APPENDIX E

Facebook studied the range of oversight models that exist globally. The resulting report reviews community and institutional mechanisms for decision oversight, as well as a range of judicial and quasi-judicial models.

Oversight of Deliberative Decision-making: An Analysis of Public and Private Oversight Models Worldwide

Paul Gowder[1] *and Radha Iyengar Plumb*[2]

Abstract

Over the last several years, companies seeking to understand how to appropriately moderate content have grappled with a range of complex social and political issues. In November 2018, in a public note by Facebook CEO Mark Zuckerberg, Facebook announced its intention of creating a mechanism for external review and input on decisions about what violates Facebook Community Standards by building an "independent body, whose decisions would be transparent and binding." To better understand the range of oversight models that exist globally, we reviewed the existing research from a range of legal and academic sources on different classes of oversight models. We categorized these systems and divided them into general "families" of oversight design, which are: investigative institutions; supervisory institutions; arbitral adjudication processes, administrative adjudication bodies, national judicial systems, including both European continental-style appellate courts and American appeals courts, and international judicial systems. We analyzed each of these families along the dimensions of autonomy of process, validity and salience of information considered, procedural fairness, transparency, and executability of outcome. Comparing these different families yields three high level findings: *First*, that despite their differences, these families operate on a similar framework where design and execution decisions are key inputs into a process which yields two key outputs: fair and accurate decisions that are operationally feasible. Such a model then can yield legitimacy when combined with the additional elements of transparency and timely execution of outputs (i.e. the oversight body's recommendation or advice). *Second*, within this framework, institutions must make trade-offs in key process dimensions such as autonomy of the board with validity or salience of information with procedural fairness. These trade-offs highlight that despite a common goal, these different families have different priorities and ultimately serve different functions. *Third*, there is no 'silver bullet' for institutional design that will address all issues for all constituencies in all conditions. In the context of a governance for social media – a largely new and rapidly evolving space – it is worth considering the underlying priorities and values of external oversight in assessing and ultimately resolving trade-offs in these process dimensions.

1 Professor of Law, University of Iowa. Financial interest disclosure: Paul Gowder was paid by Facebook in connection with the production of this research.
2 Head of Product Policy Research, Facebook Inc.

Table of Contents

Executive Summary

Over the last several years, companies seeking to understand how to appropriately moderate content have grappled with a range of complex social and political issues. The primary issue under debate was how Facebook determined whether a specific piece of content (or account) violated its existing rules, called the "Community Standards." In building the policies themselves, Facebook has sought to seek community and expert input in a range of formal and informal ways. However, the decision on whether something violated these standards was ultimately Facebook's decision. In November 2018, in a public note by Facebook CEO Mark Zuckerberg, Facebook announced its intention of creating a mechanism for external review and input on decisions about what violates Facebook Community Standards by building an "independent body, whose decisions would be transparent and binding." As part of the effort to develop this body, Facebook engaged in a six-month process which included meeting with a wide range of organizations – from think tanks and researchers to community and advocacy groups –as well as a public input process to seek feedback and concrete suggestions on potential designs. The goal of these engagements was to determine how best to empower this entity to render independent judgment on some of Facebook's most important and challenging content decisions.

To better understand the range of oversight models that exist globally, in parallel to these engagement efforts we reviewed the existing research from a range of legal and academic sources on different classes of oversight models. This review included community and institutional mechanisms for decision oversight (including the Swedish Parliamentary Ombudsman, the general features of Civilian Review Boards for U.S. policing and U.S. corporate board audit committees, hospital and press oversight entities, the Indian Panchayat systems, and the Pacific Coast ILWU labor grievance arbitration process) as well as a range of judicial and quasi-judicial models such as the U.S. court system, the French Court of Cassation, the European Court of Justice, the Inter-American Commission and Court of Human Rights, the European Court of Human Rights, the World Trade Organization Appellate Body, and the Catholic Apostolic Signatura.). We categorized these systems and divided them into general "families" of oversight design, which are as follows:

- *Investigative institutions* focus less on providing a forum for substantive review of prior rulings and more on providing internal insight and public transparency into contested decisions. These include a range of structures from incident-based reviews common in hospital and law enforcement contexts to Inspectors General and financial audits. There are some notable media and governmental examples of these types of institutions in the forms of public editors or ombudspersons. These bodies typically do not have direct decision-making authority, but rather use their capacity to investigate and criticize the internal operations of decision-makers to generate accountability.

- *Supervisory institutions* focus on providing advice and occasionally oversight on key decisions. This includes a range of structures more common in the private and academic sectors such as corporate boards and institutional or ethical review boards. Like the investigative models, these institutions may review and govern specific decisions but may not (depending on the organizational context) have the authority to make rules to govern decisions prospectively. Unlike investigative models, these institutions are typically vested with some authority to prevent specific decisions on a case by case basis---a university Institutional Review Board, for example, may forbid a researcher from conducting research it deems to be unethical.

- *Arbitral* adjudication processes are broadly characterized by the distinctive goal of resolving disputes from within an ongoing valuable relationship, rather than by appeal to some external authority, in the interests of preserving that relationship and generating consensus. Within this family, there are two broad sub-classes:

    - *Institutional arbitral* processes are ones developed within and between disputing parties with the aim of resolving disputes through some common, agreed upon arbitrator. This sub-class captures the broad range of alternative dispute resolution processes commonly used in commercial, labor, and other contexts in an effort to avoid an appeal to more formal or governmental authority.

    - *Community-based adjudication processes* are common in post-colonial areas, including Latin

America and South and Central Asia. Examples include the Indian panchayat and shura systems and the jirga systems in Afghanistan. These systems typically rely on community leaders and members to adjudicate conflicts within the context of local norms, community ties, and agreed-upon authority vested by the community.

- *Administrative adjudication bodies*, such as, in the U.S., the Social Security Appeals Council and the Board of Immigration Appeals, are characterized by members' close relationships to the agencies they supervise in terms of goals and career trajectories as well as relatively specialized knowledge and information about the administrative issues under debate.

- *National Judicial Systems* are charged with addressing disputes and rendering rulings on cases of individuals based on formal national law. In this category we consider two sub-families:

    - *European continental-style appellate courts* are characterized by features like strong internal advocates, high-volume caseloads, and brief and conclusory rulings, and typically understood as having the core purpose of correcting individual incorrect decisions from below.

    - *American appeals courts,* in particular the U.S. Supreme Court as the most salient and extreme case, are characterized by elite judges who issue highly developed legal rulings and exercise vast power over their own elected government as well as practical outcomes and downstream effects, and are chosen by a concomitant highly politicized appointments process.

- *International Judicial Systems* are established to adjudicate disputes based on an agreed upon set of international laws or norms. Examples include the international human rights courts, international trade courts, and international criminal courts. These bodies are characterized by appointment from participant states, sometimes in ways that undermine institutional functioning or are perceived as threatening state sovereignty, and strong staff case screening functions.

These different institutions are all aimed at providing meaningful oversight on a deliberative decision-making process in a way that is accepted both institutionally and more broadly in the general public. To that end, despite variation in the design and execution, the families can be assessed and compared using a common set of dimensions: autonomy, validity, salience, and procedural fairness. When effectively managed, the design and execution features will yield decisions that produce two outputs: fair and accurate decisions that are operationally feasible. It is worth noting, though, that the degree to which these processes seek one of these outcomes over the others will vary based on the core function of the institution. Indeed, a systematic comparison of these families and associated institutions indicates that there is no 'perfect system' – all the systems involve trade-offs and require prioritization based on overall goals. However, even well-designed systems are unlikely to be viewed as legitimate absent an additional set of outcomes which help translate the outputs into a broad sense of legitimacy. For a legitimate institution, the outputs must be transparently communicated and executed in a timely manner. Some key findings from the analysis of these oversight "families" highlight certain operational structures and barriers encountered in administrating oversight functions as boards and hierarchical bodies such as:

- *Staff functions* within oversight bodies vary from the lightest-responsibility-staff model whose role consists of receiving paperwork and budgeting, to the highest-responsibility-staff models who may go so far as to render preliminary resolutions of disputes which may be accepted wholesale by the board. Staff roles can be either administrative (akin to civil servants) or functional (such as law clerks).

    - There are several models of *staff accountability and reporting requirements* which range from direct reporting to boards and judges at a district level to reporting to international, hierarchical or bureaucratic committees.

    - The extent of the *role staff play* in the decision-making of boards has been the subject of public concern, where "a strong staff," i.e. staff who produce opinions, draft decisions or select cases may

be seen as exercising undue influence on decisions of boards or courts.

- *Workload management* is a key challenge in all boards which receive disputes from the public. Boards adopt a variety of strategies to mitigate it, primarily various versions of staff pre-screening (potentially empowering the screeners), multi-stage review (potentially sacrificing procedural justice and access to the dispute resolution mechanism) or the proliferation of sub-panels to hear a large volume of cases (potentially sacrificing consistency).

- *Board member selection* processes among bodies reviewed often place considerable emphasis on traits such as competence, status, representativeness, neutrality, and commitment. There are some internal tensions with these traits, for example, representative boards may lack status and competence. Different methods of board selection place different levels of emphasis on different combinations of these traits. Board member selection often takes forms such as selection by representative institutions, selection by the organization to be overseen, or selection by outside experts.

- *Decisional and process transparency of boards* are a frequent challenge. Bodies undertaking arbitration are often restricted by confidentiality while larger bodies may be subject to a large volume of cases in which full articulation and publication would impinge upon their functionality, resulting in cases often being unpublished summaries or gnomic rulings.

- *The downstream effects of decisions* vary among boards on a spectrum from the U.S. Supreme Court, which establishes a strong and formally binding body of precedent in which it makes new rules of law binding on all actors, to one-off arbitrations in which entities that lack institutional memory are unable to exercise influence beyond the specific dispute presented to them. Boards with varying degrees of articulation, transparency, and motivation to produce a consistent body of decisions occupy intermediate points on this spectrum.

Based on this research, there are several relevant findings for Facebook's consideration in the design and implementation of the Board. The core finding is that key design issues can drive longer-run legitimacy. Design features of particular importance include:

- *Board Member Selection, Membership Terms, and Support Staff:* A common design goal is to insulate board members from undue influence by appointing authorities or other powerful actors in order to ensure, to the maximum extent possible, that their decisions will be influenced only by the relevant rules and principles according to which they decide. Common danger vectors of undue influence include:

    - *External control over board member salary and long-term career prospects*. Various board structures attempt to ameliorate this influence by providing for long and nonrenewable terms for board members and fixed salaries for board members.

    - *Politicized appointment processes creating an internal tension between the goals of stakeholder representation and decisional neutrality*. Various board structures attempt to ameliorate this influence by including neutral experts in the appointments process, such as judicial nominations commissions, or working to include partisan and stakeholder balance and representation on ultimate panels.

    - *Domination by staff*. Several board structures have struggled with managing their workloads without ceding too much responsibility to staff who may have lower qualifications, may be appointed through a less careful process, or may have differing incentives from board members. Typical strategies to ameliorate this risk have included reducing the workload per board member-hour (by increasing board members or board member hours or reducing caseload) or accepting the influence of staff and adopting rigorous appointment processes to attempt to ensure that the influence they exercise is high-quality and neutral.

- *Workload management and transparency*. All of the boards that receive cases from the general public which we examined struggle with workload management. There is an inherent tradeoff between the capacity to provide full and unbiased access to dispute-resolution procedures and the capacity to provide consistent, well-articulated, and autonomous decisions that represent the full reasoning capacity of the board.

- *The influence of decisions on downstream policy.* Different cultures and organizational contexts have made very different decisions about whether oversight boards should have the capacity to set overall organizational policy, such as by making precedent-setting decisions in the judicial context or directly setting policy in the corporate and other intra-organizational context. The capacity to set policy may provide benefits in the creation of an adjudicative process that is perceived as fair and effective at incorporating abstract principles of equity into organizational decisions, but may come at the cost of reducing organizational policy autonomy and potentially promoting "judicial activism" and efforts by interested parties to exercise undue influence over the selection of board members ("politicization").

Ultimately the findings of this research serve more as a starting point to inform and develop a base of critical consumers of oversight in the context of social media and internet-mediated communication and services. In that context, comparing these different families yields three key take-aways. *First*, that despite their differences, these families operate on a similar framework where a combination of design and execution decisions are key inputs into a process which yields two key outputs: fair and accurate decisions that are operationally feasible. Such a model then can yield legitimacy when combined with the additional elements of transparency and timely execution of outputs (i.e. the oversight body's recommendation or advice). *Second*, within this common framework, the families must trade-off key process dimensions such as autonomy of the board with validity or salience of information with procedural fairness. Such trade-offs highlight that despite a common goal, these different families have different priorities and ultimately serve different functions. Finally, there is no 'silver bullet' for institutional design that will address all issues for all constituencies in all conditions. In the context of a governance for social media – a largely new and rapidly evolving space – it is worth considering the underlying priorities and values of external oversight in assessing and ultimately resolving trade-offs in these process dimensions. Enhancing external awareness about trade-offs and clearly communicating the rationale for final decisions, is in some senses more critical than the specific decisions themselves.

1 . Introduction

Over 2 billion people use Facebook, Instagram, and the entire family of Facebook, Inc. applications. Facebook has developed a set of policies, processes, and operational activities aimed at balancing access to this global communications platform with safety for those who use it. Over the last several years, the moderation of online content has grappled with a range of complex social and political issues. One of the primary issues under debate has been how Facebook has determined whether specific pieces of content (or accounts) have violated its existing rules, called the "Community Standards."[3]

In building its policies, Facebook has sought to seek community and expert input in a range of formal and informal ways. A critical attribute of this process was that the decision on whether something violated these standards was ultimately Facebook's decision. This ran contrary to the goal of empowering those who use Facebook. To address this issue, in November 2018, in a public note by Facebook CEO Mark Zuckerberg, Facebook announced its intention to create a mechanism for external review and input on decisions about what violates Facebook Community Standards. This could be achieved by building an "independent body, whose decisions would be transparent and binding."[4]

Facebook engaged in a six-month collaborative co-design process which included meeting with a wide range of organizations – from think tanks and researchers to community and advocacy groups – as well as a public engagement process to seek feedback and concrete suggestions on potential designs.[5] The goal of these engagements was to determine how best to empower this entity to render independent judgment on some of Facebook's most important and challenging content decisions. These engagements provided key insights into how Facebook's processes might benefit from external input.

Concurrently, we explored different models of oversight and accountability to understand how other decision-making bodies have approached designing and implementing meaningful oversight. The objective of this analysis was to provide an evidence-based foundation to inform key design decisions for Facebook's Oversight Board and to understand how different attributes may require trade-offs in outcomes or designs. To do this we reviewed existing legal, business, and social science research related to a range of community and institutional mechanisms for decision oversight[6] as well as a range of judicial and quasi-judicial models.[7] We assessed these models on key design and execution elements to gather evidence on how these features related to both institutional performance and external perceptions. The overall goal of this research was to better understand the landscape of oversight bodies across a range of sectors globally and assess how design and execution features of these bodies impacted how well they functioned and their overall legitimacy in providing oversight.

The findings of this research illustrate the range of different ways oversight may be performed and the extent to which key institutional features may reflect trade-offs between key goals. For instance, the desire for process and decision transparency is often viewed as critical for public scrutiny and public assessment that decisions are credible. However, decision-makers must often consider internal details about individual cases, technical considerations and constraints to ensure that their decisions are executable or feasible; such details can often be sensitive, and parties may not wish those details or the decisions based on them to be disclosed to the general public. Thus, intermediate objectives of credible decisions and operational feasibility may have a direct trade-off. Institutions have approached balancing these trade-offs

3 Facebook Community Standards, accessed at https://www.facebook.com/communitystandards/

4 Mark Zuckerberg, A Blueprint for Content Governance and Enforcement (Nov. 15, 2018), https://www.facebook.com/notes/mark-zuckerberg/a-blueprint-for-content-governance-and-enforcement/10156443129621634/.

5 Brent Harris, *Getting Input on an Oversight Board*, Facebook Newsroom (Apr. 1, 2019), https://newsroom.fb.com/news/2019/04/input-on-an-oversight-board/.

6 This review included a range of global systems such as the Swedish Parliamentary Ombudsman, the general features of Civilian Review Boards for U.S. policing, the Indian Panchayat systems, Hospital and Press oversight entities, and the Pacific Coast ILWU Labor Grievance Arbitration process as well as corporate systems such as U.S. audit boards and hospital oversight boards.

7 This review included national and international court systems such as the U.S. court system, the French Court of Cassation, the European Court of Justice, the Inter-American Commission and Court of Human Rights, the European Court of Human Rights, the World Trade Organization Appellate Body and the Catholic Apostolic Signatura.

through a range of different mechanisms which can help illuminate different design options for the proposed Oversight Board.

This paper proceeds in the next four sections to elucidate key definitions and methods in Section 2, define the classes of oversight 'families' we consider in Section 3, summarize key findings and trade-offs in section 4, and then conclude in section 5 with some considerations from the unique attributes of Facebook's processes and how this research might inform future assessments of both an oversight board and future regulatory approaches.

2. Research Approach

Our approach is broadly nested within the rule of law framework which provides a lens through which to evaluate online governance, including consideration of the nature of the processes in place and the extent to which these processes should be limited and by whom these limits should be defined.[8] Broadly, for the governance of content moderation on platforms to be legitimate according to rule of law values, three key elements should be present: (1) decisions should be made according to a set of rules developed in advance through a deliberative process; (2) the governing rules must be known and applied fairly (i.e. in a manner that is consistent and neutral rather than capricious); (3) there should be process safeguards that provide both an explanation of why a particular decision was made and participatory exploration of potentially incorrect or contested decisions.[9] Facebook aims to comport with the first and second standards through its Community Standards which were made public in May 2018.[10] In the past years, Facebook has added transparency to the process (consistent with the first element) by publishing the minutes of the policy forum where these policies are deliberated and revised.[11] It has helped increase awareness of changes through the recent release of a change log which notes the revisions to these policies over time.[12] The application of these rules has been subject to much discussion and in response, Facebook now regularly publishes its Content Standards Enforcement Report to provide additional transparency in how these rules are applied.[13] In the context of element 3, process safeguards, in May 2018 Facebook also established a re-review process, in which users who have content that has been removed can appeal this removal.[14] This process provides a form of appeal for decisions but provided limited insight into Facebook's own decision making processes. To address that issue, Facebook has been working to assess how it may better communicate decisions to users to comport with procedural fairness.[15]

2.1 Comparative Design and Example Selection

While this rule of law framework is useful, the formal judicial framework as a means of oversight is only one example of the type of oversight body which might provide meaningful process safeguards and generate accountability in a deliberative decision-making process. To better understand the range of oversight models that exist globally, we reviewed the existing research from a range of legal and academic sources on different classes of oversight models. This review included community and institutional mechanisms for decision oversight (including the Swedish Parliamentary

8 Strictly speaking, the framework articulated here is an analogy to the rule of law, which, on its own terms, only applies to the coercive actions of governments. See Paul Gowder, The Rule of Law in the Real World (2016). Nonetheless, the underlying values relating to respect for persons who have important interests at stake in a governance process persist across contexts.

9 Nicolas Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, Social Media and Society 1.

10 See *supra* note 1.

11 Policy forum minutes are available at https://newsroom.fb.com/news/2018/11/content-standards-forum-minutes/

12 Policy revisions and updates noted at https://www.facebook.com/communitystandards/recentupdates/

13 Community Standards Enforcement Report available at: https://transparency.facebook.com/community-standards-enforcement

14 Monika Bickert, *Publishing Our Internal Enforcement Guidelines and Expanding Our Appeals Process*, Facebook Newsroom (Apr. 24, 2018), https://newsroom.fb.com/news/2018/04/comprehensive-community-standards/.

15 T.R. Tyler et al., *Social Media Governance: Can companies motivate voluntary rule following behavior among their users*, Facebook Research (Nov. 1, 2018), https://research.fb.com/wp-content/uploads/2018/10/Social-media-governance-Can-companies-motivate-voluntary-rule-following-behavior-among-their-users.pdf.

Ombudsman, the general features of Civilian Review Boards for U.S. policing, the Indian Panchayat systems, Corporate Audit Committees, and the Pacific Coast ILWU Labor Grievance Arbitration process) as well as a range of judicial and quasi-judicial models such as the U.S. court system, the French Court of Cassation, the European Court of Justice, the Inter-American Commission and Court of Human Rights, the European Court of Human Rights, the World Trade Organization Appellate Body, and the Catholic Apostolic Signatura.). We categorized these systems and divided them into general "families" of oversight design along a number of key dimensions to determine if these features impact the legitimacy of the overall body. In this section we define the different concepts upon which we assess these oversight bodies. We also present the underlying theory and framework in which the institutional features and execution of core functions relate to these key concepts. This exposition is intended to inform the understanding of the different classes of oversight bodies discussed in section 3.

2.2 Dimensions for Assessment of Design and Execution Features

The goal of the Oversight Board was to cede Facebook's decision-making authority and meaningfully include the perspectives and voices of the diverse set of people who use Facebook (a concept to which we will refer as "legitimacy").[16] This concept has been subject to an extensive debate but assessing this debate is beyond the scope of this article. Instead, we present the relevant definition used in our own assessment and leave debates on more nuanced interpretations aside. The following terms have been used to frame our analysis:

The term "***legitimacy***" has been used in both a sociological and a moral sense in the academic literature.[17] In a moral sense, as in the discipline of philosophy, the term is used to mean a justifiable power or right to make decisions.[18] For example, a state may legitimately exercise authority (be morally right to issue laws to its citizens) by virtue of its democratic character. In a sociological sense, the term is used to denote the empirical acceptance of an actor or institution by some relevant group.[19] These two versions of legitimacy are distinct, but are arguably related; a number of empirical scholars have identified how both design and practical execution decisions of institutions can drive both their claim to decision making authority and the general acceptance of the execution of any vested powers.[20] Here, we aim to achieve "legitimacy" in both senses.

The notion of oversight is often associated with the ideal independence, such as "judicial independence." We elaborate the notion of independence in terms of a higher-level goal of "***autonomy***," and will say that an oversight body is autonomous when its decisions are grounded in relevant factors *and* not impacted by inappropriate influences.[21] Strategies to facilitate autonomy may include removing financial conflicts of interest, establishing norms of neutrality, and even providing incentives for truthful or balanced deliberation. In such a model, it is critical to understand appropriate dependencies as well as threats to such autonomy

16 This notion builds on definitions of legitimacy of political institutions. See, e.g., S.M. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 American Political Science Review 69 (1959) (belief that "existing political institutions are the most appropriate or proper ones for the society").

17 See, e.g., Helena De Vylder, *Stensholt v. Norway: Why single judge decisions undermine the Court's legitimacy*, Strasbourg Observers (May 28, 2014), https://strasbourgobservers.com/2014/05/28/stensholt-v-norway-why-single-judge-decisions-undermine-the-courts-legitimacy-2/; Dr G.S. Rajpurohit & Dr Anand Prakash, *Khap Panchayat in India: Legitimacy, Reality and Reforms*, 2 International Journal of Allied Practice, Research and Review 81 (2015); Mark A. Pollack, *The Legitimacy of the Court of Justice of the European Union*, in Legitimacy and International Courts (Harlan Cohen & Nienke Grossman eds., 2017).

18 See, e.g., A.J. Simmons, *Justification and Legitimacy*, 109 Ethics 739 (1999).

19 See, e.g. David L. Deephouse & Mark Suchman, *Legitimacy in Organizational Institutionalism*, in The SAGE Handbook of Organizational Institutionalism 49 (2008) (describing the use of legitimacy in this context).

20 Ludvig Beckman, *Deciding the Demos: Three Conceptions of Democratic Legitimacy*, 22 Critical Review of International Social and Political Philosophy 412 (2017).

21 This conception of autonomy is derived in part from Lawrence Lessig's conception of institutional corruption. In Lessig's words, the goal is to limit "institutional corruption [which] is manifest when there is a systemic and strategic influence which is legal, or even currently ethical, that undermines the institution's effectiveness by diverting it from its purpose or weakening its ability to achieve its purpose, including, to the extent relevant to its purpose, weakening either the public's trust in that institution or the institution's inherent trustworthiness." Lawrence Lessig, *Institutional Corruption Defined*, 41 The Journal of Law, Medicine & Ethics 553 (2013).

in terms of improper dependencies. Design features ensure the former while protecting the institution from the latter. For instance, for financial auditors, proper dependence can be accounting rules and financial info, improper influence can be the interests of management, and design strategies such as financial independence and fiduciary requirements may consequently be used to insulate auditors from management. While this conception of autonomy is helpful it is useful to distinguish it from other institutional concerns such as inefficiencies or incompetence.[22] As evidenced below, the autonomy of an institution is largely driven by key design decisions that impact whether intuitions are in practice or perception biased with respect to the body they are charged to oversee.[23]

Ensuring fair and accurate findings is widely considered a key element of oversight and thus an important dependency in developing such a system is ensuring the "***validity***" of any information considered in the decision-making process.[24] A long-debated issue across a range of different social and economic public policy issues is how best to incorporate argument and evidence in an effective and responsible manner. In particular, including evidence must balance a trade-off in evidence collected using relevant best practices for generating accurate decisions (e.g. scientific approach, evidentiary standards etc.) while ensuring the information is provided within the time and specificity constraints of decision-making cycles.[25]

We adopt the term "***salience***" to refer to the Board's capacity to take into account process and capacity knowledge as well as case-related knowledge. A decision should be practical, in the sense that it can be implemented under existing operational constraints; moreover, operational constraints may be directly relevant to the accuracy of a decision, as an un-implementable ideal decision may in practice be a less desirable outcome than a fully implementable decision that is only partially satisfactory on idealized grounds. While focus on valid evidence is critical, the information presented must also capture facts and issues relevant to the organizational decision maker's implementation in order to feasibly adopted.[26] In the absence of this information, which is relevant to constraints or considerations in decision making, valid evidence is difficult to apply and findings must often be ignored in favor of pragmatic concerns, undermining the legitimacy of the overall process.[27]

Scholars and activists have traditionally understood "***procedural fairness***" to be a key legitimacy criterion of processes that make decisions in which individuals have important stakes. Broadly speaking, there are two primary categories of procedural fairness.

- The first is fairness within an existing procedure for decision, which is often called "procedural justice." That term is typically used in philosophy and in law to refer to the rights of persons to a fair process within dispute-resolution or decision-making systems. For example, 'is a person participating in this system allowed to have a hearing before action is taken against them, or may they be heard only after the fact?' is a question of procedural justice. In the academic literature, procedural justice is generally understood as a combination of both (a) outcome-related factors, individuals having a

22 M.E. Newhouse, *Institutional Corruption: A Fiduciary Theory*, 23 Cornell Journal of Law and Public Policy (2, 2014).
23 L. Cosgrove et al., *Under the Influence: The Interplay Among Industry, Publishing, and Drug Regulation*, 23 Accountability in Research 257 (2016).
24 David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 The Journal of Legal Studies 371 (1999).
25 Ross C. Brownson et al., *Researchers and Policymakers: Travelers in Parallel Universes*, 30 American Journal of Preventive Medicine 164 (2006).
26 David Cash et al., *Salience, Credibility, Legitimacy and Boundaries: Linking Research, Assessment and Decision Making*, KSG Working Papers Series RWP02-046 SSRN Electronic Journal (2003).
27 See for example efforts to protect biodiversity and lack of salient information in K. Raustiala & D. Victor, *Biodiversity since Rio: The Future of the Convention on Biological Diversity*, 38 Environment 16 (1996).

right to a process that is more likely to lead to a fair and accurate outcome;[28] and (b) participation-related factors, i.e., individuals having a right to a process that respects their autonomy and their capacity to offer and respond to reasons by giving them a fair chance to have a say.[29] Conventional requirements of procedural justice include a neutral decision-maker, a full opportunity for those concerned to be heard by that decision-maker, and a "reasoned judgment" by that decision-maker.[30]

- The second is fairness in terms of who gets access to a decision-making process and equality of ability to obtain an effective remedy from that process. Typically described as "access to justice," this criterion is concerned with preventing, for example, socioeconomic, ethnic, educational, or other disparities in the capacity to resolve disagreements, seek decisional oversight, and practically implement remedies offered by a process.[31]

A key aspect of oversight is how its review of the bureaucracy can be itself reviewed and held accountable – namely the "**transparency**" of the findings. A broad set of social science and legal scholarship has focused on transparency as a key tool to ensure accountability and fairness in institutions charged with defining and enforcing rules and standards.[32] Political philosophy and legal theory focus on the role of transparency and open deliberation in having a civilizing effect on political behavior and generating procedural fairness.[33] Theory and evidence suggest that understanding of the reasons behind a decision help establish fairness, ensure consistency of decisions, and raise peoples' willingness to accept decisions in the face of any remaining disagreements after the deliberations.[34] In fact, an extensive body of research suggests that people are more likely to accept decisions which are arrived at by a procedure that is fair and are more satisfied with authorities and institutions using procedures that are considered to be fair, even when controlling for their preferred outcomes.[35]

Finally, we adopt the term "***executability***" to refer to the organizational considerations in terms of both affordances and constraints to ensure that the decisions of the board are in fact carried out. Executability is to be distinguished from salience, as the latter refers to the capacity of the board to deliver decisions that are compatible with organizational constraints, while the former refers to the capacity of the organization to implement decisions delivered by the board as well as the capacity of the board to provide the appropriate incentives for their implementation.

28 See, e.g., *Matthews v. Eldridge*, 424 U.S. 319 (1976) (establishing three-part balancing test for procedural due process under American constitutional law which incorporates consideration of the utility of additional procedural protections in ensuring correct decisions).

29 These have been referred to elsewhere as "sorting effects" and "process effects." Bruce L. Hay, *Procedural Justice---Ex Ante vs Ex Post*, 44 UCLA Law Review 1803 (1997).

30 John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 American University International Law Review 1173 (1998).

31 See, generally, Deborah L. Rhode, Access to Justice (2004).

32 See, e.g., Joesph Stiglitz, *The Contributions of the Economics of Information to Twentieth Century Economics*, 115 Quarterly Journal of Economics 1441 (2000); C. Lindstedt & D. Naurin, *Transparency is Not Enough: Making Transparency Effective in Reducing Corruption*, 31 International Political Science Review 301 (2010); A. Brunetti & B. Weder, *A Free Press Is Bad News for Corruption*, 8 Journal of Public Economics 1801 (2003).

33 Marjorie Cohn, *Open-and-Shut: Senate Impeachment Deliberations Must Be Public*, 51 Hastings Law Journal 365 (2000); J. Elster, Introduction, in Deliberative Democracy (J Elster ed., 1998).

34 A. Gutmann & D.F. Thompson, Democracy and Disagreement (1996); J. Bohman & W. Rehg, *Introduction*, in Deliberative Democracy: Essays on Reason and Politics (J Bohman & W Rehg eds., 1997); Elster, supra note 33.

35 J. Thibaut & L. Walker, Procedural Justice: A Psychological Analysis (1975); T.R. Tyler et al., Social Justice in a Diverse Society (1st ed. 1997); J.L. Napier & T.R. Tyler, *Does Moral Conviction Really Override Concerns About Procedural Justice? A Reexamination of the Value Protection Mode*l, 21 Social Justice Research 509 (2008); T.R. Tyler, Social Justice: Outcome and Procedure, 35 International Journal of Psychology 117 (2000); T.R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 Annual Review of Psychology 375 (2006); M.L. Ambrose, *Contemporary Justice Research: A New Look at Familiar Questions*, 89 Organizational Behavior and Human Decision Processes 803 (2002).

We summarize the key terms, relevance, and the relevant parties whose assessment determines the extent to which features meet these criteria in Table 1 below. In particular, note that some elements are driven by public perceptions and assessment while others are driven by the founding institutions' own views and still others are combinations of the two.

Table 1. Definitions of Key Terms

CRITERIA	RELEVANCE	WHO ASSESSES	DEFINITION
LEGITIMACY	Ultimate objective	All	Both the authority or right to issue decisions and an empirical acceptance of this right.
AUTONOMY	Ensure decisions are not influenced, or perceived to be influenced by inappropriate things	Public	Sufficient resources and support to enable appropriate influences and designed to mitigate the risks of improper influences on decision making.
VALIDITY	Ensure that decisions consider facts and information that are accurate and comport with best practices	Public	Decisions based on correct and sufficient information that comports with scientific best practices and/or evidentiary standards.
SALIENCE	Ensure that decisions consider applicable constraints which can substantively impact decisions when trading off key values or priorities	Founding Institution	Decisions take into account information about operational complexities and constraints including (1) current technical limitations of company systems; (2) scale and scope of application and implications for implementation (3) Resource (human or monetary) constraints that impact decision making.
PROCEDURAL FAIRNESS	Ensure that persons have genuine access to a fair decision-making process.	Public	Procedures are available on an equal basis to all persons without bias and provide a full and fair opportunity to consider the positions and interests of all who appear before it.
TRANSPARENCY	Ensure that outside stakeholders can understand the basis of decisions.	Public	Public disclosure of outcomes and the reasoning behind those outcomes to the extent consistent with protecting private user information and confidential company information.
EXECUTABILITY	Ensure that decisions are in fact carried out.	All	Internal capacity and incentives to implement decisions made.

2.3 High-level Framework and Analytic Dimensions

To systematically analyze and compare these families, we identified a common set of dimensions which formed the basis of our analysis and assessment. These are: autonomy, validity, salience, and procedural fairness. There are a range of design features which can be assessed using these criteria, such as the selection of and assignment of roles to institutional or board staff; selecting members to balance stakeholder representation and expertise; and selecting matters for review and assigning those matters to sub-panels or other decision-making bodies within the broader institution. In addition to design decisions, there are execution realities that will also impact the institution's core output, such as managing the board workload and determining the downstream effects of decisions. Taken together, a well-designed and executed institution will yield decisions that produce two outputs: fair and accurate decisions that are operationally feasible.

It is worth noting, though, that even well-designed systems are unlikely to be viewed as legitimate absent an additional set of outcomes which help translate the outputs into a broad sense of legitimacy. For a legitimate institution, the outputs must be transparently communicated and executed in a timely manner. Figure 1 below illustrates how the design and execution decisions, process assessment dimensions, outputs, intermediate outcomes for assessment and ultimate goal map into a unified process.

Figure 1. (*See chart below*) Conceptual Framework Mapping Design and Execution Process into Desired Goals

3. Models of Oversight

To better understand the range of oversight models that exist globally, we reviewed the existing research from a range of legal and academic sources on different classes of oversight models. This review included community and institutional mechanisms for decision oversight (including the Swedish Parliamentary Ombudsman, the general features of Civilian

INPUTS *FB Decision dimensions*	**PROCESS** *assessment dimensions required for successful outputs*	**OUTPUTS** *Results of effective process*	**INPUTS** *additional outcomes required dimensions to achieve goal*	**GOAL**
DESIGN DECISIONS Member Selection Member terms Support Staff selection Case selection Source of Authroities and Powers **EXECUTIVE SUPPORT** Actual powers and authorities Functions and support provided by members Downstream impact of decisions Expected Transparency of Decisions	**AUTONOMOUS** Free of undue influence **PROCEDURAL FAIRNESS** Proper procedure makign a decision **ACCURACY** Based on correct facts & information **SALIENCE** Considers technical and operational constraints	**PUBLLIC ASSESSMENT** Fait and Accurate Decisions **FACEBOOK ASSESSMENT** Operationally Feasible	**TRANSPARENCY** Communicated clearly and publicly **EXECUTABILITY** Feasible to implemented on a defensible timeline	Institutional Legitimacy for the Oversight Board

Review Boards for U.S. policing, Hospital and Press oversight entities, Corporate Audit Committees, the Indian Panchayat systems, and the Pacific Coast ILWU Labor Grievance Arbitration process) as well as a range of judicial and quasi-judicial models such as the U.S. court system, the French Court of Cassation, the European Court of Justice, the Inter-American Commission and Court of Human Rights, the European Court of Human Rights, the World Trade Organization Appellate Body, and the Catholic Apostolic Signatura.) and others. Broadly speaking, we can identify six major families of adjudicative and oversight bodies: investigative, supervisory, arbitration, community adjudication, national courts and international courts.

3.1 The Investigative Institutions Family

In a number of institutional contexts, decision makers are supervised by independent investigators or investigative boards, which do not typically directly exercise authority over their decisions but bring public attention to their decisions and help impose internal and external accountability on them. Salient examples of such institutional investigators include Inspectors General (found in various administrative agencies), the Swedish Ombudsperson, and the Civilian Review Boards that exercise a variety of investigative and oversight functions over allegations of police misconduct in many U.S. cities. Their lack of authority is a key tradeoff relative to other enforcement models, and may permit several compensating advantages, including (a) the capacity to focus on investigations rather than be drawn into management functions, (b) the capacity to include representatives from external stakeholders to whom an organization may not be willing to grant direct authoritative power, and (c) the capacity to receive frank information from within organizations whose members may not feel free to speak freely to hierarchical superiors.[36]

Typically, the processes of these organizations are non-adversarial---while a person may make a complaint to the ombudsperson, they are not entitled to be heard in some kind of proceeding before that entity; rather, the ombudsperson conducts an independent investigation and issues a report which chastises the offending agency for non-compliance, with the idea that it will later be subject to democratic accountability.[37] These models can be applied as a form of review to the extent the ombudsperson or the review board has the authority to investigate and supervise the conduct of adjudication. The Swedish Ombudsman, for example, will often investigate and criticize judicial processes, particularly for lack of procedural fairness; civilian review boards will often investigate and reconsider or criticize the outcomes of internal affairs adjudication against police officers accused of misconduct.[38]

The variations on the Civilian Police Review Board in the United States illustrate the diversity of institutional forms that investigative institutions may take. These review boards have been classified into three broad types:[39]

1. *Investigative* boards are staffed by civilian investigators that conduct independent review of complaints against police officers;

2. *Review* boards do not conduct investigations, but do review the results of staff-conducted investigations, and may hold public hearings and issue recommendations for further work in specific cases; and

3. *Auditing* boards focus less on specific cases and more on broad patterns in cases, making recommendations to reform policies and procedures of the departments they review.

36 On confidentiality and detachment from a management hierarchy as a key feature of the ombuds role, see D. Miller, *Editorial: In Whom Can We Trust?*, 4 Journal of the International Ombudsman Association 6 (2011) ("The existence of an office of privilege, unlinked to management, helps to ensure that the smallest voice can be heard without fear of retaliation, where matters can be stated and addressed on a level playing field, where might is not necessarily right and truth — with all its modern-day nuances and subtleties — can stand a chance of affecting outcomes.").

37 Riksdagens Ombudsmän, A Parliamentary Agency (2014), https://www.jo.se/en/About-JO/The-Parliamentary-agency/.

38 *Id*.; Joseph De Angelis et al., *Civilian Oversight of Law Enforcement: A Review of the Strengths and Weaknesses of Various Models* (US Department of Justice, Office of Justice Programs 2016).

39 This typology is drawn from Angelis et al., *supra* note 38.

Further variation within this broad typology includes the extent to which boards can enforce specific policy reforms (bringing such boards closer to the supervisory institutions family),[40] the extent to which board members are paid or volunteer, the entities that appoint the board (and particularly the representation of community organizations and police officials, or lack thereof, in the appointment process), and the degree of training and expertise in board members. In addition, some Civilian Police Review Boards aim to serve a function of mediation and reconciliation, similar to arbitral boards in the typology of this report, as well as to reconciliation institutions in transitional justice and human rights contexts.[41]

Institutions within this family also vary in their degree of organizational independence from the entity being investigated. For example, while key to the identity of a Civilian Complaint Review Board is its status as a *civilian* board, the literature surrounding the Ombudsperson's role has identified a characteristic dual identification deriving from the fact that the Ombudsperson is a member of the investigated organization. The Ombudsperson is said to be an "inside-outsider"---embedded within an organization and its culture, while seeking to represent the outside perspective to the organization.[42]

Hospital Incident Review Boards occupy a similar institutional role. Such boards receive numerous complaints anonymously from staff and from patients; accordingly, analyzing each incident reported to a board in-depth is unfeasible. Therefore, more serious issues will receive root cause or in-depth analysis to enable meaningful changes whereas less serious incidents or complaints can be the subject of a mixture between formal investigations and unstructured discussions. This mixture of formal investigations and unstructured discussions allows for the identification of contributory causes.[43] The experience of the investigators, organizational trust and the severity of the incident are key factors associated with better learning in relation to Hospital Incident Review Boards and how they conduct their reviews.[44]

A central goal of these boards is to learn from adverse incidents in healthcare, which involves making decisions based on incomplete or uncertain data.[45] Safety managers are the first port of call for identifying issues of concern from the range of issues raised through department meetings. These safety managers refer issues of concern to the hospital-wide committees and unit-specific incident review meetings. These meetings are unstructured and free flowing in the lower level where issues of low-impact harm are discussed. High-level meetings are more structured but focused on streamlined succinct reports rather than the investigations themselves.[46]

Press entities also feature such investigative bodies. The demands of a 24-hour news cycle place considerable pressures on press media in relation to the balance between ethical considerations and publication reflections. This often results in trade-offs between journalistic ethical norms and media market demands.[47] Self-regulation within press media centers around the concept of accountability. Bardoel has identified four main types of regulatory mechanisms for accountability

40 Most Civilian Police Review Boards lack formal powers to compel the resolution of specific disciplinary cases. Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 Seton Hall Law Review 1033 (2016).

41 For an example, see Najeeba Syeed-Miller, *Developing Appropriate Dispute Resolution Systems for Law Enforcement and Community Relations: The Pasadena Case Study*, 22 Ohio State Journal on Dispute Resolution 83 (2006).

42 Timothy Hedeen, *Ombuds as Nomads? The Intersections of Dispute System Design and Identity*, 13 University of St. Thomas Law Journal 233 (2017) citing Howard Gadlin & Elizabeth Walsh Pino, *Neutrality: A Guide for the Organizational Ombudsperson*, 13 Negotiation Journal 17, 19 (1997).

43 Janet E. Anderson & Naonori Kodate, *Learning from Patient Safety Incidents in Incident Review Meetings: Organisational Factors and Indicators of Analytic Process Effectiveness*, 80 Safety Science 105, 105 (2015).

44 L. Drupsteen & F.W. Guldenmund, *What is Learning? A Review of the Safety Literature to Define Learning from Incidents, Accidents and Disasters*, 22 Journal of Contingencies and Crisis Management 81 (2014).

45 *Insights from Applying Rigor Metric to Healthcare Incident Investigations*, 52 Proceedings of the Human Factors and Ergonomics Society Annual Meeting 1766 (E. S. Patterson et al. eds., 2008).

46 See Anderson & Kodate, *supra* note 43, at 107.

47 Torbjörn Von Krogh & Lars W. Nord, *Between Public Responsibility and Public Relations: A Case Study of Editors' Attitudes Toward Media Accountability in Sweden*, 3 Communication, Culture & Critique 190 (2010); J.F. McManus, *Media Accountability in the Era of Market-Driven Journalism*, in Media accountability today. . . and tomorrow: Updating the concept in theory and practice (T Von Krogh ed., Charly Hultén trans., 2008); Vinzenz Wyss & Guido Keel, *Media Governance and Media Quality Management: Theoretical Concepts and an Empirical Example from Switzerland.*, in Press Freedom and Pluralism in Europe: Concepts & Conditions 115 (Andrea Czepek et al. eds., 2009).

used by European media outlets: 1) market, 2) professional, 3) political, and 4) public.[48] These four spheres of accountability are intertwined within the functions of media outlets but media accountability systems, other than those governed by state regulation, are regulated by moral pressure rather than any particular statute. Media outlet conduct is also subject to various media ombudsperson standards which provide appellate level oversight within the sector.

Media Accountability Systems (MAS) can be categorized into three overarching categories to regulate standards and ethics of media outlet content publication oversight. These mechanisms may serve the public good but also serve to maintain an image of trustworthiness:[49]

- *Internal* mechanisms include personal standards and preferences, organizational culture, and professional standards.
- *External* mechanisms of control may be supervisory committees or different forms of external monitoring.
- *Cooperative* mechanism may be a press council, with representation of media owners, journalists, and the public.

Sweden has one of the oldest and most robust self-regulation mechanisms which consists of a Press Ombudsman for the Public and a Press Council which includes some members of the public.[50] Some of the strengths of the Swedish system are that these oversight bodies are well established and have a high legitimacy. It is cheap and simple for complainants and they protect the interests of the vulnerable.[51] Some of the criticisms of the oversight system is that it can be too slow, sometimes aloof, old fashioned or inflexible. It can also be tied to the belief structure or agenda of the person holding the office of Ombudsman.[52]

3.2 The Supervisory Institutions Family

Supervisory institutions such as corporate audit committees focus on providing advice and occasionally oversight on key decisions. This includes a range of structures more common in the private and academic sectors such as corporate boards and institutional or ethical review boards. Like the investigative models, these institutions may review and govern specific decisions but do not have future direct rule-making authorities. Unlike investigative models, these institutions are typically vested with some authority to prevent specific approaches or decisions. Unlike courts, these institutions may not allow outside parties any rights to appear before them and use them to contest organizational decisions; this limitation obviates a number of worries that traditionally attend courts, such as the need to balance confidential information with third-party participatory rights.

Audit committees may be forced to address a large volume of issues and are advised to focus on those issues with the greatest impact, rather than focusing on all issues equally, to allow boards with limited time and resources to use this oversight facility to its maximum potential.[53] Using lower level specialized committees with expertise in particular areas to offload less significant issues allows oversight auditing bodies to focus their resources more efficiently.[54]

48 J. Bardoel, *Converging Media Governance Arrangements in Europe*, in European Media Governance: National and Regional Dimensions (G Terzis ed., 2007).
49 The MAS categories are taken from An Arsenal of Democracy: Media Accountability Systems (C. J. Bertrand ed., 2003).
50 Von Krogh & Nord, *supra* note 47.
51 *Id.* at 199.
52 *Id.*
53 KPMG, *Global Boardroom Insights Audit Committee Workload: Keeping an Eye on the Ball* (KPMG 2014) 8 https://home.kpmg/content/dam/kpmg/my/pdf/External/aci/issue-5-audit-committee-workload-keeping-an-eye-on-the-ball-nov-2014.pdf.
54 *Id.*

Audit committee composition is regulated by the need to have a charter that is publicly accessible. Its members are regulated to ensure that they are independent from management and possess sufficient financial expertise.[55] The remuneration of these assessors as well as any form of compensation for a material amount of work must be set out prior to the committee undertaking any work to avoid any perception that the board of directors is attempting to influence the committee.[56] Audit committees are required to undertake a self-assessment each year. These assessments are an opportunity to evaluate performance and improve their processes. This evaluation can consist of internal, external or a mix of both assessors who compare the performance of the committee against its charter and comparable committees/peers.[57]

3.3 The Arbitration Family

This category captures a family of adjudication methods that focuses less on achieving correct results and more on achieving peace and community legitimacy/adherence. Members of this family may bear little resemblance to a court in any of the conventional senses, and often bear little resemblance to one another, but share this common adherence/legitimacy feature in the context of ongoing relationships where dispute resolution in the interest of relationship preservation is more important than legal formalism or correctness.[58]

One salient sub-family of examples comprises institutional processes such as commercial dispute arbitration or labor grievance. Like companies in an ongoing commercial relationship, union members and employers have a mutual interest in maintaining their financially beneficial relationship, and sometimes craft adjudicative processes to privilege that maintenance. For example, the grievance process in the contract between the Pacific Coast ports and the ILWU (a large and effective multi-port labor union) primarily consists of a series of appeals to broader geographic labor committees (port, area, and regional committees), each of which consists of union and employer representatives and must decide unanimously.[59] This system is clearly crafted to ensure that all disputes that can be solved by consensus between labor and management will be so solved. Only when such consensus is totally impossible is the decision delegated to an external arbitrator, selected by a similar consensus-as-far-as-possible method.[60] The inherent tradeoff in this method of dispute resolution is that organizationally shared goals are prioritized over individual goals; an employee who finds him or herself at odds both with the union and with the employer about the correct resolution of such a labor dispute, for example, is potentially unlikely to find his or her interests taken entirely to heart in the arbitral process.

3.4 The Community Adjudication Family

Many communities feature traditional forms of dispute resolution that are more or less independent from (although sometimes incorporated by) official, formal, or state-centered modes of dispute resolution. For example, India has had, at various points in its history and in various regions, a dispute resolution system oriented around local councils of high-

55 Ernst and Young, *Staying on Course: A Guide for Audit Committees* (Ernst and Young 2014) 17 http://bit.ly/EYStayingOnCourse2014. The standards described in this section apply to companies listed on the New York Stock Exchange under NYSE Listed Company Manual § 303A.07 as well as Securities and Exchange Commission regulations, 17 C.F.R. § 240.10A-3.

56 Gregory A. Markel & Heather E. Murray, *Internal Investigations Special Committees Resource*, Harvard Law School Forum on Corporate Governance and Financial Regulation (2017), https://corpgov.law.harvard.edu/2017/07/06/internal-investigations-special-committees-resource/.

57 Ernst and Young, *supra* note 55, at 18.

58 While we use the term "arbitration" to capture this feature of dispute resolution, it more correctly could be applied to an entire spectrum of alternative dispute resolution methods (including, for example, mediation) oriented around conflict de-escalation and resolution within an ongoing relationship. See generally Ronald J. Fisher & Loraleigh Keashly, *The Potential Complementarity of Mediation and Consultation within a Contingency Model of Third Party Intervention*, 28 Journal of Peace Research 29 (1991); Jay Rothman, *Conflict Engagement: A Contingency Model in Theory and Practice*, 21 Peace and Conflict Studies 104 (2014).

59 ILWU-PMA, *Pacific Coast Long Shore Contract Document July 1, 2014 – July 1, 2019* (2014) http://apps.pmanet.org/pubs/LaborAgreements/2014-2019_PCLCD_web.pdf.

60 *Id*.

status citizens, the *Panchayat*, and the Indian government has conducted various efforts to make use of that system and variations on it to fill gaps in local dispute resolution processes.[61] Similarly, adjudicative practices of indigenous communities in Colombia are protected under the 1991 Constitution of Colombia.[62] This system allows indigenous groups to adjudicate on non-heinous internal crimes which do not involve inter-indigenous group crimes or incidents involving non-indigenous peoples.[63] In some contexts these legal practices are often not based on historical legal principles but are modern adaptations where such groups have not found effective remedies in the dominant legal structures to their specific needs.[64]

Characteristic of such community-based processes is that they attempt to draw decision makers from community elites and apply community values rather than legal system values.[65] A key advantage of such systems is their greater capacity to generate decisions that local persons will agree with (as opposed to centralized decision makers applying centralized rules that may lack local legitimacy); a key disadvantage is that they may undermine efforts to carry out universal or values-based reforms and policies.[66] Indeed, they may violate state law or existing human rights principles in the interests of community reconciliation.[67] Community-based dispute resolution processes may be particularly effective in contexts where formal institutions lack the capacity to effectively enforce their judgments; a prominent example is in supplying land security in Afghanistan.[68]

3.5 National Court Systems

This family, can be divided into two sub-families, broadly representing courts characteristic of the civil law and the common law traditions. The former family is exemplified by the French Court of Cassation (with some features also shared by the European Court of Justice "ECJ" and the Catholic Apostolic Signatura), and stands out for a structure that focuses on volume processing and the suspicion of judicial lawmaking via precedent. The French Court of Cassation decides about 30,000 cases per year, and decides them in extremely short written opinions which lack any notion of a dissent or any other way to signify differing opinions among the judges.[69]

In order to cope with the caseload, the French Court of Cassation also has over 100 judges and never sits *en banc*---most cases are disposed of by fairly small panels assigned in a somewhat impenetrable way.[70] Judges tend to come up in a career track within the legal system. Generally courts in or adjacent to this family tend to make extensive use of internal structure, such as Court Presidents, Panel Presidents, Judge-Rapporteurs selected for specific cases, and the like to assign cases to different panels, delegate parts of the workload, prepare preliminary reports and opinions, and make preliminary determinations about admissibility. Cassation also limits itself to reconsideration of legal conclusions from below and does not intervene in the underlying facts found by the courts it supervises. In addition (and consistent with the broader

61 For summaries of the various iterations and variations of the panchayat under modern Indian governance, see, generally, Shishir Bail, *From Nyaya Panchayats to Gram Nyayalayas: The Indian State and Rural Justice*, 11 83 (2015); Marc Galanter & Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 55 Hastings Law Journal, 789.

62 Luis Eslava, *Constitutionalization of Rights in Colombia: Establishing a Ground for Meaningful Comparisons*, 22 Revista Derecho del Estado 183 (2009).

63 *Id*.

64 Donna Lee Van Cott, *A Political Analysis of Legal Pluralism in Bolivia and Colombia*, 32 Journal of Latin American Studies 207 (2000). Van Cott, D.E (2000).

65 S. Latha & R. Thilagaraj, *Restorative Justice in India*, 8 Asian Journal of Criminology 309 (2013); James A. Wall et al., *Third-Party Dispute Resolution in India and the United States*, 38 Journal of Applied Social Psychology 3075 (2008); L.P. Thomas, *Dispute Resolution in Rural India: An Overview*, 2 Journal of Legal Studies and Research 96 (2016).

66 For example, scholars and practitioners have criticized community adjudication boards rooted in traditional local institutions in various countries for gender bias as well as for an inability to adapt to heterogenous and pluralistic contexts. See e.g., Tilmann Röder J., *Informal Justice Systems: Challenges and Perspectives, in Innovations in Rule of Law A Compilation of Concise Essays 58, 59* (Juan Carlos Botero et al. eds., 2012).

67 Van Cott, *supra* note 64, at 214–15.

68 Ilia Murtazashvili & Jennifer Murtazashvili, *Can Community-Based Land Adjudication and Registration Improve Household Land Tenure Security? Evidence from Afghanistan*, 55 Land Use Policy 230 (2016).

69 Mitchel de S.O.-l'E. Lasser, *The European Pasteurization of French Law*, 90 Cornell Law Review 995, 1006 (2005).Lasser, M. de S-O-l'e (2005). The European Pasteurization of French Law, *Cornell Law Review, 90*: 995-1085, 1006.

70 *Id*. at 1004.

continental idea of an inquisitorial rather than an adversarial process), the public prosecutor is entitled to take an advisory role in adjudication, and also an administrative role, for example, referring decisions of lower courts to Cassation.

The word "cassation," which is used in a number of European Courts, is often taken to signify a difference between the U.S. model of appellate adjudication as lawmaking and a more administrative style---cassation is primarily about quashing incorrect decisions from the courts below, and, secondarily, making sure the law is applied consistently, rather than precedent setting and legal development.[71] That being said, scholars have observed that the French Cassation Court nonetheless manages to create things that more-or-less look like a weak kind of precedent, perhaps simply because the imperative to generate case-by-case consistency motivates practices like deciding subsequent cases in accord with previous decisions.[72] In that sense, the lack of precedent in Cassation may just mean that even though the court decides cases in a way that is aware of its past, the government need not do so---one cannot say that some decision of the Court of Cassation is law that the executive must follow, in the way one can in the U.S. Scholars and judges from other families have criticized the cassation model for depriving litigants of a genuine opportunity to fully participate in the adjudication of their cases; for example, the French Court of Cassation has even been condemned by the European Court of Human Rights.[73]

The common law family is exemplified by the American federal court system: American appeals are handled in many different ways in the federal and state systems, but two models are of distinct interest in comparative context. First, the U.S. Supreme Court ("SCOTUS) stands out as a salient example of a totally judge-driven system. SCOTUS has almost-total discretion over its own caseload (unlike the European family), it can hear a fairly small number of important cases; because it is an extremely high-prestige and heavily supported operation, it has a judiciary with substantial capacity. The result is that the Court exercises vast real-world external power as well as largely unconstrained internal power over its own operations---while the Court has a staff, the activities of the permanent staff are mostly limited to internal administration, and those staff members who actually participate in the judicial function by producing things like draft opinions are individual, short-term, assistants to individual justices, hired by those justices (clerks), and hence strongly within the control of those justices.[74]

As such, SCOTUS is largely free from worries raised about the European and International families with respect to the competence of judges, the domination of decisions by staff or by internal bureaucratic procedures, the failure to give full attention to the positions of litigants in the cases it considers, and the like. However, the importance of every single judge, combined with the small number of judges and the vast power that SCOTUS has to set binding precedent and to overturn the decisions of other branches via the power of judicial review, has led to the extreme politicization of the appointments process for justices.[75] The stakes of an individual justice are simply much higher, so partisans have (as recent history in the United States clearly indicates) deployed extreme tactics to secure their preferred justices; this (longstanding) partisan influence on appointment has led, in turn, to widespread worries (equally longstanding) about the ability of the court to make its own decisions free from partisan bias.[76]

71 Raymond Leo Cardinal Burke, *The Relation between the Apostolic Signatura and the Particular Churches*, 74 The Jurist: Studies in Church Law and Ministry 31 (2014); Sofie M.F. Geeroms, *Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated...*, 50 The American Journal of Comparative Law 201 (2002).

72 M. Troper & C. Grzegorczyk, *Precedent in France*, in Introduction to Interpreting Precedents: A Comparative Study (D. N. MacCormick et al. eds., 1st ed. 1997); Laurent Cohen-Tanugi, *Case Law in a Legal System Without Binding Precedent: The French Example* (Stanford Law School China Guiding Cases Project), Feb. 29, 2016.

73 Lasser, *supra* note 69.

74 David R. Stras, *Book Review Essay: The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 Texas Law Review 947 (2007).

75 See John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 Law and Contemporary Problems 41 (2002); Martin M. Shapiro, *Supreme Court and Government Planning: Judicial Review and Policy Formation*, 35 George Washington Law Review 329 (1966).

76 B.L. Bartels & C.D. Johnston, *Political Justice?: Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process*, 76 Public Opinion Quarterly 105 (2012); James L. Gibson & Gregory A. Caldeira, *Confirmation Politics and The Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination*, 53 American Journal of Political Science 139 (2009); Miles T. Armaly, *Politicized Nominations and Public Attitudes toward the Supreme Court in the Polarization Era*, 39 Justice System Journal 193 (2018); Eric Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 Pepperdine Law Review 547 (2017).

Almost diametrically opposed to the SCOTUS model is the system of administrative appeals in federal executive agencies. There, judges are effectively career civil servants who are selected for their capacity to most effectively apply the internal rules of the agency in which they operate---for example, their capacity to adjudicate the question of who is disabled for the purpose of receiving social security disability benefits.[77] Such administrative judges are widely viewed as competent, within their domain, but quite unlikely to be independent---simply as particularly good rule-appliers without much capacity to, for example, import external values into the application of the rules.[78] They sometimes have the capacity to generate their own precedent, but, when they do so, it is as a purely internal process---i.e., internal interpretations of the agency's own rules, binding on subordinates within the agency, but subject to change by agency executives at any time.

3.6 The International (Primarily Human Rights) Court Family

This family, exemplified by the Inter-American Commission and Court on Human Rights, the European Court of Human Rights, the European Court of Justice, and similar courts, tends to bear some resemblance to the European family, particularly with respect to the substantial role played by staff and by internal organization in managing caseload. However, it has distinctive features deriving from the international context. In particular, the independent stakeholders of these courts, in the form of sovereign states which participate in their authorizing treaties, tend to exercise a quite strong role in appointing judges. In some cases, the states formally appoint their own judges; in others, they're merely nominated by states and some central body formally carries out the appointment, but where the literature contains suggestions that those appointments are *de facto* state appointments.[79]

This stakeholder nomination process may promote both buy-in by these states as well as fair consideration of their distinctive interests. Some courts have made elaborate efforts to manage such buy-in via regulating the representation of states in matters with which they are concerned.[80] However, the price for these features has been lingering concerns about the capacity of those courts to generate professionalized and unbiased decisions, and ongoing reform efforts---for example, the European Court of Human Rights nomination process since 2010 has been enhanced by an advisory panel of former ECtHR judges and judges from other legal systems who advise the formal nominating body and has been credited with leading to a greater rate of rejection of unqualified candidates put forth by national governments.[81]

Some of these concerns arise from differing levels of support for the courts across the states that participate in them; states with less support for the courts have been accused of appointing less-qualified judges to them or using them as patronage nominations.[82] This is exacerbated by the fact that these courts tend to have very strong bureaucratic staff as well as assistant or internally subordinate judicial bodies that handle the brunt of the workload in terms of preliminary determinations---which may in part be an imperative of the sheer number of meritless or apparently meritless claims

77 Michael Asimow, *Five Models of Administrative Adjudication*, 63 American Journal of Comparative Law 3 (2015).
78 James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 Wake Forest Law Review 1191, 1199 (2006).
79 Basak Cali & Stewart Cunningham, *Judicial Self-Government and the Sui Generis Case of the European Court of Human Rights*, 19 German Law Journal 1977 (2018).
80 For example, the Inter-American Court of Human Rights prohibits judges from concerned states from sitting on cases brought by private citizens, but guarantees their representation on cases brought by other states (Rules of Procedure of the Inter-American Court of Human Rights Art. 19-20, referring to American Convention on Human Rights Article 44, concerning cases brought by private persons, and Article 45, brought by states). The European Court of Human Rights allows a judge elected in respect of a state concerned in a case may sit *ex officio* in seven-judge chambers and grand chambers (European Convention on Human Rights Article 26), and permits three-judge committees appointed to consider cases brought by individuals to invite a judge elected in respect of that country to join the panel (European Convention Article 28, 34), although it forbids such judges from sitting in grand chambers on cases referred to them from smaller ordinary chambers (Rules of Court 24(5)(c), referring to Convention article 43, on referral to grand chamber from ordinary chamber).
81 See Cali & Cunningham, *supra* note 79, at 1986.
82 On the disadvantages of state-centered nomination processes, see J. Limbach et al., *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (2003) http://www.corteidh.or.cr/tablas/32795.pdf; Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harvard International Law Journal 271 (2003).

that are filed in human rights courts.[83] In the Inter-American System in particular, this has led to a situation where (according to some scholars) the Commission is almost totally dominated by its staff, as part-time, often not-high-status Commissioners lack the capacity to do more than rubber-stamp bureaucratic determinations.[84]

As a particularly prolific international court, the European Court of Human Rights ("ECHR") has been the object of a substantial literature with respect to fundamental criteria of oversight legitimacy, such as transparency and independence. On transparency: while elements of the selection of judges to the ECHR, such as CVs and judicial pay, are available and published by the Council of Europe and the European Court of Human Rights (ECtHR), as are separate concurring and dissenting opinions where written, information such as advice or recommendations from the Jurisconsult are not made available currently.

Judges on the ECtHR benefit from several institutional supports to preserve their independence once nominated. They serve nine-year, non-renewable, terms (thus rendering them immune to re-nomination pressures, although potentially not pressures from national governments relating to access to subsequent appointments to other offices), and may only be removed with the concurrence of a 2/3 majority of the other judges on the court.[85] The Council on Europe has also urged states to further protect judicial independence by guaranteeing them legal immunities and further positions on the conclusion of their terms in order to relieve them of other vulnerabilities that may allow pressure to be exerted over their decisions.[86] Judges are prohibited from engaging in activities that are a conflict of interest while serving as a judge and in the immediate period after leaving office.[87] This includes representing third-parties in court proceedings if the case had been entered during the period of service as a judge of the court and for a period of two years after the dates in which they ceased to hold office as a judge of the court.

The ECtHR also makes heavy use of precedent in order to preserve consistency in its high-volume caseload and avoid duplicative case resolution. There is evidence in the empirical literature that the ECtHR uses precedent as a legitimizing tool to substitute for its lack of coercive power in inducing domestic courts to apply its rulings.[88] Voeten suggests that in fact the ECtHR functions just as domestic courts do in terms of using precedent, i.e., that they rely on ideology rather than reflecting interests of national governments or cultural differences.[89]

There are also international bodies, particularly in the commercial context, that straddle the boundaries between judicial and arbitral models. A key example is the World Trade Organization's (WTO) Appellate Body. While the Appellate Body operates like a court in many respects, including, for example, the creation of precedent which it follows in subsequent cases, the hearing of *amicus curiae* submissions by interested third parties, and a formalized adjudicative procedure, it is embedded in an institutional context which assumes that it is designed to support consensus on rules among World Trade Organization ("WTO") members. Thus, WTO member states must approve new Appellate Body members by consensus; the member states (through a representative organization, the Dispute Settlement Body) may overturn decisions of that body, also by consensus; and much of the adjudicative process is held to be confidential under WTO rules.

83 For example, the Inter-American Court only takes up cases that have already been decided by the Inter-American Commission and then brought by the Commission to the Court to bring recalcitrant states in line (see IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, art. 31(1); American Convention on Human Rights, art. 46(1)(a)); the ECJ has an extremely strong internal Advocate-General system where the advocates act essentially like junior judges, issuing public opinions before the judges actually get to them, and which the judges very frequently rubber-stamp. See Carlos Arrebola et al., *An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union*, 5 Cambridge International Law Journal 82 (2016); Noreen Burrows, *The Place of the Advocate General in the Procedure of the European Community Courts, in The Advocate General and EC Law* (Noreen Burrows & Rosa Greaves eds., 2007).

84 Dinah Shelton, *The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System*, 5 Notre Dame Journal of International & Comparative Law 1.

85 European Convention on Human Rights, Article 23. See Lee Epstein et al., *Comparing Judicial Selection Systems*, 10 Wm. & Mary Bill Rts. J. 7, 33–36 (2001) (arguing that non-renewable terms promote judicial independence)

86 Cali & Cunningham, *supra* note 79, at 1991. 1

87 Rule 4 of the ECtHR Court Rules

88 Yonatan Lupu & Erik Voeten, The Role of Precedent at the European Court of Human Rights: A Network Analysis of Case Citations, presented at Political Networks Conference 37, 5 (Paper 12 2010) http://opensiuc.lib.siu.edu/pnconfs_2010/12.

89 Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 American Political Science Review 417 (2008).

This dual character has led to tensions and the possible impending organizational failure of the World Trade Organization Appellate Body. The United States has exercised the power given to every state member by the consensus appointment process to refuse the appointment of new members of the Appellate Body; as of this writing, the Appellate Body has a bare minimum of members, and is projected to be unable to obtain a quorum (and hence to operate) as soon as the next current member's term expires.[90] The complaints of the United States focus on the Appellate Body's court-like conduct, particularly the creation of precedent.[91]

Table 2. Summary of Families including Examples and Key Trade-offs

	INVESTIGATIVE	SUPERVISORY	ARBITRITION		ADMINISTRATIVE	NATIONAL COURTS		INTERNATIONAL COURTS
			Institution	*Community-Based*		*European*	*U.S. Appellate/ U.S. Supreme Court*	
Core Function	Investigate specific cases or incidents	Provide advice and occasionally oversight on decisions.	Resolve disputes from within an ongoing valuable relationship in the interests of preserving that relationship and generating consensus		Resolve specialized issues regarding home institution	Address disputes and render rulings on individuals cases based on formal laws and norms		Adjudicate transnational disputes based on an agreed upon set of international laws or norms.
Sectors using this model	Public, Private, Corporate	Private, Academic	Public, Private	Community (non-governmental, sometimes integrated into government)	Public	Public	Public	Public, Private
Examples	Inspectors general, hospital review boards, financial audits, civilian police review boards	Corporate Boards, Institutional review boards (for academic research)	Labor dispute resolutions, commercial arbitration	Panchayat, Shura	The U.S. Social Security Appeals Council	The French Court of Cassation	U.S. Supreme Court	International Human Rights Courts, WTO Appellate Body, International Criminal Court
Tradeoffs	Sacrifice ability to force execution to ensure organizational focus, representative capacity, and trust	Sacrifice third-party access and participatory rights to achieve broad operational insight within organization	Sacrifice transparency and downstream rulemaking capacity to achieve swift and efficient resolution, relationship maintenance, confidentiality preservation	Sacrifice neutrality and broader system policies for likelihood of compliance and civic peace	Sacrifice independence to achieve control of board by organization and policy conformity plus technical expertise	Sacrifice transparency and principled articulation of decisions and development of rules for efficiency at high volume and restraint of judicial activism	Sacrifice organizational control, create risk of politicization, to achieve procedural fairness, outcome quality, independence, conformity to principle	Sacrifice autonomy and (sometimes) decisional quality to achieve powerful stakeholder acceptance

90 Tom Miles, *U.S. blocks WTO judge reappointment as dispute settlement crisis looms*, Reuters World News (Aug. 27, 2018), https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC19O.

91 Tetyana Payosova et al., *Policy Brief 18-5: The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures* (Peterson Institute for International Economics 2018) https://piie.com/publications/policy-briefs/dispute-settlement-crisis-world-trade-organization-causes-and-cures.

4. Analytic Findings and Trade-offs

Our review of the existing models, as described above, plus the overall literature on the functioning of oversight bodies, are broadly aimed at discovering design principles applicable to providing meaningful oversight on a deliberative decision-making process in a way that is accepted both institutionally and more broadly in the general public. To that end, despite variation in design and execution, the families can be assessed and compared a common set of dimensions: autonomy, validity, salience, and procedural fairness. When effectively managed, the design and execution features will yield fair and accurate decisions that are operationally feasible. It is worth noting, though, that the degree to which these processes seek one of these outcomes over the other will vary based on the core function of the institution. Indeed, a systematic comparison of these families and associated institutions indicates that there is no 'perfect system' – all the systems involve trade-offs and require prioritization based on overall goals. However, even well-designed systems are unlikely to be viewed as legitimate absent an additional set of outcomes which help translate the outputs into a broad sense of legitimacy. For a legitimate institution, the outputs must be transparently communicated and executed in a timely manner.

The different design features along with the execution in practice reveal a number of recurrent considerations in the functioning of oversight boards. At the highest level of abstraction, those considerations include:

- Selecting and assigning roles to board staff, with the key challenge being ensuring that board decisions genuinely come from the board and are not unduly influenced by staff;
- Managing the workload of the board, with the key challenge being that higher workloads potentially reduce the capacity of board members to make consistent and fully transparent decisions;
- Selecting board members, with the key challenge being balancing stakeholder representation, expertise, and autonomy;
- Selecting matters for the board to decide and assigning those matters to sub-panels or other decision-making bodies within the board, with the key challenges being making decisions about the functional role of the board within the overall problem-solving process and balancing authority within the court to ensure fairness and consistency;
- Determining the extent to which the board will communicate the details of its decision-making process and the inputs to that process to the public, including evidence, hearings, votes, and any disagreement among board members, with the key challenge being the balance between the values of transparency and privacy as well as security;
- Determining the downstream effects of decisions in terms of their capacity to set precedent for future decisions and provide feedback to policy-makers; and
- Setting powers and procedures for the supply of information to the board to ensure fully informed and high-quality decisions.

As will be apparent from the below, these considerations overlap somewhat---for example, the challenge of preserving board autonomy with respect to staff arises with particular urgency in boards with a high workload which require a broader scope of delegated authority to staff; that decision in turn implicates foundational questions about the extent to which the board is meant to serve as a day-by-day check on organizational decisions (and hence consider a large number of disputes) as opposed to a broader policy-shaping body (which considers only a small number of significant disputes).

The individual challenges described below should be understood in the context of the key legitimacy criteria described in the introduction to this report.

Autonomy. The most developed literature on this criterion tends to be organized around the related idea of "judicial

independence." Erik Voeten summarizes a number of standard criteria for independence in the context of international courts by identifying key vectors of influence on judges or their decisions to which an institutional designer seeking to preserve independence should attend, with items most relevant for the present purpose including "opportunities to affect the selection and tenure of judges," "control over the docket of [international courts]," and "control over material and human resources" (i.e., staff and funding).[92] In the present context, these criteria suggest particular attention to the relationship between board members and staff, the selection process and terms of membership for board members, and the criteria for case selection.

Validity. As described in the introduction, validity is primarily an input criterion focusing on the capacity of the board to make sound decisions by receiving accurate and complete information and acting on it appropriately. Accordingly, design considerations relating to member and staff expertise and workload as well as evidence and knowledge-acquisition processes are most relevant.

Salience and *Executability*. Primary design considerations to promote salience and executability relate to the relationship between the wider organization and the board, including the role of staff and their relationship to the broader organization as well as the board, and the powers with which the board is vested, particularly with respect to its capacity to generate decisions with an impact beyond the particular case under consideration.

Procedural fairness. This legitimacy criterion will be achieved to the extent the internal process of the board adequately provides persons who appear before it with a fair degree of voice, thus moderating a pure truth-seeking information gathering process with one that also takes into account participatory interests of persons with a relevant stake, as well as to the extent the case selection process is unbiased and fairly provides the opportunity to review a diverse and representative group of user and public interests. It will also depend on the neutrality of board members, which in turn depends on the quality of their selection process as well as ethical rules that may be imposed on their operations.

Transparency. In part, transparency is a function of the external constraints on a board, such as its workload and the extent to which the decisions it must make involve private or confidential information. Managing those external constraints will be the key design consideration to promote appropriate transparency.

92 Erik Voeten, *International Judicial Independence*, in Interdisciplinary Perspectives on International Law and International Relations: The State of the Art 421, 424 (Dunoff & Mark A Pollack eds., 2012). Voeten hastens to note, however, that these formal institutional features are only weakly correlated to expert perceptions of bias. See also Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 Annual Review of Political Science 345 (2009).

Table 3. (*See chart below*) Design Considerations and Legitimacy Criteria

4.1 Balancing Staff Assistance and Board Authority

A naïve description of the personnel structure of oversight boards would rely on a distinction between "board members," understood as the personnel who, individually or collectively, render authoritative decisions or formally speak for the board, such as the voting members of an audit committee, judges on a court, or arbitrators; and "staff," consisting of all other personnel who occupy a supporting role but do not speak for the board, such as clerks, assistants, human resources and accounting personnel. While that picture of board staffing has some validity in the abstract, reality is substantially more complicated; for example, many board models feature staff roles who are not formally members of the decision-making group but who exercise substantial formal or informal authority over the disposition of disputes. More generally, the relationship between board members and staff varies widely among the cases examined above. At the highest level of generality, there is observed variation in the following characteristics of staff:

- The scope of responsibility assigned to staff. In some models, staff carry out administrative functions, such as receiving paperwork and budgeting. In some, staff carry out initial dispute screening (e.g., for admissibility), investigation, and other ancillary substantive functions. In the highest-responsibility-staff models, staff generate preliminary resolutions for disputes, which may be adopted wholesale by the board.

CRITERIA	DESIGN CONSIDERATIONS
AUTONOMY	Manage relationship between board and organization as well as staff to prevent undue influence. Design neutral and representative appointments process.
VALIDITY	Design appointments process that selects for expertise. Build effective process for board to seek information from organization and those who appear before it.
SALIENCE	Manage communication process between board and implementing staff as well as overall organization, providing effective communication about feasibility of decisions in the decision-making process.
PROCEDURAL FAIRNESS	Provide a fair process for selecting cases for board review, one which does not systematically exclude any group of persons and which allows persons a reasonable opportunity to offer feedback and critique of underlying decisions consistent with operational efficiency and workload management. Design a selection process that promotes board member neutrality and ethical rules that enforce it.
TRANSPARENCY	Manage board workload to prevent over-delegation to staff and hasty/thinly articulated decisions. Devise balance between protection of private information and communication of results and reasoning to persons seeking review as well as public at large.
EXECUTABILITY	Design effective process for board to interact with overall organization, and established process for implementing decisions. Make conscious decision about the extent to which board has input on broader processes and policies through precedential or persuasive effect on decisions, and how that input will be taken into account on an organizational level.

- The structure of management authority over staff. In some models, board staff report directly to board members, or to a board president/chief judge; in others they report to a bureaucratic hierarchy in the broader organization. In others, administrative authority and functional authority are distinct.

- The selection process and criteria for staff.

In several cases, there are distinct categories of staff, such as in the U.S. Supreme Court, which contains both administrative staff and personal judicial law clerks with very different roles and selection processes.

The primary challenge faced by existing boards with respect to staff is a tension between staff assistance and board control. A strong staff can provide substantial assistance to board members with tasks such as filtering cases, preparing drafts of written output, and making outcome recommendations. But a too-strong staff can exercise authority that ought to be carried out by the board. In this context, three examples from the cases considered above are particularly salient:

- The Inter-American Commission on Human Rights lacks, on the arguments of some scholars, effective authority partly in virtue of the fact that staff take on a quite large role in case selection and presentation.[93]

- In the United States Courts of Appeals, judges have substantial personal control over their personally-hired staff, however, their workload is sufficiently high that they often delegate substantial authority to staff (law clerks) to dispose of a large volume of minor cases.[94] In contrast to the Inter-American System, the objection raised to the Court of Appeals delegation process is not that the judges lack effective authority (for they do exercise authority over their clerks); rather, it is that the public does not have the benefit of their qualifications in minor cases---decisions delegated to junior members of the profession are less likely to be correct.

- In the European Court of Justice, the judges are assisted by Advocates-General, who write preliminary opinions in important cases. While the Advocates-General are highly qualified and of high status within the profession (unlike U.S. judicial clerks), commentators have worried about the potential for undue influence from Advocate-General opinions and the possible introduction of political bias.[95]

Several other variables are relevant to the problem of staff assistance vs control, and the problem may be better posed as a balance between the strength of the board members/judges and the strength of staff---to the extent that board members are stronger (higher status, more independent-minded, less time-burdened, have greater access to independent sources of information, more direct rather than mediated access to disputants) they will be more able to render autonomous decisions even in the face of a strong staff. Sub-questions include:

Who are the staff?

In some boards, staff are personnel chosen by the underlying organization. For example, the staff of the European Court of Human Rights are hired by the Council of Europe.[96] In others, such as clerks in the U.S. Courts, staff are chosen by

93 According to Shelton, *supra* note 84, at 10, "the 'hidden judiciary' has the files, prepares the memos, presents the draft decisions, and the [Commission] generally spends no more than an hour discussing the matter before largely approving the secretariat draft," and also notes that "up to ninety percent of all petitions sent to the [Commission] are summarily dismissed" by staff before being seen by Commissioners. Other reasons for the Commission's lack of power on Shelton's account include that board members are part-time and sometimes not selected in a fashion designed to maximize their strength and credibility.

94 Penelope J. Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish US Law*, 39 Arizona State Law Journal 1 (2007). In the United States, judicial law clerks typically serve for one or two years immediately after completing their law degree.

95 Jens Frankenreiter, *Are Advocates General Political? Policy Preferences of EU Member State Governments and the Voting Behavior of Members of the European Court of Justice*, 14 Review of Law & Economics (2018); Arrebola et al., supra note 83.

96 Rules 8, 15, 16, 18A and 18B of ECtHR Rules of Court 2018.

board members directly.[97] Finally, in still others, staff (or at least senior staff) are chosen by a nomination process parallel to those of board members (as with the Advocates-General in the European Court of Justice).[98] It may be expected that the interests and views of the hiring entity may influence the choices made by staff. In some contexts, staff have been members of the entity being overseen, while board members may be external, leading to skepticism about the extent to which a board is truly external to the organization.[99]

What information is received by staff versus board members?

In some boards, staff receive information which they distill for the board. For example, in the Inter-American Commission, Commissioners typically do not directly see petitions, but rather see summaries provided by staff.[100] From descriptions of the "cert pool" process in the literature, it appears that United States Supreme Court Justices may typically not see petitions which the court declines to hear.[101]

What are the concrete roles of staff?

Functions observed in the cases described above include:

- Screen cases for admissibility (most courts).
- Assign cases to panels, sometimes in conjunction with screening.[102]
- Offer advice (privately or publicly) as independent an argument for board to consider in appropriate cases (French Court of Cassation, European Court of Human Rights, European Court of Justice).
- Summarize facts and/or arguments of parties, present to board instead of disputants (Inter-American Commission).
- Prepare preliminary opinions (privately or publicly) as drafts for board to adopt (European Court of Justice Advocate-General, U.S. Courts).
- Conduct investigations (Corporate audit, Ombuds, Civilian Complaint Review Board).

In a given system, some of these functions may be seen as "core" board capacities that are necessary for genuinely independent decisions, and hence must be carried out by or under the close supervision of the board, while others

97 Chap. 10 Sec. 7 of The Judiciary Act of 1789.

98 Art. 253 & 255 Treaty on the Functioning of the European Union (TFEU).

99 Richard S. Jones, *Processing Civilian Complaints: A Study of the Milwaukee Fire and Police Commission*, 77 Marq. L. Rev. 505, 507–8 (1994) (recounting cases of police civilian review boards where board members were external to department but staff support, including investigation, were conducted within the department).

100 Shelton, *supra* note 84, at 14. This consideration is particularly relevant to Facebook in view of the possibility that matters for consideration by the board could include sensitive user information.

101 The Court reviews the overwhelming majority of its cases at discretion: litigants file petitions for writs of certiorari, which the Court may accept or reject. The standard procedure for considering such petitions involves the delegation to a "cert pool" of clerks who write memoranda recommending acceptance or rejection, seemingly to shield the Justices from having to review the entire petition themselves. See, generally, Stras, supra note 74; Barbara Palmer, *The "Bermuda Triangle?" The Cert Pool and Its Influence Over the Supreme Court's Agenda*, 18 Constitutional Commentary 105 (2001).

102 For example, the registry of the European Court of Human Rights has a "Filtering Section" to direct cases to a single-judge expedited screening process or a panel of judges. See Open Society Justice Initiative, Protocol 14: How it Works (Feb. 2012), https://www.justiceinitiative.org/uploads/4d7dcfc0-ff44-45bb-951f-5047b529148d/echr2-protocol14-20120227.pdf. This process has been criticized on the grounds that when the registry allocates cases to single judges to consider for dismissals on grounds of admissibility, it does so with minimal information about the case, and that those judges typically simply "rubber-stamp" registry recommendations. Janneke H. Gerards & Lize R. Glas, *Access to Justice in the European Convention on Human Rights System*, 35 Netherlands Quarterly of Human Rights 11 (2017).

may be seen as "administrative" that can be carried out by staff with minimal supervision.

In order to have a clearer view of the tradeoffs involved, we may identify three core models of staff assistance.[103]

Staff assistance model - Trusted Personal Assistant

In some organizations, there are highly responsible staff roles that lie outside the administrative organizational structure and are characterized by close affiliation with individual board members. The judicial clerks of the U.S. Federal courts are an example of this model. Such clerks are selected and supervised by individual judges, and typically report exclusively to their judges; they may exercise a very high degree of responsibility (such as preparing draft orders and advising judges on outcomes) but do so entirely at the discretion of their employing judge.[104]

Staff assistance model - Professional Secretariat

Some organizations feature their own administrative structure, often composed of experienced professionals with potentially long tenure. In some of these bodies, the head of the staff organizational structure is a board member, such as a Court President; in others, there is a head staff member appointed by the same authorities as those who appoint the board members.

A key example is the Registry of the European Court of Human Rights. The Registry consists of 640 staff members under the authority of a Registrar and a Deputy Registrar. Staff members are chosen by a competitive, civil-service style process organized by the Council of Europe (the international organization under whose auspices the European Court of Human Rights "ECHR" operates), which seems to favor 4-year contracts for junior lawyers.[105] The Registry and Deputy Registrar are selected by members of the Court and are under the supervision of the President of the Court.

The Registry carries out both bureaucratic functions (information technology management, mail, filing and archiving) and legal functions. In the latter category, the Registry primarily seems to offer an advisory role to the judges. There is some uncertainty as to the extent to which lawyers in the Registry exercise power over decisions of the court through this advice-giving function. It has been suggested, however, that there may be substantial informal influence on outcomes by senior members of the Registry, particularly since the terms of judges are limited, such that senior Registry members hold the institutional memory of the court.[106]

A similar example is the administrative structure of the European Court of Justice "ECJ", which is supervised by members of the court (and its junior court, the General Court) in an administrative committee, chaired by the President of the Court and comprised of other judges, which manages employment, budgeting, and other staffing issues.[107] As the ECJ and ECHR examples indicate, where administrative bodies exist within courts, this may increase the *de facto* authority of those members of the board, whether a Board President or an administrative council or committee, who exercises

103 In addition, some models of oversight may rely on minimal to no staff support. For example, arbitral models where boards are potentially constructed in an ad hoc fashion by parties to an ongoing relationship may rely, for staff-like functions, primarily on resources supplied by the parties themselves.

104 For a general description of the functions they carry out, see Todd C. Peppers et al., *Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in "Appellate Triage,"* 98 Marquette Law Review 313 (2014).

105 Council on Europe, *Assistant Lawyers Scheme,* https://www.echr.coe.int/Documents/Scheme_assistant_lawyers_ENG.pdf

106 Cali & Cunningham, supra note 79, at 1992. *See also* Kanstantsin Dzehtsiarou, *Appointment of the Court's Registrar: Towards More Transparency*, Strasbourg Observers (Apr. 22, 2015), https://strasbourgobservers.com/2015/04/22/appointment-of-the-courts-registrar-towards-more-transparency/.

107 Christoph Krenn, *Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success*, 19 German Law Journal 2007 (2018).

primary supervisory authority over that body.[108]

Another key example of this organizational structure is the corporate audit function in the United States, which is often structured as an auditing and investigative staff unit within the normal organization chart (and hence reporting administratively to management), but which is ultimately functionally answerable to the Board of Directors and its independent audit committee.[109] Under the Sarbanes-Oxley Act and regulations enacted thereunder, audit committees in American corporations must be financially independent of the company;[110] the functional reporting arrangement of the internal audit function can be seen as providing support for that independence.

Staff assistance model - Junior Board Member

Some organizations feature a layer of staff that occupy a mixed role, exercising powers similar to those of board members but at a junior level. This structure is particularly characteristic of the European court models. The European Court of Justice, for example, includes Advocates-General who are appointed by the same process as are judges, and who issue preliminary decisions which are generally seen as highly influential on ultimate case outcomes. Similarly, the French Cassation Court grants the Public Prosecutor special privileges, including the power to refer cases to the court for its decision---although that example may not quite fall into that model, as the Public Prosecutor could be seen less as a member of the court and more as a *sui generis* official with a vast array of other powers in the French judicial system.[111]

The European Court of Human Rights also has a role that resembles this junior board member. The Jurisconsult is a legal specialist (and a member of the Registry) employed by the court to ensure that the decisions of the various panels are consistent. According to a former Jurisconsult who served for seven years, the Jurisconsult reviews all drafts of rulings and "warns against discrepancies or omissions of jurisprudence, reports of similar cases being at a more advanced stage, suggests waiting the judgment of the Grand Chamber in a case pending before it and that asks a similar question, highlights imperfections or deficiencies of a motivation, suggests solutions, etc."[112]

Rather than understanding these models as alternative forms of staff organization, it may be helpful to understand them as distinctive staff roles, which may coexist within the same organization. For example, the Dutch Hoge Raad has a research staff, like a secretariat or a registry, a Public Prosecutor and Advocate General office which offers opinions in

108 In many judicial systems in particular, Court Presidents exercise substantial authority not only through supervision of administrative staff but through assignment of cases to court panels, through participation on intergovernmental committees designated to select other judges, through supervision of other judges in case of ethics complaints, and through having a public megaphone as the most visible representatives of their courts. For general discussion, see Adam Blisa & David Kosaf, Court Presidents: The Missing Piece in the Puzzle of Judicial Governance, 19 German Law Journal 2031 (2018); J. Clifford Wallace, *Comparative Perspectives on the Office of Chief Justice*, 38 Cornell International Law Journal 219 (5, 2005).

109 Institute of Internal Auditors, *Internal Auditing's Role in Corporate Governance* (Institute of Internal Auditors 2018) https://na.theiia.org/about-ia/PublicDocuments/Internal-Auditings-Role-in-Corporate-Governance.pdf.

110 See: 17 C.F.R. § 240.10A-3(b)(1).

111 On the public prosecutor's vast powers in general, see Jacqueline S. Hodgson, *The French Prosecutor in Question*, 67 Washington & Lee Law Review 1361 (2010). In Cassation in particular, the powers of the prosecutor include, *inter alia*, to appear at will in hearings, to refer decisions to the court for quashing "in the interests of the law," to request the court sit in plenary session, or a special "mixed division," to sit on the Bureau which advises the Court President on court administration, and to sit on the Commission for the Promotion of Judges. Cour de Cassation, *About the Court*, Cour de Cassation, https://www.courdecassation.fr/about_the_court_9256.html. Generally, there has been some skepticism about the extent to which these kinds of powerful internal advocates are compatible with judicial neutrality and procedural fairness. See, e.g., Michal Bobek, *A Fourth in the Court: Why Are There Advocates General in the Court of Justice?*, 14 Cambridge Yearbook of European Legal Studies 529, 532–33 (2012) (recounting ECtHR rulings that internal advocates in Belgium, France, the Netherlands and Portugal violated human rights standards). However, it has also been argued that such advocates have the capacity to promote decision quality by forcing judges to engage with careful advocacy as well as potentially represent public or civil society interests. See Nicholas AJ Croquet, *The European Court of Human Rights' Norm-Creation and Norm-Limiting Processes: Resolving a Normative Tension*, 17 Columbia Journal of European Law 307, 368–69 (2011) (arguing for introduction of an advocate-general in ECtHR).

112 Taken from the website of the law firm of Vincent Berger, jurisconsult from 2016-2013; http://www.berger-avocat.eu/en/ECtHR/jurisconsult.html

cases much like the junior board member model, and individual assistants to specific judges.[113]

4.2 Board Member Workload

Time-burdened board members are forced to concede more responsibility (control) to staff or accept lower decision quality. There are at least three high-level variables relative to time management:

1. Number of cases or other matters for decision.

2. Number of board-member-hours available.

3. Number of board-member-hours required to decide a case.

Once again, choices among these options seem to cluster into several discrete families.

Some boards, particularly among courts in the European model as well as intermediate appellate courts in the United States, are oriented toward high-volume case processing, considering hundreds or thousands of cases yearly. The primary strategies adopted to manage the workloads of these boards include:

- Expansion of the number of board members and the creation of many small sub-panels to hear cases, with the possible tradeoffs of (a) reducing outcome consistency between cases,[114] and (b) conferring disproportionate influence over outcomes to those who set panel assignments (often Court Presidents and the like); and
- Summary disposition of cases, either by enforcing formal admissibility standards (either by single board members or by staff), or by producing summary rulings in easy cases, with the possible tradeoff of conferring disproportionate influence over outcomes to those who make summary decisions. Concerns have also been raised that summary disposition procedures may sacrifice outcome accuracy and procedural fairness.[115]
- A reduction of board member labor allocated to all cases, potentially by limiting inputs (such as constraining the evidence or argument allowed to petitioners), but particularly by limiting outputs. Output limitation strategies include producing brief decisions with minimal reasoning, such as in the French Court of Cassation and the European Court of Justice "ECJ", and delegating important tasks such as decision-writing to staff, such as in the U.S. courts, and, indirectly, via the Advocate-General in the ECJ.[116]

113 Elaine Mak, *Case Selection in the Supreme Court of the Netherlands Inspired by Common Law Supreme Courts?*, 21 European Journal of Current Legal Issues 18 (2015).

114 See, generally, Rimvydas Norkus, The Filtering of Appeals to the Supreme Courts (Network of the Presidents of the Supreme Judicial Courts of the European Union Dublin Nov. 26, 2015) https://www.lat.lt/data/public/uploads/2018/01/introductory-report-the-filtering-of-appeals-to-supreme-courts-president-rimvydas-norkus.pdf (describing a hypothetical extreme case of a high-volume Supreme Court and its consequences for outcome predictability and consistency).

115 See, e.g., Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 Admin. L. Rev. 647, 674–75 (2008) (noting critiques of streamlined summary disposition process in U.S. Board of Immigration Appeals, in which single-judge summary affirmance plus tight deadlines lead to high error rate); Lize R. Glas, *Unilateral Declarations and the European Court of Human Rights: Between Efficiency and the Interests of the Applicant*, 25 Maastricht Journal of European and Comparative Law 607 (2018) (describing "unilateral declarations" process in the ECtHR and worries about the potential insufficient protection it may provide to the interests of complainants); William M. Richman & William L. Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 U. Mich. J.L. Reform 623 (1988) (describing worries going back to 1980's about procedural fairness implications of U.S. Court of Appeal workload management strategies). See also European Court of Human Rights press release, "Launch of new system for single judge decisions with more detailed reasoning" https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5735020-7285664&filename=Launch%20of%20new%20system%20for%20single%20judge%20decisions%20with%20more%20detailed%20reasoning.pdf (describing change in procedure in summary single-judge dismissals of cases to provide more detailed explanations to complainant in light of court's success in dealing with backlog).

116 Even in cases that receive a full rather than summary hearing, U.S. law clerks often play a substantial role in opinion drafting, which has been criticized by some scholars and judges. For example, See, e.g., Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 Hofstra Law Review 1095, 1100 (2004) (identifying as ethically suspect U.S. judges who fail to seriously supervise opinions written by clerks).

Some boards, most prominently the U.S. Supreme Court, manage their workload by exercising a strong pre-screening process, limiting their consideration to particularly important cases. Case-selection processes are further reviewed below, however, it should be preliminarily noted that the primary trade-off from this institutional choice is that many individuals whose cases might benefit from board review (in terms of increased likelihood of achieving an accurate resolution as well as independent virtues of voice and participation) are sacrificed in this context.

Workload management is particularly salient in part-time boards, such as in the Inter-American human rights system as well as in corporate boards, police civilian complaint review boards and other advisory boards. In many of those contexts, the part-time nature of such boards may be a significant limitation on their institutional capacity.[117]

4.3 Board Member Selection

The abstract-level qualifications for board members are broadly shared across the models considered in this report. At the highest level, those qualifications include:

- *Competence*: board members are typically required to reliably apply governing rules in order to achieve accurate outcomes;
- *Status*: board members are typically required to be able to command the respect of staff, the organization over which they exercise oversight, and persons appearing before them, in order to retain credibility and authority for their decisions as well as to maintain their independence;[118]
- *Representativeness and Neutrality*: board members are typically required to be acceptable to a broad and diverse array of constituents and interest groups, which, depending on the institutional context, may be achieved either by selection processes that attempt to achieve neutrality among such groups, or by processes that attempt to guarantee that all such groups are represented on the board;[119] and
- *Commitment*: board members are typically required to be both diligent and faithful to their tasks, not inserting their personal preferences or agendas into the decision-making process.

There are, however, internal tensions among these virtues. For example, representative boards may lack status and competence, to the extent that representation is achieved by nomination by stakeholders who lack a commitment to the goals of the board; high-status board members may be less willing to keep their own agendas out of their decisions. Different methods of board selection tend to prioritize different combinations of these virtues.[120]

117 See, e.g., F. Todd DeZoort et al., *Audit Committee Effectiveness: A Synthesis of the Empirical Audit Committee Literature*, 21 Journal of Accounting Literature 38, 62–65 (2002) (citing studies identifying a positive association between frequency of corporate audit committee meetings and a indicators of effectiveness such as the quality of financial reports). Shelton, supra note 84 describes the part-time nature of the Inter-American Commission as a major limitation on its abilities.

118 See, generally, Klein & Morrisroe, *supra* note 24; Nuno Garoupa & Tom Ginsburg, *Judical Audiences and Reputation: Perspectives from Comparative Law*, 47 Columbia Journal of Transnational Law 451 (2009).

119 Conceptually, we may see representativeness as lending a kind of collective neutrality. Consider, for example, a fairly typical process for appointing arbitrators in which each party appoints one arbitrator, who in turn appoints a third. While the party-appointed arbitrators are unlikely to be *individually* neutral, the aim of such an institutional design is that if it works, the third arbitrator will be individually neutral, and the panel as a whole will be collectively neutral because the biases of the party-appointed arbitrators will counteract one another when the votes are counted up. Cf. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Washington & Lee Law Review 405 (2000); Jr. Wynn James Andrew & Eli Paul Mazur, Judicial Diversity: *Where Independence and Accountability Meet*, 67 Albany Law Review 775 (2004) (making similar points).

120 For an alternate typology of desirable qualities and methods of appointment, see Robert P. Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 Case Western Reserve Law Review 409 (1981). See also Lawrence B. Solum, *Judicial Selection: Ideology versus Character*, 26 Cardozo Law Review 659 (2005) (giving a list of personal virtues in the judicial context, which include intelligence, courage, temperance [non-corruption], and temperamental stability).

Selection by stakeholders is common in arbitration as well as in international courts such as the European Court of Human Rights (in which initial slates of judges are nominated by states, then confirmed by the Council of Europe) as well as in some community-based entities such as civilian police review boards (which may contain representatives appointed by the police and by advocacy organizations).[121] This selection method prioritizes representation of diverse stakeholders, however, at the possible cost of competence and commitment.[122] Some organizations have established a multi-stage process to ameliorate these concerns, according to which potential board members are first nominated by stakeholders, and then screened by a central committee for competence.[123] Others have adopted something like the reverse, where a nominating committee or other central organization creates a short list of potential nominees, from which stakeholders either choose the ultimate nominees or exercise a veto power over unacceptable candidates.[124]

Stakeholder selection processes are typically associated with organizations where there are a discrete number of readily identifiable stakeholders---for example, the stakeholders in an arbitration often are seen as just the parties themselves; the stakeholders in an international court often are seen as just the signatories to the treaty.[125] Another example of such a process is the Swedish Press Council, whose members are appointed by the National Press Club, the Swedish Union of Journalists, the Newspaper Publishers Association the Magazine Publishers Association, the Chief Parliamentary Ombudsman and the Chairman of the Swedish Bar Association.[126] Such processes may be less appropriate in cases where the board lacks a clearly defined closed set of constituents, as those who are left out are likely to complain of their lack of representation.[127]

A variation on selection by stakeholders is *selection by representative institutions*. In some cases, this selection process is fairly independent from individual stakeholders such as U.S. judicial nominees, in which the only stakeholders who have any particular influence are the U.S. President and powerful Senators), in others informal norms have arisen such that stakeholders effectively have nomination authority on a representative basis[128] or veto power on unacceptable nominations associated with their interest groups.[129] In addition, there are hybrid representative-selection processes according to which central representative institutions select members by consensus, thus ensuring that they are acceptable to all stakeholders (such as with the World Trade Organization Appellate Body). Key concerns raised with this method of selection focus on the politicization of board nominations and consequent threats to neutrality, with the U.S. Supreme Court being the most salient example of a case where the underlying politics of the representative institutions have famously leaked into the oversight institution itself.[130]

121 Ofer, *supra* note 40.

122 See Erik Voeten, *The Politics of International Judicial Appointments*, 9 Chicago Journal of International Law 387 (3, 2009) on patronage appointments to international courts.

123 For example, The European Court of Justice nomination process includes a panel of experts to advise on the appointments process, pursuant to Article 255 of the Treaty on the Functioning of the European Union, and the European Court of Human Rights process in 2010 interposed an expert panel between state nominations and the ultimate appointments process to screen candidates for their qualifications. Council of Europe Parliamentary Assembly Committee on the Election of Judges to the European Court of Human Rights, (2019, April 11). Procedure for electing judges to the European Court of Human Rights: Information document prepared by the Secretariat" AS/Cdh/Inf (2019) 01 rev 2, available at http://website-pace.net/documents/1653355/1653736/ProcedureElectionJudges-EN.pdf/e4472144-64bc-4926-928c-47ae9c1ea45e

124 See, e.g., Iowa Constitution Article V, Section 15, which provides for a judicial nomination commission to provide a list of appointees to the state governor

125 However, these cases may nonetheless be controversial---third parties may have a stake in arbitration outcomes, for example, and ordinary citizens or non-signatories may have a stake in international adjudications.

126 Allmänhetens Pressombudsman (2019). Charter of the Press Council, available at: https://po.se/about-the-press-ombudsman-and-press-council/charter-of-the-press-council/

127 See, e.g., Ofer, *supra* note 40 (advocating for community organization appointment rather than mayoral/police appointment of civilian police review board members).

128 For example, the ECJ's nomination process, at least in the past, has been described as ostensibly by common consent of the relevant governments, but in reality, "the nominees presented by each Government are in fact endorsed by the Council of Ministers without any real discussion." M. Gilbert Guillaume, quoted in a speech of Lord Mance of the U.K. Supreme Court at the United Kingdom Association for European Law, October 19, 2011, https://www.supremecourt.uk/docs/speech_111019.pdf

129 One example of the latter is the "blue slip" power traditionally exercised by U.S. Senators, who have had an informal veto over judicial nominees from their home state. Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 William & Mary Bill of Rights Journal 75 (2001).

130 For one of the many efforts to explain the American politicization of the judicial appointments process, see Ferejohn, *supra* note 75.

Selection by the organization. Oversight boards closely associated with specific organizations sometimes select their oversight boards internally. This obviously raises the risk of lack of neutrality, representativeness, and commitment to externally imposed regulations. Thus, regulators have responded by imposing constraints on the qualities that such board members may have, in order to protect those interests.[131] However, organization selection may allow the organization to effectively screen for competence and commitment to the organization's rules. A variation on organizational selection is *selection by established career ladder*. Some boards have an ordinary process of career progression according to which a candidate board member passes through lower level boards and other roles in an organization's oversight/dispute-resolution function before progressing to the highest oversight boards via a civil-service-style promotion process.[132]

Selection by outside experts. Many U.S. states select their judges by "judicial commissions" that include, for example, representation by the local lawyers and existing/prior judges to ensure that their specialized knowledge is put to work in the selection process. Some international courts also make use of screening commissions to attempt to provide a check on the quality of nominated members.[133] Many European and Latin American courts have adopted "judicial councils" comprised either wholly or partially of judges which select members, and may also be responsible for related matters such as the discipline of judges who violate codes of ethics.[134] This process is designed to promote competence in board members, but does so at the risk of replicating the biases of those who are doing the selection. Judicial commission selection processes in the U.S., for example, have been criticized by conservatives on the grounds that lawyers tend to be more left-wing than the general population, and hence are likely to pick more left-wing judges.[135]

Substantive criteria for board member selection

Some substantive criteria for board members are common across contexts, for example requirements of formal qualifications in the relevant decisional domain---such as financial expertise for corporate audit board members, or legal training and experience for high court judges.[136] In addition, diversity and representativeness are required in a number of boards, such as requirements of gender diversity in many European constitutional courts.[137] In the U.S. context, a number of federal regulatory agencies that exercise oversight-board-like functions, such as the Federal Communications Commission and the Securities and Exchange Commission, are required by law to be balanced with respect to political party membership.[138]

Diversity requirements, particularly with respect to groups who are underrepresented in decision-making institutions, have been extensively studied in the corporate context, where there is a large literature debating the extent to which

131 For example, U.S. corporate audit board members are required to meet certain criteria of financial independence from the company. Conceptually, this may be understood as a faithfulness or neutrality provision, attempting to guarantee that audit members are not biased in favor of management in exercising their judgment, or that they are motivated by the rules they must follow rather than, for example, their personal financial interests. Corporate audit committees must be nominated by independent board members, and there is research suggesting that, in periods prior to this regulatory requirement, audit committees with selection processes involving management were less effective. Joseph V. Carcello et al., *CEO Involvement in Selecting Board Members, Audit Committee Effectiveness, and Restatements*, 28 Contemporary Accounting Research 396 (2011).

132 With respect to courts, Nicholas L. Georgakopoulos, *Discretion in the Career and Recognition Judiciary*, 7 The University of Chicago Law School Roundtable 205 (2000) distinguishes between the "career judiciary" in the civil law courts of Europe, at which a person joins the bench early in his or her career and progresses up the hierarchy, with the "reputation judiciary" in the Anglo-American common law courts, where judges join the bench after careers in practice or academia.

133 For example, the Council of Europe maintains an Advisory Panel to serve as an intermediate step between the nomination of candidates for the European Court of Human Rights by countries and their acceptance by the Parliamentary Assembly. See description of the Advisory Panel at https://www.coe.int/en/web/dlapil/advisory-panel. For a description of the process in general, see Parliamentary Assembly. 2014. Election of Judges to the European Court of Human Rights, available at: http://website-pace.net/web/as-cdh.

134 Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 American Journal of Comparative Law 103 (2009) discuss judicial councils in Europe and Latin America as well as U.S. judicial commissions.

135 Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 Missouri Law Review 675 (2009).

136 See Epstein et al., *supra* note 85, at 17–20 (comparing formal qualifications of European constitutional court judges).

137 Nienke Grossman, *Achieving Sex-Representative International Court Benches*, 110 American Journal of International Law 82, 83 (2016) (listing courts with gender-representation requirements).

138 Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 Columbia Law Review 9 (2018).

there is a measurable effect of corporate board diversity on financial performance.[139] In addition to decision quality benefits, diversity may support external (sociological) legitimacy: members of the public from diverse backgrounds may be more willing to see the actions of diverse boards as fair.[140]

Scholars have also argued that people of underrepresented and socially excluded groups have a moral right to participate in important decision-making boards, particularly judiciaries, for example, as a way of redressing social exclusion or ensuring broad-based democratic (normative) legitimacy for those boards.[141] Moreover, scholars and jurists have argued that diverse board members are more culturally competent, in the sense of being more able to understand diverse styles of communication and forms of information.[142] Diverse decision-making bodies may be better able to produce unbiased decisions on an individual case-by-case basis, because non-diverse/unrepresentative bodies may produce decisions unduly influenced by the ideas and perceptions of dominant group members.[143]

4.4 Decisional and Process Transparency

Boards vary in the degree in which they communicate information about their decisions to a broader public. At the extreme noncommunicative pole is arbitration, in which arguments and evidence are often confidential, and outcomes themselves may be secret.[144] At the other extreme are judicial outcomes in a court such as the United States Supreme Court, where argument and evidence are almost entirely public, and the court issues opinions signed on an individual basis by justices which can run to hundreds of pages of detailed reasoning and argument.

Transparency appears to be a function of several variables:

- *Board workload*. Those entities with a larger workload are often simply unable to publish their full reasoning in each case, resorting to gnomic rulings (such as in the French Cassation) or unpublished summary rulings

139 For example, see Gennaro Bernile et al., *Board Diversity, Firm Risk, and Corporate Policies*, 127 Journal of Financial Economics 588 (2018) (providing evidence that corporations with boards that are more diverse on a "multidimensional index" comprised of "gender, age, ethnicity, educational background, financial expertise, and breadth of board experience" take wiser financial risks). See also Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 Delaware Journal of Corporate Law 377 (2014) (skeptically evaluating the evidence for a financial benefit from board diversity); James A. Fanto et al., *Justifying Board Diversity*, 89 North Carolina Law Review 901, 934 (2011) (arguing that advocates of board diversity should not focus on ostensibly dubious financial benefits, but on broader decisional benefits relating to social objectives such as "alter[ing] the dominant, finance-based, social identity that now characterizes public company boards"). For the general theoretical basis for a relationship between diversity and decision improvements, see, e.g., Scott E. Page, W*here Diversity Comes from and Why It Matters?*, 44 European Journal of Social Psychology 267 (2014). The decisional benefits of diversity may depend on representation by a "critical mass" of underrepresented group members. See Paul M. Collins Jr et al., *Gender, Critical Mass, and Judicial Decision Making*, 32 Law & Policy 260 (2010), who provide some empirical support for a theory of critical mass according to which isolated members of minority groups conform to majority views until they reach a sufficient concentration within a decision-making body to receive social support for divergence, and Jasmin Joecks et al., *Gender Diversity in the Boardroom and Firm Performance: What Exactly Constitutes a "Critical Mass?,"* 118 Journal of Business Ethics 61 (2013), who find evidence of financial performance increasing in corporate boards with a critical mass of approximately 30% women.

140 See, e.g., Ming W. Chin, *Fairness or Bias: A Symposium on Racial and Ethnic Composition and Attitudes in the Judiciary*, 4 Asian-American Law Journal 181 (1997) (attributing public perception of racial bias in California judiciary to its lack of racial diversity); Luis Fuentes-Rohwer & Kevin R. Johnson, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 Michigan Journal of Race & Law 5, 10 (2004) (arguing that diverse judges "improve public perception of the impartiality of judicial decision-making"). Jessica E. Sowa & Sally Coleman Selden, *Administrative Discretion and Active Representation: An Expansion of the Theory of Representative Bureaucracy*, 63 Public Administration Review 700, 701–2 (2003) describe this as "the symbolic importance of passive representation."

141 See, e.g., Richard Devlin et al., *Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or towards a Triple P Judiciary*, 38 Alberta Law Review 734 (2000).

142 See, e.g., Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 Asian-American Law Journal 127, 134–37 (2003) (detailing ways in which the distinctive experiences of nonwhite American judges have enhanced judicial decision-making, such as in weighing the credibility of claims of racial bias and in understanding the meaning of nondominant forms of social interaction). See also Ifill, *supra* note 119; Fuentes-Rohwer & Johnson, *supra* note 140 (similar).

143 Wynn & Mazur, *supra* note 119, at 785 describe the property of a diverse judiciary that can offer fair decisions to all in virtue of its diversity as "structural impartiality." See also Ifill, supra note 119.

144 Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 North Carolina Law Review 679 (2018).

produced by staff in many cases (as with the intermediate U.S. Courts of Appeals).[145]

- *The desire (or lack thereof) to generate precedent*. Boards that are oriented toward simply resolving matters before them on a one-off basis have less incentive to fully explain their decisions in order to guide future cases. The distrust of judicial lawmaking has been cited as a major factor in the minimal decisions of the French courts.[146] Moreover, a strong desire to generate precedent may also press boards to inflate their reasoning by generating rulings on matters not brought before them or critical to the result.[147]

- *The sensitivity of the information leading to a decision relative to the public stake in it*. The relative non-transparency of commercial boards, such as arbitrators and the World Trade Organization Appellate Body, as well as national security entities such as the United States Foreign Intelligence Surveillance Court, is often justified by the need to preserve confidentiality of information submitted to them.[148]

4.5 Downstream Effects of Decisions

The downstream effects of board decisions vary along several dimensions:

- *Degree of Formal Authority Over Policy Versus Individual Cases*: some boards set or recommend overall policy for an organization. For example, some civilian police review boards may recommend organizational reforms to policing practices.[149] Others are focused on resolving specific disputes in specific cases, as in investigative boards. Some categories of board set policy by resolving specific cases; this is characteristic of the Anglo-American common law method of legal adjudication, in which courts declare new rules of law in the course of resolving individual disputes.

- *Degree of Oversight Hierarchy*: some boards, particularly appellate courts, sit atop an oversight hierarchy such that lower-ranking bodies are *de facto* obliged to decide cases in accordance with the reasoning of the higher-ranking body in order to avoid subsequent reversal of their decisions, even if there is no formal rule requiring them to do so. The same organizational constraint sometimes applies to boards that supervise administrative organizations which recurrently consider similar problems: an administrative organization that wishes to economize on decision-making effort has an incentive to conform its decisions to the rulings of an oversight board that has the capacity to reverse those decisions.[150]

- *Degree of Communicative Capacity*: in addition to formal policymaking authority, many boards exercise influence over the long-term development of policy by communicating their reasoning to other decisionmakers or to the public at large; boards that are more transparent or communicative, and those that

145 On the Courts of Appeals, see Pether, *supra* note 94; Michael Kagan et al., *Invisible Adjudication in the U.S. Courts of Appeals*, 106 The Georgetown Law Journal 683 (2018).

146 See Lasser, *supra* note 69, at 1006.

147 For example, the U.S. courts have been criticized for creating unnecessary precedent with "dicta," statements of law that are not necessary to resolve the case before them. See, e.g., Pierre N. Leval, *Judging under the Constitution: Dicta about Dicta*, 81 New York University Law Review 1249 (2006).

148 Yasuhei Taniguchi, *The WTO Dispute Settlement as Seen by a Proceduralist*, 42 Cornell International Law Journal 1 (2009); Stefano Azzali, *Confidentiality vs. Transparency In Commercial Arbitration: A False Contradiction To Overcome,* Transnational Notes (Dec. 28, 2012), https://blogs.law.nyu.edu/transnational/2012/12/confidentiality-vs-transparency-in-commercial-arbitration-a-false/.

149 Peter Finn, *Citizen Review of Police: Approaches and Implementation*, NCJ 184430 (U.S. Dept. of Justice, Office of Justice Programs, National Institute of Justice 2001) 6.

150 Some organizations resolve this dilemma by maintaining an ultimate rulemaking authority that controls both the administrative and the oversight function. For example, while appellate boards in U.S. administrative agencies may effectively set policy by reversing administrative decisions contrary to their perception of correct policies, the heads of those agencies exercise overall supervisory authority over both the boards and the administrative organization, and hence may reset policy on their own initiative. See, e.g. Eyer, *supra* note 115, at 669–71 (describing Attorney General's use of regulatory power to create and set limits to Board of Immigration Appeals authority, review cases, and change procedures).

have higher status with listeners who hold influence over the policy process, can be expected to exercise more influence over downstream policy outcomes.[151]

- *Degree to Which Underlying Rules Are Partially Specified*: a board may operate on the basis of detailed rules which cover more situations which it must decide unambiguously, or it may operate on the basis of broad statements of policy and principle which may require it to develop interpretive rulings in order to ensure consistency on a case-by-case basis.

- *Degree to Which Membership is Stable*. Stable membership boards may develop consistent principles according to which they operate over time, and may be particularly motivated to be individually consistent (for example, so as to not appear to be biased, arbitrary, or hypocritical).

In view of these factors, boards which are not formally vested with the authority to create binding precedent often accrete informal precedent-setting power: board members tend to be motivated to act consistently across cases, and hence have an incentive to reference their own prior decisions; those who appear before them (such as litigants in courts) similarly have an incentive to do so, and to shape their behavior in anticipation of consistent decisions (thus acting as if those boards have the power to set formal rules).[152] For example, the French Court of Cassation is embedded in a cultural and legal context in which statutes are the only official source of law and judicial lawmaking is deeply distrusted. Moreover, it issues famously short rulings that disclose little of the internal debates or detailed reasoning on which its decisions are based. Nonetheless, even that court has generated unofficial precedent that influences subsequent results.[153]

Those boards which do not have any informal precedent-setting power are probably limited to ad hoc arbitral bodies that do not disclose their inputs or their outputs beyond the parties. Such boards are unlikely to have precedent-setting power simply because they lack institutional memory: without consistency of membership or any kind of publication of facts or outcomes, there is no knowledge of prior cases to influence subsequent cases. Such dispute resolution processes have been criticized by scholars for just this feature, as the capacity to formally or informally set precedent may promote the evolution of underlying rules as well as knowledge by those who are subject to those rules about how their behavior will be evaluated.[154] However, even in such contexts, there may be some minimal institutional knowledge, and hence informal precedent, created in the form of information transmitted by repeat players: a union and an employer who maintain their own records of arbitration facts and outcomes, for example, may have the resources to offer consistency-based arguments to new arbitration panels.[155]

4.6 Case Selection and Assignment

As noted above, the selection process for cases, as well as the process for channeling cases to, for example, expedited review, smaller or larger panels, and the like, has significant implications both for the exercise of power within a board as well as for the quality and consistency of decisions and the extent to which users and the community at large genuinely perceive

151 Reputation or status can be associated with the board as a whole or its individual members. Garoupa & Ginsburg, *supra* note 118. On prestige and the influence of precedent, see Klein & Morrisroe, *supra* note 24.

152 See, generally Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 International Review of Law and Economics 519, 521–23 (2006) (describing civil law notion of jurisprudence constante, or the following of consistent bodies of precedent as persuasive authority in the absence of formal case-by-case stare decisis); Margaret McCown, *The European Parliament before the Bench: ECJ Precedent and EP Litigation Strategies*, 10 Journal of European Public Policy 974 (2003) (describing informal influence of ECJ precedents on arguments of litigants and judges).

153 See Lasser, *supra* note 69.

154 Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Washington University Law Review 637, 695 (1996) discusses this argument in some detail.

155 On precedent in arbitration, see generally W. Mark C. Weidenmaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. Rev. 1091 (2012) (empirical study finding evidence that U.S. arbitration awards frequently cite judicial precedent but very rarely cite arbitral precedent).

themselves to have access to a fair process for seeking reconsideration of internal decisions. Sub-questions include:

What are the criteria for selecting cases?

- Some bodies use *merits-based criteria*, such as the likelihood of success in an ultimate adjudication. However, merits-based criteria require someone to make a preliminary determination as to the strength of the appeal, and many vest substantial power in that person (or group). This may be reduced in high-volume boards in which case selection is simply based on procedural considerations, such as a disputant having exhausted all other avenues for review.
- Some bodies use *learning-based criteria*, i.e., they select cases for the purpose of improving the system of rules as a whole, for example, to make precedent in order to clarify an underlying rule, to reconcile inconsistent past decisions of lower bodies, provide feedback to rule makers, or to resolve an important or recurring issue. (This is the process of the U.S. Supreme Court.)

Who does the selecting and assignment?

There is some evidence that the personnel who select cases and (in some systems) who assign cases to different subpanels or to expedited vs full processes (or to summary disposition) have the capacity to exercise a disproportionate amount of power over outcomes.[156] This can be ameliorated by creating second-stage processes where the full board or larger subpanels can review screening or assignment decisions, but only at the cost of institutional complexity and additional burden on disputants.

High-capacity/low-volume courts like the U.S. Supreme Court ("SCOTUS") can make these determinations themselves in a unified fashion (such as the SCOTUS process for granting certiorari if any four justices agree). But lower capacity or higher volume courts typically allocate them to one of the following:

- Staff (leading to the undue influence concerns noted above);
- Fixed subgroups of the board (such as a "President of the Court" and other senior staff);
- Rotating subgroups of the board; or
- Some parallel/junior board (such as the Inter-American Commission on Human Rights, which filters cases for the Inter-American Court).

Some boards have adopted hybrid procedures. For example, the Dutch Hoge Raad has a procedure according to which an Advocate-General reviews a case and recommends dismissal of inadmissible cases, a recommendation to which an appellant may respond, leading to an ultimate decision of admissibility by a panel of the court.[157]

Another helpful typology is set out in a conference presentation by Rimvydas Norkus, the President of the Lithuanian Supreme Court.[158] According to Norkus, European Supreme Court case selection procedures fall into three basic categories, as well as hybrid models among them:

1. The "leave-to-appeal" system, in which cases are heavily filtered with selection "on the basis of quite abstract criteria" such as the importance of the case in terms of resolving significant legal disputes, typically by the court itself, a sub-panel of that court, the court below, or some body consisting of members of both the court itself and lower courts;

156 See, e.g., Pether, *supra* note 94; Shelton, supra note 84.
157 Mak, *supra* note 113.
158 Norkus, *supra* note 114, at 11–12.

2. The "no judicial filtration" system, in which courts manage their workload by informally recruiting the assistance of third parties, such as the bar (i.e., by relying on lawyers to advise their clients about the futility of an appeal),

3. A "disguised leave to appeal" system in which courts manage their docket after the fact by exercising robust authority to handle cases by summary disposition after they have already landed on its docket.

Some systems also include privileged internal processes for referring cases to the board as a separate track in addition to outside appeal, such as to the capacity of the French Public Prosecutor to refer cases to Cassation.

Finally, there is at least one oversight board that claims the authority to conduct random reviews of cases even in an adjudicative context. The implementing regulations of the U.S. Social Security Administration Appeals Council provides that it will use random sampling to identify cases from lower levels that may be reviewed on its own initiative, as well as "selective sampling" "to identify cases that exhibit problematic issues or fact patterns that increase the likelihood of error" for review.[159] This process may serve as a useful supplementary check on systematic errors or biases in selection of cases for review by other means.[160]

4.7 Guaranteeing Effective Information

All board models require some access to reliable and complete information relevant to decisions. Several dimensions of variation in how that information is accessed may be gleaned from the reviewed models:

- Some boards are *embedded in the existing administrative structure of the organization under review*, or have assistance from staff who are thus embedded. Examples are corporate audit committees with authority over internal audit functions within the management hierarchy, Inspector General offices, and potentially some kinds of administrative adjudicators.[161] Such boards may have privileged access to organizational information, such as the capacity to directly pull decision files, but may not have as strong a degree of access to information from third parties.

- Some boards have *coercive process to obtain information*, ranging from soft processes by which information which is not provided may be used to warrant inferences against the party failing to provide that information, to hard processes (typically associated with national courts) in which boards may directly impose monetary or other sanctions on parties who fail to provide information sought, for example, by subpoena.

- Some boards (particularly in the investigative family, such as Ombuds and some Civilian Review Boards) have *staff support to conduct independent investigations* on their own initiative.

- Some boards *rely primary on voluntary submission from adversarial parties* to receive decision-relevant information, though this may be appropriate only when the parties are on an equal footing to acquire information in the first place.[162] All boards permit parties to a dispute to submit some information, and in addition to preserving information quality, the capacity for parties to submit information to the board is a core element of procedural fairness.

159 20 C.F.R. 404.969(b).

160 Of note with respect to the next section, this procedure also implies that the Appeals Council has some degree of privileged access to records of decisions at lower levels.

161 See, e.g., Inspector General Act of 1978, 5 U.S.C. App. 6(a)(1) (providing broad informational access to U.S. government Inspector Generals)

162 See, e.g., WTO Agreement Annex 2, "Understanding on rules and procedures governing the settlement of disputes," Article 13 (specifying process for WTO dispute settlement panels to seek information from parties without any obvious process for compelling provision of that information).

- Formal courts develop detailed rules on *admissibility of evidence and burdens of proof and persuasion* which may not be present in less informal methods of dispute resolution such as those in the arbitral family.

5. Conclusions

This analysis helps highlight the range of different institutional systems and models – or, as we have termed them, 'families' – that aim to provide external oversight and accountability as a balance to deliberative decision-making processes. Ultimately the findings of this research serve more as a starting point to inform and develop a base of critical consumers of oversight in the context of social media and internet-mediated communication and services. Our aim was to build an initial body of knowledge that could be use in assessing both oversight board and future regulatory approaches.

In that context, comparing these different families yields three key take-aways. *First*, that despite their differences, these families operate on a similar framework where a combination of design and execution decisions are key inputs into a process which yields two key outputs: fair and accurate decisions that are operationally feasible. Such a model then can yield legitimacy when combined with the additional elements of transparency and timely execution of outputs (i.e. the oversight body's recommendation or advice). *Second*, within this common framework, the families must trade-off key process dimensions such as autonomy of the board with validity or salience of information with procedural fairness. Such trade-offs highlight that despite a common goal, these different families have different priorities and ultimately serve different functions. Finally, there is no 'silver bullet' for institutional design that will address all issues for all constituencies in all conditions. In the context of a governance for social media – a largely new and rapidly evolving space – it is worth considering the underly priorities and values of external oversight in assessing and ultimately resolving trade-offs in these process dimensions. Enhancing external awareness about trade-offs in design and execution decisions and clearly communicating final decisions is in some senses more critical than the specific decisions themselves.