the context of the Commission's review of initial decisions by an ALJ.[65] In practice, parties seek the Commission's review of ALJ decisions under this provision in some cases involving securities fraud or other contested violations.[66] It is less clear how often parties seek the Commission's review in circumstances not involving ALJ initial decisions, or how frequently the Commission reviews actions on its own initiative.

III. Factors Affecting PAS Officials' Involvement in Adjudication

This section highlights several factors that have affected PAS officials' involvement in SEC adjudications, noting where applicable the extent to which these factors have specifically affected administrative proceedings involving securities fraud.

One broad factor that has affected the Commission's involvement in adjudications is the agency's long history as an independent agency exercising "quasi-judicial" powers. The agency's past and current framework for PAS official involvement can be traced back to the historical view that the agency's investigative powers are "administrative" or even "executive" functions (thus warranting close involvement by the Commission), whereas its power to conduct administrative hearings are "quasi-judicial" in nature (thus necessitating more limited Commission involvement).[67] Historically, for example, the SEC had an Office of Opinion Writing that was separated from other agency functions and was dedicated to assisting the Commission in reviewing administrative hearing records and preparing final decisions.[68] Today, it appears that the Adjudication Group in the SEC's Office of General Counsel may perform similar assistance to the Commission,[69] but further research would needed to determine how this and other organizational changes may affect the Commission's substantive involvement in administrative adjudications.

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[63] *Id.* at 22-23.
[64] 17 U.S.C. § 78d-1(b).
[65] 17 C.F.R. § 201.360(c).
[66] Will insert a law review cite or example SEC administrative case link.
[67] *See* Andrew Downey Orrick, *Organization Procedures and Practices of the Securities and Exchange Commission*, 28 GEO. WASH. L. REV. 50 (1959). *But see* Joanna L. Grisinger, The Hearing Examiners and the Administrative Procedure Act, 1937-1960, 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 43 (2014) (quoting Joseph P. Kennedy emphasizing the substantive policy role of Commissioners in reviewing initial decisions of hearing examiners).
[68] *Id.*
[69] 17 C.F.R. § 200.21; *Adjudication*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/ogc/adjudication (last visited Apr. 5, 2024).

Over the past decade, one of the biggest criticisms the SEC has faced is that the agency is bringing too many cases in its own administrative forum, particularly in securities fraud cases and other contested matters that the SEC previously brought more often in federal court.[70] (Somewhat unusually among agencies, the SEC has discretion to pursue cases before an administrative or a judicial forum.) Framed in terms of PAS official involvement, the contention here is that the Commission has expanded its involvement in such matters by relying more heavily on administrative proceedings over which it has final decisionmaking authority in lieu of instituting suits in federal court that an Article III judge will ultimately adjudicate. The drivers of SEC's increased use of administrative proceedings are complex, but multiple statutory changes over the past several decades (including Dodd Frank) that have expanded SEC's authority to bring such proceedings are playing a key role.[71] In response to litigation challenging the legality of SEC administrative proceedings in securities fraud cases and other matters, the SEC has temporarily halted such proceedings pending a likely U.S. Supreme Court decision on the matter by June 2024.[72]

Another important determinant affecting Commission involvement in administrative adjudications has been the rise of administrative settlements. When the SEC settles formal investigations administratively, the Commission takes the final vote on the recommendation of the DE Director, and there is no involvement by an SEC ALJ or a federal judge. A key cause of the rise in administrative settlements is the SEC's increased focus on pursuing strict liability offenses (such as failure to register or file reports), which are easier to prove and more likely to settle.[73] Further research is needed, however, to better understand whether administrative settlements may also be increasing in securities fraud cases and other matters that typically present more challenging legal and factual issues.

[70] *See generally* Blount, *supra* note 32.
[71] *See* Velikonja, *supra* note 26, at 965-67; Zaring, *supra* note 33, at 1173-79.
[72] *See* Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), cert. granted, 143 S. Ct. 2688 (2023); *Second Commission Statement Relating to Certain Administrative Adjudications*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/news/statement/second-commission-statement-relating-certain-administrative-adjudications (last visited Apr. 5, 2024).
[73] Velikonja, *supra* note 26, at 977.

Appendix T:
Tax Deficiency Cases

This case study provides an overview of whether, when, and how executive branch officials appointed through presidential nomination and Senate confirmation (PAS officials) participate in the adjudication of tax deficiency cases in the Internal Revenue Service (IRS) and the U.S. Tax Court. The IRS is a bureau of the Department of the Treasury, and the Tax Court is an Article I court that hears challenges to IRS tax deficiency determinations. This study focuses on Tax Court cases challenging IRS tax assessments before the taxpayer has paid any tax, which are the most common cases the Tax Court hears.

Part I provides an overview of the program for challenging IRS tax deficiency determinations, the program's historical development, and the IRS and Tax Court processes for adjudicating cases under it. Part II describes whether, when, and how PAS officials participate in this adjudication as a matter of both law and practice. Part III describes the contextual variables that affect or have affected this participation.

I. Background

The Program

Federal tax collections, and the complexity of federal tax law, increased significantly in the early 20th century. These developments were driven by multiple factors, including the ratification of the 16th Amendment in 1913 and the United States' entry into World War I in 1917.[1] In short, the government gained new constitutional authority to impose income taxes, and the war effort necessitated new legislation to collect additional tax revenue.

The increasing volume and complexity of tax returns led to significant backlogs in the processing of tax returns through the early 1920s.[2] Prior to 1921, the federal government could assess and collect taxes without prior notice or hearing. Although the Revenue Act of 1921 required the government to provide such notice and an opportunity for an administrative appeal, the backlogs during this period prevented many taxpayers from pursuing such appeals.[3]

In addition, prior to 1924, taxpayers were generally required to pay taxes due before challenging them administratively or in an Article III court.[4] The lack of provision for pre-assessment challenges to tax determinations was burdensome to both taxpayers and the government.[5] In response, the Revenue Act of 1924 created the Board of Tax Appeals (BTA) to

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[1] HAROLD DUBROFF & BRANT J. HELLWIG, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 5–13 (2nd ed. 2014).
[2] *Id.* at 17 (noting that the government did not report clearing the backlog until 1927).
[3] *Id.* at 21–23.
[4] Danshera Cords, *Administrative Law and Judicial Review of Tax Collection Decisions*, 52 ST. LOUIS U. L.J. 429, 43435 (2008).
[5] *See*, *e.g.*, DUBROFF & HELLWIG, *supra* note 1, at 32 (summarizing legal complexities of taxpayer refund suits against government collectors).

hear pre-assessment challenges.[6] As discussed further below, the BTA is the predecessor to today's Tax Court.

Since 1927, the IRS and its predecessors have also had a dedicated office to hear administrative appeals of tax determinations. Although not originally created by statute, the office has been the subject of several legislative enactments designed to bolster its independence.[7] This office, currently called the Independent Office of Appeals (IOA), is also discussed further below.

The Agency and Court

This section discusses the general responsibilities of the Department of the Treasury and the IRS in administering federal tax laws and provides background on the two key entities responsible for the adjudication of tax deficiency cases (the IOA and the Tax Court).

Provisions of federal tax law are generally codified in Title 26 of the United States Code, which is called the Internal Revenue Code (IRC).[8] Except as otherwise provided by law, the Secretary of the Treasury oversees the administration of the IRC.[9] The IRC establishes, within the Department of the Treasury, a Commissioner of Internal Revenue who administers the IRC based on delegated authority from the Secretary.[10] The Commissioner is the head of the IRS, which is the Treasury bureau responsible for determining, assessing, and collecting federal taxes.[11] Both the Secretary and the Commissioner are PAS officials.[12]

The IOA is an office of the IRS that is responsible for resolving tax controversies "without litigation on a basis which is fair and impartial to both the Government and the taxpayer[.]"[13] The IOA has authority to settle matters administratively and holds conferences where taxpayers have an opportunity to present their position.[14] The IOA's earliest predecessor was established in 1927 as an office under the Commissioner, and it underwent several agency-directed organizational changes in the following decades.[15]

Congress has passed two key pieces of legislation related to the IRS's administrative appeals function. First, the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA) directed the Commissioner to undertake a broad reorganization of the IRS, including "ensur[ing] an independent appeals function" within the IRS that prohibits ex parte communications between appeals officers and other IRS employees "to the extent that such

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[6] Cords, *supra* note 4, at 435.
[7] *See generally* Internal Revenue Manual (I.R.M.) § 8.1.1.1.1 (Jan. 9, 2024); Resolution of Federal Tax Controversies by the Independent Office of Appeals, 87 Fed. Reg. 55,934 (Sep. 13, 2022).
[8] *See* 26 U.S.C. § 7701(a)(29).
[9] 26 U.S.C. § 7801.
[10] 26 U.S.C. § 7803(a); Treasury Order 150-10 (Feb. 1, 2021) (delegating to the Commissioner the authority to administer and enforce the internal revenue laws).
[11] 26 C.F.R. § 601.101(a); I.R.M., § 1.1.1, Exhibit 1.1.1-1 (July 29, 2019) (IRS Organization Chart).
[12] 31 U.S.C. § 301(b); 26 U.S.C. § 7803(a)(1)(A)
[13] I.R.M. § 8.1.1.1.1 (Jan. 9, 2024).
[14] *Id.*
[15] Vincent S. Canciello, *The Restructured Office of Appeals in a Modernized IRS*, J. TAX PRAC. & PROC., Dec. 2000-Jan. 2001, at 36, 36.

communications appear to compromise the independence of the appeals officers."[16] Second, the Taxpayer First Act of 2019 (TFA) established the IOA in its current form and for the first time designated it as a statutory office within IRS.[17] Under this law, the IOA is headed by a Chief of Appeals who is appointed by and reports directly to the Commissioner.[18]

As noted above, the Tax Court traces its origins to 1924, when the Revenue Act of 1924 created the BTA. This legislation established the BTA as an independent executive-branch agency.[19] The members of the BTA were appointed by the President on the advice and consent of the Senate and could only be removed by the President for inefficiency, neglect of duty, or malfeasance in office.[20] Although Congress renamed the BTA as the "Tax Court of the United States" in 1942 and recast its members as judges, Congress did not change its status as an independent agency in the executive branch.[21] In 1969, however, Congress both changed the name of the agency to "the United States Tax Court" (which is the name it still holds today) and designated it as a "court of record" established "under article I of the Constitution of the United States[.]"[22]

Today, the IRC continues to describe the Tax Court as an Article I court.[23] In 2015, Congress also amended the law to specifically state that the Tax Court "is not an agency of, and shall be independent of, the executive branch of the Government."[24] Its judges, however, continue to be PAS officials subject to the same appointment and removal requirements that were originally established in 1924.[25] The D.C. Circuit has held that the President's power to remove Tax Court judges does not violate the Constitution and, notwithstanding the 2015 amendment, has effectively treated the Tax Court as an independent executive-branch agency for purposes of its functions.[26]

In addition to the judges of the Tax Court (who, as outlined above, are PAS officials), certain other members of the Tax Court called "special trial judges" (STJs) hear and decide Tax Court cases. Under the IRC, STJs are appointed by the Chief Judge of the Tax Court (and are therefore not PAS officials) and have the power to decide various types of cases prescribed by

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[16] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1001(a)(4), 112 Stat. 685, 689 (codified at 26 U.S.C. § 7801(a)(4)).
[17] Taxpayer First Act (TFA), Pub. L. No. 116-25, § 1001, 133 Stat. 981, 983 (2019) (codified at 26 U.S.C. § 7803(e)).
[18] 26 U.S.C. § 7803(e)(2).
[19] Revenue Act of 1924, Pub. L. No. 68-176, § 900(k), 43 Stat. 253, 337.
[20] *Id.* § 900(b)
[21] Cords, *supra* note 4, at 435 n.35.
[22] Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730.
[23] 26 U.S.C. § 7441.
[24] *Id.*
[25] 26 U.S.C. § 7443.
[26] *See* Kuretski v. Comm'r, 755 F.3d 929, 939-943 (D.C. Cir. 2014) (holding that the President's power to remove Tax Court judges does not violate separation-of-powers principles and that the Tax Court exercises authority as part of the executive branch rather than the legislative or judicial branches); Crim v. Comm'r, 66 F.4th 999, 1001 (D.C. Cir. 2023) (noting that congressional statements about the status of government entities are not dispositive for constitutional purposes, and treating Congress' characterization of Tax Court as independent of the executive branch as simply seeking to minimize the agency's "appearance of institutional bias"). *Cf.* Freytag v. Comm'r, 501 U.S. 868, 885-888 (1991) (holding that the Tax Court was not an executive "department" for appointments clause purposes, but not expressly excluding the Tax Court from the executive branch for other purposes).

statute, including tax deficiency cases where the amount in dispute does not exceed $50,000.[27] Under the IRC and Tax Court rules, the Tax Court may authorize STJs to make the decision of the court subject to the review of the Tax Court (e.g., the Chief Judge).[28]

The Adjudication Process

This section describes the processes that the IOA and the Tax Court use to adjudicate tax deficiency cases, which are the primary type of cases they hear.[29] It is important to note that the IOA and the Tax Court have power to hear other types of cases as well and that the scope of their review authority has expanded since their inception in the 1920s.[30]

In general, taxpayers pay taxes based on returns they file with the IRS showing the amount of taxes due.[31] After receiving the return, the IRS assesses those taxes by formally recording the liability of the taxpayer based on information from the return.[32] If, after examining the return, the IRS determines that there is deficiency between the amount shown on the return and the amount actually owed, the IRS notifies the taxpayer of the deficiency.[33] (In this case study, the IRS's process for determining the existence of deficiencies is generally referred to as its "examination" or "audit" function.) This initial notice of deficiency is called a "30-day letter" because the taxpayer generally has 30 days to respond to it before the IRS takes additional action.[34]

A taxpayer who receives a 30-day letter generally has two options for responding to the IRS. First, the taxpayer may simply pay the taxes due.[35] After paying the taxes, the taxpayer may choose to file a refund claim with the IRS if that taxpayer wishes to dispute the deficiency.[36] Alternatively, the taxpayer may instead pursue an optional administrative appeal with IOA prior to paying the taxes due.[37] Pursuing an administrative appeal with IOA may lead to a settlement between the IRS and the taxpayer.[38] The IOA holds conferences offering the taxpayer the opportunity to present arguments in their favor, but the IOA is limited to considering the record developed during prior IRS proceedings. The IOA may send the matter back to the relevant IRS component if necessary to develop additional information for consideration during the administrative appeal.[39]

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[27] 26 U.S.C. § 7443A(b).
[28] *See* 26 U.S.C. § 7443A(c); *see also* Tax Court Rule 182.
[29] David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 22 (1995).
[30] Canciello, *supra* note 15, at 36; Laro, *supra* note 29, at 22-23.
[31] 26 U.S.C. § 6151(a); 26 C.F.R. § 601.103(a).
[32] 26 U.S.C. §§ 6201, 6203; 26 C.F.R. § 601.104(a)(1).
[33] 26 C.F.R. § 601.105(d).
[34] *See* 26 C.F.R. § 601.105(d).
[35] *See generally* INTERNAL REVENUE SERV., PUBLICATION 594: THE IRS COLLECTION PROCESS 2-3 (2018).
[36] If the taxpayer is unsuccessful in the refund claim, the taxpayer can pursue a civil action for a refund in an Article III court. *See* 26 U.S.C. § 7422; *see also* 26 U.S.C. § 1346.
[37] *See* 26 C.F.R. § 601.106(b).
[38] *See* 26 C.F.R. § 601.106(d).
[39] *IRS Tax Tip 2023-80*, INTERNAL REVENUE SERV., https://www.irs.gov/newsroom/heres-what-to-expect-after-requesting-an-appeal-of-a-tax-matter (last visited Apr. 4, 2024).

If the taxpayer does respond to the 30-day letter (or if an administrative appeal does not result in a settlement), the IRS then issues a "90-day letter."[40] The taxpayer generally has 90 days after the IRS mails this letter to either pay the taxes due or file a petition with the Tax Court for a redetermination of the deficiency.[41] If the taxpayer files a petition with the Tax Court, payment of the taxes is not required while the Tax Court matter is pending.[42] If the taxpayer does not file a petition with the Tax Court (or, alternatively, if the taxpayer simply does not pay the taxes due) within 90 days, the IRS has the authority to pursue collection actions against the taxpayer.[43]

In tax deficiency cases, the Tax Court is generally regarded as undertaking de novo review of IRS determinations both with respect to questions of law and fact.[44] Under the IRC, the IRS Chief Counsel (who is a PAS official[45]) has authority to represent the IRS in Tax Court proceedings.[46] Tax Court cases may be referred to IOA for possible settlement in circumstances where the taxpayer did not previously pursue an administrative appeal with the IOA.[47]

The Tax Court has adopted extensive rules governing its proceedings.[48] The Tax Court's rules are analogous to rules for conducting bench trials in Article III courts, but taxpayers may choose to follow simplified procedures in cases where no more than $50,000 is in dispute (small tax cases).[49] Small tax cases are informal proceedings where any probative evidence is admissible.[50]

The Tax Court issues three types of decisions.[51] First, the Tax Court issues summary opinions in small tax cases, and those opinions are generally not considered precedential.[52] Second, the Tax Court issues memorandum opinions in cases involving highly fact-specific issues or settled questions of law, and they are also considered to be of limited precedential significance.[53] Third, the Tax Court issues "Tax Court opinions" in cases involving significant or novel legal issues, and they serve as precedent for subsequent decisions.[54] The U.S. courts of appeals have exclusive jurisdiction to review decisions of the Tax Court,[55] except that tax deficiency cases involving less than $50,000 are not reviewable.[56]

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[40] 26 U.S.C. § 6212. This letter is also called a "statutory notice of deficiency." *See*, *e.g.*, 26 C.F.R. § 601.106(a)(1)(i)
[41] 26 U.S.C. § 6213(a).
[42] *See id.*
[43] *See id.*
[44] *See* 26 U.S.C. § 7459(b); Cords, *supra* note 4, at 438.
[45] 26 U.S.C. § 7803.
[46] 26 U.S.C. § 7452.
[47] Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 329 (1999).
[48] *See Tax Court Rules*, U.S. TAX COURT, https://www.ustaxcourt.gov/rules.html (last visited Apr. 4, 2024).
[49] BARRY MCMILLION, CONG. RSCH. SERV., IF10331, U.S. TAX COURT: A BRIEF INTRODUCTION 2 (2015).
[50] U.S. TAX COURT, CONGRESSIONAL BUDGET JUSTIFICATION 18 (2023).
[51] MCMILLION, *supra* note 49, at 2.
[52] Michael J. Bommarito II, Daniel Martin Katz & Jillian Isaacs-See, *An Empirical Survey of the Population of U.S. Tax Court Written Decisions*, 30 VA. TAX REV. 523, 529-30 (2011).
[53] *Id.*
[54] *Id.*
[55] 26 U.S.C. § 7482.
[56] 26 U.S.C. § 7481.

II. PAS Officials' Involvement in Adjudication

This section discusses PAS officials' involvement in tax deficiency matters adjudicated by the IOA and the Tax Court, both as a matter of law and practice.

The IOA has broad authority to settle tax deficiency cases at the administrative level. The primary benefits to the taxpayer of an administrative appeal with the IOA are that the taxpayer does not have to pay the deficiency while the matter is pending and, if the taxpayer and IOA agree to a settlement, the taxpayer can avoid having to pursue a case in the Tax Court. The IOA generally receives more than 30,000 appeals each year in tax deficiency cases.[57] The vast majority of IOA cases are settled.[58] The IOA process has historically been viewed as effective at resolving cases at the administrative level and avoiding the need for trial in the Tax Court.[59]

The head of the IOA is appointed by, and reports directly to, the Commissioner.[60] Thus, the chief purpose of the IOA is not to insulate the IRS's administrative appeals function from the Commissioner but to ensure the IOA performs thatfunction independent of other IRS offices who previously handled or participated in the matter. The primary offices responsible for handling tax deficiency matters before they reach the IOA are the various offices that conduct Examination functions and the IRS's Office of the Chief Counsel (OCC).

The IOA has detailed rules governing the processing of appeals, including the extent to which Examination and OCC officials may participate in IOA proceedings.[61] These rules make clear that the appeals process is not a continuation of the examination process,[62] and they prohibit certain ex parte communications between IOA employees and IRS employees who were involved in the original examination.[63] However, the rules provide that IOA has the discretion to authorize other IRS employees (including, potentially, Examination and OCC employees) to participate in settlement conferences.[64]

In practice, IOA has been subject to critiques that it lacks independence in some respects from other IRS functions. For example, IRS's National Taxpayer Advocate Service (NTAS) has raised concerns that IOA staff are insufficiently transparent about the extent to which they rely on input from, or share information with, other IRS employees during the processing of administrative appeals.[65] NTAS has also critiqued IOA for authorizing OCC attorneys to attend

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[57] *See generally SOI Tax Stats - Appeals Workload, by Type of Case, IRS Data Book Table 27*, INTERNAL REVENUE SERV., https://www.irs.gov/statistics/soi-tax-stats-appeals-workload-by-type-of-case-irs-data-book-table-27 (last visited Apr. 4, 2024). Tax deficiency cases are largely coded as "examination cases" for IRS statistical purposes, but deficiency cases can fall into other categories such as "offers-in-compromise cases" (where the taxpayer is appealing an offer to pay the IRS less than the full deficiency). The bulk of the remaining IOA cases are "collection due process" cases, where the taxpayer is contesting the IRS's manner of collecting the tax. Collection due process cases are rarely pursued in the Tax Court and are not covered in this case study. *See* MCMILLION, *supra* note 49, at 2.
[58] Lederman, *supra* note 47, at 329.
[59] *See id.* at 332-33 (noting that cases handled by IOA before proceeding to Tax Court were about four times more likely to go to trial, suggesting that such cases where less susceptible to settlement in the first place).
[60] 26 U.S.C. § 7803(e)(2).
[61] *See generally* I.R.M, Part 8 ("Appeals").
[62] I.R.M § 8.6.1.7.2.
[63] I.R.M § 8.1.10.
[64] I.R.M § 8.6.1.5.4.
[65] *See* NAT'L TAXPAYER ADVOCATE SERV., ANNUAL REPORT TO CONGRESS 134 (2023).

appeals conferences in certain significant cases. NTAS noted a perception that this helps the attorneys prepare for possible trial if settlement is unsuccessful.[66] Tax practitioners have also echoed some of these critiques.[67]

Unlike the head of the IOA, the judges of the Tax Court are PAS officials and can only be removed by the President for inefficiency, neglect of duty, or malfeasance in office.[68] Tax Court judges operate under their own independent rules, and their opinions are not subject to review by other executive-branch officials.[69] In addition, STJs (who decide, among other matters, tax deficiency cases where the amount in dispute does not exceed $50,000) are appointed by the Chief Judge of the Tax Court, and their decisions are subject to the review of Tax Court judges.[70] Thus, as a matter of law, Tax Court judges play a dominant role in the adjudication of cases that reach the Tax Court, to the exclusion of other executive branch officials.

As a matter of practice, there is limited evidence that other officials or influences play a significant role in the adjudication of Tax Court decisions. For example, scholars have not found significant evidence that Tax Court judges hold pro-IRS biases or other biases in favor of government interests.[71] In addition, although IOA plays a role in in the settlement of cases after they are "docketed" in the Tax Court, empirical work does not suggest IOA's involvement in such settlements has had a broader influence on how Tax Court judges adjudicate docketed cases that do not settle.[72]

III. Factors Affecting PAS Officials' Involvement in Adjudication

Three key factors have influenced the involvement of PAS officials in Tax Court adjudications. First, the primary purpose of establishing the Tax Court (and its predecessors) as an independent government entity has been to limit the involvement of Treasury PAS officials (i.e., the Secretary of the Treasury and the Commissioner) in the adjudication of tax controversies. Congress has largely been successful in achieving this objective.[73] The main reason for this success is likely that Tax Court judges are themselves not only PAS officials, but also have long terms (15 years) and are protected from at-will removal by the President.[74]

Second, although it is not clear that Congress' designation of the Tax Court as an Article I court independent of the executive branch has had any impact on the independence of Tax Court

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[66] *Id.* at 135.
[67] *See* Steven Toscher, Jonathan Kalinski & Gary Markarian, *The New Independent Office of Appeals Must be Independent to Survive*, 22 J. TAX PRAC. & PROC. 45, 46 (2020)
[68] 26 U.S.C. § 7443.
[69] *See supra* notes 19-28 and accompanying text.
[70] *See* 26 U.S.C. § 7443A.
[71] *See* Bommarito, et al., *supra* note 52, at 528-29 (arguing that claims of pro-government bias are not supported); Laro, *supra* note 29, at 24 (explaining that Tax Court judges have varied background in government service and private practice, and asserting that "each judge takes an objective and independent view of the issues to be decided"); James Edward Maule, *Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 TENN. L. REV. 351, 425-26 (1999) (concluding that Tax Court judges are not biased in favor of IRS).
[72] Lederman, *supra* note 47, at 329 (outlining different variable affecting Tax Court adjudications, including of involvement of IRS appeals office).
[73] *See supra* notes 69-70 and accompanying text.
[74] *See* 26 U.S.C. § 7443.

judges from Presidential influence or control,[75] it appears that this designation was a compromise between those who disagreed in 1969 about whether to convert the Tax Court to an Article III court.[76] Due to lack of support to create dedicated Article III courts to resolve tax disputes, the PAS officials of the Tax Court (i.e., Tax Court judges) continue to play a key role in the adjudication of tax cases.

Third, one area where Congress has limited the involvement of PAS officials in Tax Court adjudications is in matters that may be heard by STJs.[77] Although the establishment of the BTA (the Tax Court's original predecessor) in 1924 remedied some shortcomings in tax deficiency procedures (e.g., by providing for pre-assessment review), providing for formal quasi-judicial review of tax disputes by an independent agency was not necessarily designed to make tax adjudication more straightforward and efficient.[78] As early as 1943, Congress granted the predecessor of today's Tax Court the authority to designate non-PAS officials to assist in and hear cases subject to review by PAS officials.[79] This process eventually evolved into the process prescribed under current law, which allows STJs (rather than Tax Court judges) to hear certain types of cases and to make decisions in small tax cases.[80]

The history and evolution of PAS involvement in IOA proceedings provides an interesting contrast to the Tax Court. The goal in the Tax Court context has been to limit Treasury PAS official involvement in Tax Court cases by creating separate PAS officials to adjudicate those disputes. In contrast, the objective in the IOA context has been to limit the influence of other IRS functions that the Commissioner (a PAS official) oversees, even though the IOA head is appointed by, and reports to, the Commissioner.[81] Before the RRA's passage in 1998, these limits were generally accomplished through internal agency policy.[82] Although these efforts were lauded as an organizational model and spurred Congress to reinforce the IOA's predecessor's independence via statute,[83] achieving IOA independence from other functions overseen by the Commissioner (such as Examination functions in tax deficiency cases) has presented challenges in recent years. Some of these challenges appear to relate to the fact that IOA, while nominally independent under the TFA provisions enacted in 2019, is still functionally part of the IRS and is influenced by other IRS components.[84] In other respects, impediments to IOA's independence

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[75] *See supra* notes 23-26 and accompanying text.
[76] *See* Cords, *supra* note 4, at 435.
[77] *See supra* notes 27-28 and accompanying text.
[78] DUBROFF & HELLWIG, *supra* note 1, at 85 (explaining that the principal purpose of the BTA was to provide an independent forum for resolution of tax issues, not as a solution for the complexities associated with tax administration)
[79] *Id.* at 824.
[80] *Id.* at 829.
[81] *See supra* notes 13-18 and accompanying text.
[82] *See supra* notes 13-15 and accompanying text.
[83] *See* Canciello, *supra* note 15, at 37 (asserting that IOA's predecessor "emerged unscathed" from legislative hearings preceding the enactment of the RRA and "actually gained increased authority and responsibility" under the RRA); *see also supra* notes 16-18 and accompanying text.
[84] *See* NAT'L TAXPAYER ADVOCATE SERV., *supra* note 65, at 135 (critiquing IOA for lacking an independent culture distinct from other IRS functions, and critiquing proposed regulations that limit the types of appeals IOA may hear); Hale E. Sheppard, *Depriving Partnerships of Access to the Independent Office of Appeals: Old and New IRS Challenges to Conservation Easements*, 99 TAXES July 2021, at 35, 35. (criticizing IOA for refusing to allow administrative appeals based on broad assertions of promoting "sound tax administration").

may be rooted in resource challenges that do not raise the same questions about the IOA's ability to achieve independence from the agency to which it belongs.[85]

[85] *See* NAT'L TAXPAYER ADVOCATE SERV., *supra* note 65, at 134 (noting that certain IOA employees may rely on and defer to other IRS employees due to lack of training and experience).

Appendix V
Prevention and Remediation of Unfair Labor Practices

This case study provides an overview of whether, when, and how executive branch officials appointed through presidential nomination and Senate confirmation (PAS officials) participate in the adjudication of cases alleging unfair labor practices in violation of the National Labor Relations Act (NLRA).[1] Established in 1935 by the NLRA (or Wagner Act), the National Labor Relations Board (NLRB) is an independent federal agency that "safeguard[s]" private-sector "employees' rights to organize, engage with one another to seek better working conditions, choose whether or not to have a collective bargaining representative to negotiate on their behalf with their employer, or refrain from doing so."[2]

The NLRB carries out this charge primarily by (1) conducting union elections and resolving related union representation issues, and (2) preventing and remediating unfair labor practices that violate the NLRA. This case study is limited to cases falling within the latter category—that is, to the NLRB's adjudication of complaints that an employer or labor organization (union) has committed an unfair labor practice. (Most union representation matters are adjudicated under a different process.) Unfair labor practice cases outnumber representation cases by a significant margin. In fiscal year 2023, for instance, unfair labor practice cases accounted for nearly ninety percent of all filed cases.[3]

Part I provides an overview of the program, its historical development, and NLRB's process for adjudicating cases under it. Part II describes whether, when, and how PAS officials participate in adjudications under the program as a matter of both law and practice. Part III describes the contextual variables that affect or have affected their participation.

I. Background

The Program

With limited exceptions, the NLRA governs all private-sector labor-management relations. At the heart of the NLRA lies its section 7, which confers on most non-supervisory employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any or all of such activities . . . ."[4]

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[1] National Labor Relations Act (NLRA), as amended, 29 U.S.C. §§ 151–169. All statutory citations below include a citation to applicable section of the session law, as amended, followed by a citation to the corresponding section of the U.S. Code. It is customary when referring to specific provisions of the NLRA to refer to the session law rather than the U.S. Code. (Title 29 is a non-positive law title.)

[2] *About NLRB*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are (last visited Feb. 12, 2024).

[3] *Unfair Labor Practice and Representation Cases Filed per Fiscal Year*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/annual-case-intake/unfair-labor-practice-and-representation (last visited Feb. 12, 2024).

[4] NLRA § 7, 29 U.S.C. § 157.

Section 8 of the NLRA, in turn, secures these rights by prohibiting employers and unions from engaging in certain enumerated unfair labor practices. An employer may not, among other things, interfere with its employees' exercise of their section 7 rights; "dominate or interfere with the formation or administration" of a union; discriminate against applicants for employment or employees to "discourage or encourage" their union membership; or, once a union is NLRB-certified or lawfully recognized by the employer as the exclusive collective bargaining agent of its employees, refuse to bargain in good faith with the union.[5] A union may not, among other things, interfere with employees' exercise of their section 7 rights, engage in certain coercive activities like picketing with an impermissible objective, or refuse to bargain collectively with an employer whose employees it represents.[6]

The NLRA empowers the NLRB to prevent and remediate unfair labor practices through administrative adjudications.[7] A distinctive feature of the NLRB is that, largely alone among administrative agencies, it has always made policy almost exclusively through these adjudications rather than issuing substantive regulations,[8] despite its general statutory rulemaking authority.[9] Over the years, the NLRB has promulgated relatively few substantive regulations; most of its CFR-codified regulations address adjudicatory procedures. As noted below, the NLRB's (PAS) members themselves function largely as appellate adjudicators.[10]

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[5] NLRA § 8, 29 U.S.C. § 158.

[6] *Id.* The most significant amendment to the NLRA came in 1947 when Congress enacted the Labor-Management Relations Act of 1947 (LMRA), commonly known as the Taft-Hartley Act. 61 Stat. 136, 80 Pub. L 101 (1947). As relevant here, the Act amended section 8 to proscribe certain unfair labor practices by unions. *See 1947 Substantive Taft-Hartley Provisions*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions (last visited Feb. 14, 2024).

[7] This is the exclusive means by which the NLRB can prevent and remediate unfair labor practices. The NLRA does not authorize the NLRB to sue an employer or union in federal court, with one exception: The NLRB may seek interim injunctive relief pending the conclusion of the Board's issuance of a final order in an adjudication. *See* NLRA § 10(j), 29 U.S.C. § 160(j). In the case of certain specially enumerated unfair labor practices, including unlawful secondary boycotts, the NLRB must seek such interim relief whenever there is "reasonable cause" to believe that a violation has occurred. NLRA § 10(l), 29 U.S.C. § 160(l).

[8] *See, e.g.*, *Board Decisions Issued*, NLRB, https://www.nlrb.gov/reports/agency-performance/board-decisions-issued (last visited Feb. 14, 2024) ("The Board sets policy for the Agency primarily through adjudication."); James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 234 (2005); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991); *see also* Antonin Scalia, *Back to Basics: Making Law without Making Rules*, 5 REGULATION 25 (1981). An earlier notable article is Morton C. Bernstein, *The NLRB's Adjudication-Rulemaking Dilemma under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970). Numerous commentators have argued that the Board should issue substantive regulations, if only to codify existing decisional rules. *See, e.g.*, Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions thorough the Clinton and Bush II Years*, 37 BERK. J. OF EMP. & LAB. L. 223, 288 (2016); Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking v. Adjudication*, 64 EMORY L.J. 1469 (2015); Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, Over Policy Prescription, at the NLRB*, 5 FLA. INT'L L. REV. 347, 359 (2010).

[9] *See* NLRA § 6, 29 U.S.C. § 156.

[10] *See About NLRB*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/the-board#:~:text=The%20Board%20has%20five%20Members,one%20Member%20expiring%20each%20year (last visited Feb. 14, 2024) ("The Board . . . acts as a quasi-judicial body in deciding cases on the basis of formal records in administrative proceedings.").

NLRB decisions have occupied a prominent place on the dockets of the U.S. courts of appeals (especially the D.C. Circuit) and the Supreme Court. No other agency, in fact, is as well-represented as the NLRB in decisions of the Supreme Court.

The Agency

The NLRB characterizes itself as a "bifurcated" agency.[11] By statute, it consists of (1) a presidentially appointed and Senate confirmed General Counsel, who investigates and prosecutes unfair labor practice cases (among other activities); and (2) a five-member Board, also presidentially appointed and Senate confirmed, that primarily adjudicates such cases after a complaint issues. [12] (Any regulations are promulgated by the Board.) The General Counsel and the Board are independent of each other: the former has exclusive prosecutorial authority (with one already noted exception[13]) and the Board exclusive adjudicative authority.[14] The General Counsel also represents the Board before the courts in actions to enforce or review Board orders.

Board members are appointed (with limited exceptions) for terms of five years. One member is presidentially designated as the chairman. The President may remove a Board member "only" for "malfeasance or neglect of duty."[15]

The General Counsel is appointed for a four-year term and enjoys no explicit statutory for-cause protection. Two courts of appeals recently held that the General Counsel enjoys no implied removal protection by virtue of the four-year term and hence is freely removable by the President even during that term.[16]

The NLRA allows the Board to delegate all its "powers" to any "group" (panel) of three of its five members.[17] It also provides that three members of the Board constitute a quorum, unless the Board delegates its authority to three-member panel, in which case two members

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[11] *Who We Are*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are (last visited Feb. 13, 2024).
[12] "NLRB" is used here to refer to the agency as a whole; "Board" is used to refer to the five-member board. *Accord Who We Are*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are (last visited Feb. 14, 2024). The 1947 LMRA expanded the membership of the Board from three to five members. *See* NLRA § 3, 29 U.S.C. § 153(a). The NLRA does not impose any party-balancing or member-qualification requirements. Recently introduced legislation would impose the former and expand the number of Board members. *See* S. 991, National Labor Relations Board Reform Act, 118th Cong. (2023).
[13] *See* note 6 *infra*.
[14] *See generally* NLRB v. United Food & Commercial Workers Union, 484 U.S. 112 (1987). There is one exception. While suits for injunctions under sections 10(j) and 10(l) are filed by the General Counsel (on behalf of the Board), the Board must authorize § 10(j) suits. *See* Michael Asimow, Greenlighting Administrative Prosecution: Checks and Balances on Charging Decisions 12–12 (Jan. 21, 2022) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/projects/agency-head-enforcement-and-adjudication-functions.
[15] *See* 29 U.S.C. § 153(a).
[16] *See* NLRB v. Aakash, Inc., 58 F.4th 1099 (9th Cir. 2023); Exela Enter. Sols., Inc. v. NLRB, 32 F.4th 436 (5th Cir. 2022). These cases arose as a result of President's unprecedented Biden's removal of the Board's General Counsel. *See, e.g.*, Noem Scheiber, *The Biden Administration Fired a Trump Labor Appointee*, N.Y. TIMES, Jan. 20, 2021.
[17] *See* NLRA § 3(b), 29 U.S.C. § 153(c) ("The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise.").

constitute a quorum.[18] The Board often exercises this authority. It has not been uncommon for the Board to have vacancies,[19] and on occasion the Board has lacked a quorum.

While the NLRA authorizes the Board to delegate certain adjudicatory authority in representation cases to NLRB regional directors (who, as noted below, operate under the General Counsel's supervision),[20] it says nothing explicit about delegation of final adjudicatory of its authority in unfair labor practice cases. The Board has never delegated that authority.

The NLRB is headquartered, by statutory mandate, in Washington, DC,[21] where the Board members and General Counsel work. Each Board member is assisted by a small staff, which includes "legal assistants."[22] The NLRB also maintains 26 regional offices across the country, each headed by a regional director.[23] The regional offices operate under the supervision of the General Counsel (not the Board), and in the case of unfair labor practice cases, they investigate unfair labor practice charges, issue complaints, and prosecute complaints in formal adjudications. All "final authority" with respect to these prosecutorial activities resides with the General Counsel.[24]

The other component of the NLRB relevant to this case study is the Division of Judges. The Division houses the NLRB's approximately twenty administrative law judges (ALJs), who operate through offices in Washington, D.C., San Francisco, and New York City under the administrative leadership of a chief ALJ.[25] ALJs preside over formal hearings on unfair labor practice complaints. Section I.C. below elaborates upon their functions.

During each year during the last decade, nearly 20,000 unfair labor practice charges were filed with the NLRB.[26] Roughly half were withdrawn by the filing party (i.e., an employer, union, or individual) or dismissed by regional directors as non-meritorious. Of the cases in which

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[18] *See id.* ("A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof."). An important qualification is necessary: If the Board delegates its authority to a three-member group, all three members must remain on the Board for the delegation to remain valid. *See* New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010).

[19] As of this writing, for example, the Board is short one member. *See The Board*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/the-board (last visited Feb. 12, 2024).

[20] NLRA § 3, 29 U.S.C. § 153(b). The regional directors' decisions in these cases are subject to discretionary Board review. *See id.*

[21] *See* NLRA § 5, 29 U.S.C. § 155.

[22] NLRA § 3(d), 29 U.S.C. § 153(d). The Board may not employ any attorneys other than "legal assistants" "for the purpose of reviewing [hearing] transcripts or preparing drafts of opinions." NLRA § 4, 29 U.S.C. § 154.

[23] *Regional Offices*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/regional-offices (last visited February 13, 2024).

[24] NLRA § 3(d), 29 U.S.C. § 153(d). By statute, all NLRB attorneys, other than administrative law judges (discussed below) and "legal assistants" to Board members, work under the supervision of the General Counsel. *See id.*

[25] *Division of Judges*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/division-of-judges (last visited Feb. 13, 2024).

[26] *See Unfair Labor Practice and Representation Cases Filed per Fiscal Year, NLRB*, https://www.nlrb.gov/reports/nlrb-case-activity-reports/annual-case-intake/unfair-labor-practice-and-representation (last visited Feb. 13, 2024). Unfair labor practices are designated in NLRB filings, reports, and other documents as "C" cases to distinguish them from representation cases (which are designated as "R" cases). Again, this case study addresses only the former type.

a regional director found "probable merit," half were settled. The rest presumably resulted in the filing of a complaint. In each of the last five fiscal years (ending in 2023), an average of 776 complaints were issued,[27] and an average of 373 final Board orders were issued.[28]

A relatively sizable number of Board orders are reviewed by the U.S. courts of appeals—many by the D.C. Circuit for reasons noted below. During each fiscal year during the last decade, the courts issued on average fifty two decisions reviewing Board orders. The Board prevailed in, on average, thirty-six cases each year.[29]

The Adjudication Process[30]

The adjudication process is largely governed by detailed Board-promulgated and C.F.R. codified procedural regulations whose key provisions have remained unchanged for most of the NLRB's history.[31] Some features of the process, as reflected in footnote citations below, are specified in the NLRA itself. Under modern NLRB practice, cases usually proceed as follows:

A case begins with the filing of an unfair labor practice charge by an employer, union, or employee. (The NLRB cannot itself charge a violation unlike, say, the Equal Employment Opportunity Commission.)[32] A regional director conducts a thorough investigation that may include the issuance of document subpoenas, witness interviews, and the receipt of position statements.[33] If the regional director finds a timely charge to have probable merit and the case does not settle, he or she files a complaint, thereby commencing a formal proceedings (that is, a proceeding subject to the formal hearing provisions of the Administrative Procedure Act).[34] (A charge is not timely unless it is filed with six months after the commission of the alleged unfair labor practice.[35]) A trial-like hearing is usually held before an ALJ[36] that resembles in most respects a federal-court bench trial in terms of its formality and, in some complex cases, its

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[27] *See Unfair Labor Practice Charges Filed Each Year*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-charges (last visited Feb. 13, 2024).
[28] *See Disposition of Unfair Labor Practice Charges per FY*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/disposition-of-unfair-labor-practice (last visited Feb. 13, 2024).
[29] *See Appellate Court Decisions*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/litigation/appellate-court (last visited Feb. 13, 2024).
[30] For an extended discussion of the procedures summarized below, see HOW TO TAKE A CASE BEFORE THE NLRB (Julie Gutman Dickinson, John E. Higgins Jr., & David A. Kadela eds., 10th ed. 2020).
[31] *See* 29 C.F.R. subpt. c.
[32] *See id.* § 102.9; *see also* NLRA § 10(b), 29 U.S.C. § 160(b).
[33] *See* GENERAL COUNSEL'S OFFICE, CASE HANDLING MANUAL, PART I, UNFAIR LABOR PRACTICE PROCEEDINGS (2024), https://www.nlrb.gov/guidance/key-reference-materials/manuals-and-guides.
[34] *See* 5 U.S.C. §§ 554, 556–557. These are what ACUS has sometimes called a "Type A" adjudications. *See, e.g.*, 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). A charging party may seek review by the General Counsel of a regional director's decision not to issue a complaint. *See* 29 C.F.R. § 102.19(a).
[35] NLRA § 10(b), 29 U.S.C. § 160(b).
[36] *See* 29 C.F.R. § 102.34. The Board may, after the issuance of a complaint, transfer the case to itself or one of its members for a hearing and other proceedings rather than having it proceed before an ALJ. *See* § 29 C.F.R. § 102.50; *see also* NLRA § 10(b), 29 U.S.C. § 160(b) (providing for a formal hearing before "the Board or a member thereof, or before a designated agent of the agency [i.e., an ALJ]"); 5 U.S.C. § 556(b) (providing that evidence may be "taken" by the agency, "one or more of its members," or an ALJ). The Board rarely, if ever, exercises this authority.

duration. Federal-court rules of evidence apply "so far as practicable."[37] The burden of persuasion lies with the regional director under a preponderance-of-the-evidence standard.[38]

At the conclusion of the hearing (and usually following the submission of post-hearing briefs[39]), the ALJ issues a recommended decision on the exclusive basis of the hearing record.[40] The decision includes "findings of fact, conclusions of law, and the reasons or grounds" for them, as well as "recommendations for the proper disposition of the case." If the ALJ finds a violation of the NLRA, the decision must also include a recommended remedy.[41] The remedy includes an order requiring the violator to "cease and assist" from engaging in the unfair labor practice and to take appropriate "affirmative action"(which may include the reinstatement, with backup, of an unlawfully terminated employee) to remediate it.[42] The ALJ files the decision with the Board. The Board then enters an order transferring the case to itself.[43] There is no adjudicator between the ALJ and the Board.

The Board thereafter issues a final decision and order in every case. Section II describes the procedures governing their issuance.

Board orders are not self-enforcing. In the absence of voluntary compliance, the NLRB (represented by the General Counsel) petitions a U.S. courts of appeals for enforcement of its order under procedures provided by the NLRA. An employer or union aggrieved by a Board order, for its part, may seek review of the order in a court of appeals.[44] A common scenario is for the employer or union to petition for review of an order and then the Board to cross-petition for enforcement. The NLRB or the aggrieved employer or union may file either in the circuit in which the unfair labor practice occurred or the circuit in which the employer or union resides or transacts business. A union or employer may also always seek review in the D.C. Circuit.[45] The result is that the D.C. Circuit hears far more cases than any other circuit.

II. PAS Officials' Involvement in Adjudication

By Board rule, any party to the case (including the regional director or General Counsel) may appeal all or part of an ALJ's recommended decision as of right.[46] (That is, PAS official

[37] 5 C.F.R. § 102.50; *see also* NLRA § 10(c).
[38] NLRA § 10(b), 29 U.S.C. § 160(b).
[39] *See* 29 C.F.R. § 102.42.
[40] *See id.* § 102.45(a); *see also* NLRA § 10(c), 29 U.S.C. § 160(c). No ALJ decisions may be "reviewed . . . by any person other than a member of the Board or his legal assistant." NLRA § 4, 29 U.S.C. § 154.
[41] 29 C.F.R. § 102.45(a); *see also* NLRA, § 10(c), 29 U.S.C. § 160(c) (providing the if "the evidence is presented . . . before an administrative law judge . . . , such judge . . . shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board").
[42] *See* NLRA § 10(c), 29 U.S.C. § 160(c).
[43] 29 C.F.R. § 102.45(a). On the content of the record, see *id.* § 102.45(b).
[44] NLRA § 10(f), 29 U.S.C. § 160(f).
[45] *Id.*
[46] *See* 29 C.F.R. § 102.46. In deciding cases, the Board is sometimes aided by the participation of amici. *See id.* § 102.46(i). The Board "occasionally invites the public to file amicus briefs in cases of significance or high interest." *Invitation to File Briefs*, NLRB, https://www.nlrb.gov/cases-decisions/filing/invitations-to-file-briefs. As for intervention on appeal, neither the NLRA nor the NLRB's rules of practice provide for it. (They provide only for intervention at hearings. *See* 29 C.F.R. § 102.29.) But "[o]n occasion when special circumstances arise, the Board

review is not discretionary, as it is at some agencies.) Appeals are initiated by the filing of "exceptions" to the ALJ's decision. Exceptions must be filed within 28 days (unless the Board allows additional time) of the order transferring the case to the Board (see above).[47] Cross-exceptions must be filed within 14 days "from the last date on which exceptions . . . may be filed."[48] Exceptions must be specific in assigning claimed error to an ALJ's recommended decision.[49] If a party fails to "except" to any "matter," it may not raise it with the Board.[50]

In the absence of timely exceptions, the ALJ's decision and order become the Board's decision and order without any Board review. Neither the NLRA nor the Board's rules provide for review in the absence of party-filed exceptions—that is, sua sponte Board review—in contrast to the rules governing PAS officials' review at some agencies.[51]

If timely exceptions are filed, the Board usually decides a case on the exclusive basis of the record of the ALJ-conducted hearing,[52] and usually without oral argument.[53] The record consists of, among other things, the complaint, transcript of the hearing, documentary evidence, the ALJ's decision, and any exceptions to it.[54] The standard of review of ALJ decisions is de novo, both as to conclusions of law and findings of fact, except that by long-standing decisional rule the Board defers to ALJ credibility determinations unless they are clearly incorrect.[55]

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has granted intervention requests to permit the filing of exceptions by an interested party. The Board has discretion to grant intervention in special cases to such an extent and upon such terms as it deems proper." NLRB OFFICE OF EXECUTIVE SECRETARY, GUIDE TO BOARD PROCEDURES 38 (2017), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017_0.pdf (last visited Feb. 14, 2024).

[47] 29 C.F.R. § 102.46(a).

[48] *Id.* § 102.46(c); *see also* NLRA § 10(c), 29 U.S.C. § 160(c) (providing that exceptions must be filed within 20 days after service or "within such further period as the Board may authorize"). The appealing party files detailed "exceptions" to the ALJ's "decision" (whether to its findings fact, conclusions of law, or procedural rulings); or, if other party has filed "exceptions," the appealing party files "cross-exceptions." Exceptions may be accompanied by a supporting brief. The party opposing the exceptions may file an answering brief, to which any party may file a reply brief. NLRA § 10(c), 29 U.S.C. § 160(c); 29 C.F.R. § 102.46.. (If a brief is filed, the exceptions may not contain any "argument" or "citations" to supporting authorities. They must appear only in the brief. 29 C.F.R. § 102.46(b)(2).)

[49] *See* 29 C.F.R. § 102.29.

[50] *Id.* § 102.46(f).

[51] The NLRA and the regulations are written a bit differently, but their import is the same. The NLRA provides that, in the absence of exceptions, the ALJ's "recommended order" (which must be accompanied by a "report") becomes the "order of the Board." NLRA § 10(c), 29 U.S.C. § 160(c). The Board's regulation provides that, in the absence of exceptions, "the findings, conclusions and recommendations" in the ALJ's "decision . . . automatically become the decision and order of the Board and become its findings, conclusions, and order." 29 C.F.R. § 102.48(a). When timely exceptions are not filed, "all objections and exceptions must be deemed waived." *Id.*

[52] The "Board may decide the matter upon the record, or after oral argument, or may reopen the record and receive further evidence before a Board member or other Board agent or agency, or otherwise dispose of the case." *Id.* § 102.48(b)(2). The Board rarely receives further evidence. When it does, it is received an ALJ.

[53] Either party may request oral argument, *see id.* § 102.46(g), but the Board "rarely" allows it. NLRB OFFICE OF EXECUTIVE SECRETARY, GUIDE TO BOARD PROCEDURES 12 (2017), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017_0.pdf (last visited Feb. 13, 2024).

[54] *See* 29 C.F.R. § 102.45(b).

[55] The foundational and still regularly cited decision is *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf'd* 188 F.2d 362 (3d Cir. 1951). *See, e.g.*, Jamaica Car Wash, 365 N.L.R.B. No. 106, slip op. at 1 n.1 (2017). See generally Semet, *supra* note 8, at 237, which observes that, under Board case law, "the Board has virtually no discretion to

Nearly all cases result in one of two Board dispositions. The Board either finds that the respondent employer or union violated the NLRA, in which case it must "state its findings of fact" and issue an appropriate remedial order; or finds no violation, in which case the Board must issue an order dismissing the complaint.[56]

By longstanding practice, all decisions in unfair labor practice cases involving review of an ALJ's recommended decision disposing of a case on the merits are deemed "published." They appear first in slip opinion form and then in the NLRB's official reporter.[57] Unpublished decisions (styled as "orders") are reserved for (1) summary decisions involving such matters as interlocutory appeals (usually on procedural matters), motions to approve settlements, and requests for reconsideration,[58] and (2) orders adopting ALJ decisions when no party has filed exceptions. All published opinions are precedential—that is, binding on the Board and other NLRB officials unless overruled by the Board.[59]

Published Board decisions (especially in routine cases) often rely on the ALJ's decision for the recitation of the procedural history of the case, findings of facts, and conclusions of law, and, in every case, the ALJ's decision is appended to the Board's published decision. Whether it adopts (or affirms), modifies, or rejects the ALJ's decision (in whole or part) on review, the Board's decision often bears little resemblance to a judicial decision. It is often very short, and much of its case-specific content appears in footnotes.[60] In complex cases or important cases, the Board's decision will sometimes more closely resemble a judicial decision in terms of its structure, though it is still usually much shorter.[61] Even then, it is often necessary to read the ALJ's decision alongside the Board's decision to acquire a full understanding of the hearing proceedings and facts.

Board decisions are issued under the names of all members in the majority. (They are, in effect, per curium.) Individual members may, and often do, write concurring or dissenting opinions, especially in cases presenting important policy questions.

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upset the [ALJs'] credibility or factual judgments." This statement of the law is correct with respect to credibility determinations, but not factual determinations generally. Factual findings are reviewed under a de novo standard. That said, empirical analyses do reveal a high level of deference in practice to ALJ factual determinations, especially in routine cases. *See, e.g.*, Cole D. Taratoot, *Review of Administrative Law Judge Decisions by the Political Appointees of the NLRB, 1991–2006*, 23 J. OF PUB. ADMIN. RES. & THEORY, 551, 556–67 (2013).

[56] NLRA § 10(c), 29 U.S.C. § 160(c).

[57] *See Board Decisions*, NLRB, https://www.nlrb.gov/cases-decisions/decisions/board-decisions (lasted visited Nov. 21, 2022).

[58] *See, e.g., 21st Century Valet Parking, LLC d/b/a Star Garden* (31-RC-301557) (Oct. 28 2022) (interlocutory appeal); *Bridgestone Americas Tire Operations, LLC* (10-CA-230142) (Oct. 7, 2020) (approving settlement); *American Federation for Children, Inc.* (28-CA-246878 & 28-CA-262471) (Jan. 6, 2022) (request for reconsideration).

[59] *See* Christopher J. Walker, Melissa F. Wasserman, & Matthew Lee Wiener, Precedential Decision Making in Agency Adjudication 64–69 (App. L) (Dec. 6, 2022) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/document/precedential-decision-making-agency-adjudication-final-report.

[60] For a notable judicial commentary on this practice, see UAW v. NLRB, 802 F.2d 969, 972 (7th Cir. 1986) (Posner, J.). On the form and structure of Board opinions, see Walker, Wasserman, & Wiener, *supra* note 59, at 64–69 (App. L.).

[61] *See, e.g., T-Mobile USA, Inc.,* 372 NLRB No. 4 (slip op.) (Nov. 18, 2022) (13 pages including dissent).

As noted above in section I, the full Board may delegate its decision-making authority in adjudications (and any other matter) to a panel of three of its members A party may seek full Board review of an order decided by three members, but such requests are "rarely granted."[62]

When deciding cases, Board members may consult only with other Board members and their "legal assistants."[63] The NLRA includes an explicit prohibition on the Board's consultation with an ALJ whose decisions is under review.[64]

III. Factors Affecting PAS Officials' Involvement in Adjudication

Since its statutory establishment in 1935, the Board has consistently exercised exclusive appellate review of hearing-level ALJ decisions. It has never delegated its statutory decision-making authority to non-PAS officials, established a system of discretionary appellate review, or (with the limited exception noted above for ALJ credibility determinations) accorded any deference to ALJ recommended decisions on review. These features of the adjudication system can presumably be explained by entrenched historical practice and the Board's near-exclusive reliance on adjudication rather than rulemaking to make policy under the NLRA throughout its long history.

A final, related feature of the Board's adjudicatory decision making bears noting: Decisions addressing significant policy matters under the NLRA have often come under intense public and congressional scrutiny.[65] Not surprisingly, the politicized nature of NLRB decision making—which is to say its frequent resolution of important policy issues of high political salience—has resulted in partisan disputes over the confirmation of Board nominees.[66]

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[62] NLRB OFFICE OF EXECUTIVE SECRETARY, GUIDE TO BOARD PROCEDURES 39 (2017), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017_0.pdf (last visited Feb. 14, 2024). But before any published decision is issued in a case assigned to a three-member panel, non-panel members review the decision and may join the panel. *See id.*

[63] NLRA § 4, 29 U.S.C. § 154; *see also* NLRA § 3(d), 29 U.S.C. § 153(d) (referring to the Board's "legal assistants").

[64] *See id.*

[65] Notable recent congressional bills would eliminate the NLRB's adjudicatory authority in unfair labor practice cases. *See, e.g.*, S. 882, Protecting American Jobs Act (117th Cong. 2021).

[66] *See, e.g.*, William B. Gould IV, *Politics and the Effects of the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L. REV. 1501 (2015).