

Presidential Adjudication

Emily S. Bremer*

Table of Contents

Introduction	2
I. The Imperiled Position of the Administrative Law Judge	5
A. The Pre-APA Need for Reform	5
B. The APA’s ALJ Regime	9
C. Emerging Threats to the APA’s ALJ Regime	14
II. Presidential Duties in Adjudication	18
A. Presidential Responsibility for Agency Policymaking	18
B. Presidential Duty to Ensure Fair Agency Adjudication	23
C. Presidential Duty to Ensure Fair MSPB Adjudication	26
III. Existential Threats to Administrative Adjudication	27
A. A Deeper, Conceptual Problem?	27
B. An Otherwise Doomed Regime?	31
C. Back to Square One?	34
Conclusion	36

[Note to conference participants: This is rudimentary draft, and I hope that you will forgive its errors, omissions, and significant draftiness. As the paper notes, I think it’s likely that the Supreme Court will soon take up the question of the constitutionality of the APA’s ALJ structure. One of my goals in this paper is to work out arguments that I may later want to include in an amicus brief when that occurs. But regardless of what the Court does, I believe there are other significant threats to and problems with the current state of administrative hearings, most of which related directly or indirectly to the APA’s ALJ regime. Thus, this paper also has a second goal: to contribute to the discussion about how to fix those problems beyond whatever the Supreme Court might do, but without replicating the work that others are doing. Thank you for your time and expertise. I look forward to your comments and suggestions for improving the next draft of this work!]

* Associate Professor of Law, University of Notre Dame Law School. Thanks to Elisabeth Crusey for excellent research assistance. Support for this paper was received from the C. Boyden Gray Center and the Hoover Institution.

Introduction

The Administrative Procedure Act’s (APA) most central reform—its regime for ensuring presiding officers in administrative hearings are impartial and competent—is on a collision course with the Supreme Court’s recent separation of powers jurisprudence. In peril is the APA’s structure for empowering and protecting Administrative Law Judges (ALJ), which perform the function of presiding over administrative hearings and issuing initial decisions that may become final in the absence of agency head review.¹ The primary threat to the regime is *Free Enterprise Fund v. PCAOB*,² a 2010 case in which the Supreme Court held that “multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President.”³ Seemingly like the structure at issue in *Free Enterprise Fund*, the APA’s ALJ structure entails “multilevel protection from removal.”⁴ ALJs can be removed from office only for cause, which is determined by the Merit Systems Protection Board (MSPB),⁵ the members of which likewise can be removed only for cause.⁶ The situation is further complicated when ALJs are employed by independent agencies such as the SEC, whose members also enjoy for-cause removal protection.⁷ The principle of *Free Enterprise Fund* would pose no threat to the APA if ALJs were mere employees, but the Supreme Court foreclosed this lingering possibility in 2018, when it held in *Lucia v. SEC* that ALJs are officers and not employees.⁸ In *Jarkesy v. SEC*, the U.S. Court of Appeals for the Fifth Circuit held that the multilevel removal protection provided by the APA’s ALJ structure is unconstitutional under *Free Enterprise Fund*.⁹ The Supreme Court appears poised to take up the issue, in some case if not in *Jarkesy*.¹⁰

Lurking beneath the surface of this controversy is a more fundamental conflict: in recent

¹ See 5 U.S.C. §§ 556(b) & (c), 557(b). Part I.B. closely examines the ALJ structure.

² 561 U.S. 485 (2010).

³ 561 U.S. at 484.

⁴ 561 U.S. at 484.

⁵ See 5 U.S.C. § 7521.

⁶ See 5 U.S.C. § 1202(d).

⁷ In *Free Enterprise Fund*, the parties and majority assumed that SEC commissioners can be removed only for cause, although the SEC’s organic statute contains no for-cause provision. See *Free Enterprise Fund*, 561 U.S. at ____; *id.* at ____ (dissenting). SEC commissioners are, however, appointed for a term of years, see 15 U.S.C. § 78d(a), which perhaps should be interpreted as a protection against removal by the President for the duration of the term. For an argument to this effect, see Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021).

⁸ See 138 S.Ct. 2044, 2049 (2018).

⁹ See 34 F.4th 446, 464 (5th Cir. 2022).

¹⁰ As of this writing, the U.S. has filed a petition for certiorari in *Jarkesy*, see Petition for Certiorari, Docket No. 22-859 https://www.supremecourt.gov/DocketPDF/22/22-859/256566/20230308164750050_Jarkesy.pet%20Final.pdf. Among the questions presented is “[w]hether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.” *Id.* A response is due on April 10, 2023.

decades, the Supreme Court has begun to develop a conception of administrative action that is fundamentally at odds with the conception that prevailed in the New Deal era and animated the APA. As I have argued in prior work, the APA is based on a conception of administrative action as exclusively quasi-legislative and quasi-judicial, and fundamentally *not* executive.¹¹ At the time the statute was enacted, most administration was accomplished through adjudication, and that form of agency action was foremost in Congress' mind in drafting the APA. Another influential force was concern about how to empower administrative agencies without facilitating authoritarianism.¹² In the three-quarters of a century since the APA's adoption, administration has changed and evolved considerably. Beginning in the 1960s and 70s, rulemaking began to displace adjudication as the preferred method of agency policymaking, and Congress created a host of new agencies with broad statutory mandates to protect public health and safety through regulation.¹³ This shift in turn heralded the rise of presidential administration and the emergence of the *Chevron* doctrine.¹⁴ In response, the Supreme Court's administrative law docket has increasingly focused on high-stakes policymaking undertaken pursuant to statutes that grant broad discretion and contemplate a central role for rulemaking. As the Court has decided these modern disputes, a profoundly different—fundamentally executive—conception of administrative action has emerged.¹⁵ This conception, which has accompanied the adoption of a more unitary theory of executive power that legitimates agency policymaking through democratic accountability, finds perhaps its firmest footing in the modern administrative context, with its focus on administrative policymaking through the development and enforcement of rules.

The Supreme Court now faces the challenge of adapting its modern conception of administration to an older, quasi-judicial form of agency action that presents a complex and very different set of issues and values. Meeting this challenge will require recovering an understanding that

¹¹ See Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 436-447 (2021) [hereinafter Bremer, *Rediscovered Stages*].

¹² See e.g., Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 GEO. MASON L. REV. 573 (2021); Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1 (2022).

¹³ See, e.g., Antonin Scalia, *Vermont Yankee, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 376 (describing “the constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking”); see also Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 254 (1986); Ralph F. Fuchs, *Development and Diversification in Administrative Rule Making*, 72 NW. U. L. REV. 83 (1977); [add to string cite].

¹⁴ See Emily S. Bremer, *Power Corrupts*, Hoover Institution Project on Revitalizing American Institutions (forthcoming 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4375200.

¹⁵ This perhaps was inevitable, but it was also creeping and implicit, occurring without direct consideration as the judicial process trained attention on discrete disputes. For example, the Court recently refused to distinguish between agencies that directly regulate private parties and those that affect private parties indirectly through the regulation of the government's internal affairs.¹⁵

administrative law has substantially lost in the modern era, regarding the purpose and place of an administrative hearing within the staged structure of agency adjudication contemplated by the APA.¹⁶ In this process, the initial stage of adjudication entails a myriad of informal, non-hearing techniques such as investigations, inspections, examinations, conferences, negotiations, and settlements. In the relatively rare instances in which these techniques are insufficient to resolve a matter with the affected private party's consent, a judicial-type hearing might be required to resolve the dispute. Congress often prefers that the needed hearing be conducted by the agency—rather than by a court on judicial review—and so includes a hearing requirement in the agency's governing statute. This approach ensures the agency's primary jurisdiction, but it presents significant constitutional challenges, threatening due process as a matter of both separation powers and individual rights.¹⁷ The need to address these challenges was the driving force behind the APA. The statute's hearing provisions—and most especially its ALJ regime—offer a legislative specification of the minimum requirements of due process in quasi-judicial hearings conducted within administrative agencies. But they also vindicate the Constitution's separation of powers, by protecting and preserving agency head control over the policymaking aspects of adjudicatory hearings. In short, the APA's regime masterfully navigates the challenges inherent in giving effect to Congress's preference for quasi-judicial hearings in administrative programs to be conducted by the agency rather than by a court.

This paper defends the constitutionality of the APA's ALJ regime, arguing that the statute is well designed to promote properly presidential adjudication. The Supreme Court's 2021 decision in *United States v. Arthrex*, saving for-cause protection for Administrative Patent Judges (APJs) by inserting agency head control into the *inter partes* review structure, suggests that the Court is beginning to understand that adjudicatory regimes are different than rulemaking-based administrative schemes. When it considers the constitutionality of the APA's ALJ regime, the Court must deepen its appreciation for those differences. Presidential adjudication implicates simultaneously more than one constitutional duty, for the President must ensure the law is faithfully executed through fair administrative hearings conducted by impartial adjudicators. The APA was carefully constructed for just this purpose. And while the Court need not defer the 79th Congress's judgment, it must engage a

¹⁶ For a complete account of what administrative law has forgotten about the structure and operation of agency adjudication, see Bremer, *Rediscovered Stages*, *supra* note 11. It bears emphasizing that the staged structure is no mere historical relic: agency adjudication today remains a staged process. *See id.* at 11.

¹⁷ For an originalist discussion of relationship between due process and separation of powers, see Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672 (2012). The interplay and tension between the sovereign power and individual rights aspects of due process are also observable, for example, in personal jurisdiction doctrine. [cites]

thorough and sophisticated evaluation and understanding of that judgment. If it does so, the Court will find sound and persuasive reasons to uphold the APA's ALJ regime. Even if the Supreme Court sustains the APA's constitutionality, there are serious problems in administrative adjudication that lie beyond the Supreme Court's jurisprudence and outside the APA. These problems call for action and cooperation from Congress and the Executive Branch.

This paper proceeds in three parts. Part I describes the problems Congress sought to remedy by enacting the APA's ALJ regime, examines that regime in detail, and explains the forces that threaten its continued viability. Part II defends the constitutionality of the APA's ALJ structure. Part III argues that the Supreme Court's reconceptualization of administrative action presents deeper threats to administrative adjudication than has previously been recognized. But the Supreme Court cannot solve the current problems in administrative adjudication, for there are threats that come from beyond the Supreme Court and outside the APA. If, as seems likely, the federal government is unwilling or unable to reinvigorate the APA's hearing regime, administrative adjudication faces a truly existential threat. And in the absence of a compelling alternative to the APA's core compromise, it may be time to seriously consider whether administrative hearings can remain within the executive branch.

I. The Imperiled Position of the Administrative Law Judge

A principal goal of the APA was to ensure due process of law in administrative adjudication while maintaining individual agencies as the locus of adjudicatory decisionmaking. Central to this project was reforming the widespread, constitutionally problematic practice of commingling prosecutorial and adjudicative functions in a single agency employee. The needed reform was accomplished by the APA's formal hearing provisions, which established minimum procedural requirements for quasi-judicial hearings. At the heart of this regime was the APA's structure creation of the position of the administrative law judge (ALJ). This part begins by explaining the constitutional mischief that Congress sought to remediate by enacting the APA.¹⁸ It then explains the structure and operation of the APA's hearing provisions and concludes by explaining how recent Supreme Court decisions have imperiled this core compromise of the APA.

A. The Pre-APA Need for Reform

A principal reason for the APA's 1946 enactment was to reform administrative adjudication, which at the time was the dominant form of agency policymaking. On the one hand, there was a desire

¹⁸ Understanding this mischief can help to explain this statute. See Sam Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 1007-09 (2021).

to keep adjudication, including (most controversially) the conduct of quasi-judicial hearings, within individual administrative agencies. At the same time, there were problems in the way that hearings were conducted in the pre-APA period. The APA’s “intellectual foundation”—i.e., the voluminous research of the Attorney General’s Committee on Administrative Procedure into actual procedures used by pre-APA administrative agencies—documented these problems.¹⁹

To understand the problems the APA was designed to remedy, however, one must first understand the placement and purpose of an administrative hearing in adjudication. As I have explained in prior work, the APA was based on the understanding that adjudication is a staged process.²⁰ In the initial stage of adjudication, the agency uses informal techniques to uncover the relevant facts and determine their legal significance. These informal techniques vary widely—acceptance and processing of applications and complaints, conferences, inspections, examinations, negotiations, and settlement—and are usually sufficient to resolve the matter with the consent or acquiescence of the affected private party. This is because the informal stage of the process typically reveals undisputed facts with indisputable legal significance. In the rare case in which a dispute remains at the conclusion of the informal stage, the matter is elevated to the hearing stage of the process. At this point, what is needed is a way to resolve an otherwise intractable, fact-bound dispute between the agency and an affected private party. The hearing could be provided in the courts, on judicial review of a final agency order issued without a hearing. But Congress often prefers that the initial hearing and decision be made by the agency, so that its expertise can be brought to bear on the legal, factual, and policy issues raised by the disputes. Congress effectuates this institutional preference by including a hearing requirement in the agency’s statute.

The adjudicatory hearing is thus held toward the end of the administrative process for the purpose of resolving fact-bound, otherwise intractable disputes between the agency and the private

¹⁹ Kenneth Culp Davis, Walter Gellhorn, & Paul Verkuil, *Present at the Creation: Regulatory Reform Before 1946*, 38 Admin. L. Rev. 511, 513-14 (1986) (hereinafter *Present at the Creation*). I have examined this research in detail in previous work. See Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 90-93 (2022) [hereinafter Bremer, *undemocratic Roots*]; Bremer, *Rediscovered Stages*, *supra* note 11, at 396-402. The relevant documents are available electronically in THE BREMER-KOVACS COLLECTION: HISTORIC DOCUMENTS RELATED TO THE ADMINISTRATIVE PROCEDURE ACT OF 1946 (HeinOnline 2021). See Emily S. Bremer & Kathryn E. Kovacs, *Introduction to The Bremer-Kovacs Collection: Historic Documents Related to the Administrative Procedure Act of 1946* (HeinOnline 2021), 106 MINN. L. REV. HEADNOTES 218 (2022).

²⁰ Bremer, *Rediscovered Stages*, *supra* note 11, at _____. Adjudication retains this structure today, although modern administrative forgot it as attention shifted overwhelmingly to rulemaking as the predominant form of agency policymaking. See *id.* at _____.

parties it governs.²¹ It is designed to produce reliable evidence that can be used to make the factual findings necessary to support the agency's final resolution of the dispute.²²

An obvious challenge is that the presiding officer in an adjudicatory hearing is employed by one of the parties to the dispute: the agency. This challenge is present even in agencies that use an inquisitorial model rather than an adversarial model for adjudicatory hearings. A prominent example is found in Social Security hearings, which are inquisitorial in the sense that the claimant appears alone before an SSA ALJ.²³ No person appears in the hearing to argue the agency's opposing interest or position in the matter. Moreover, SSA has long taken the position that its obligation, even in hearings, is to protect the interests of SSA beneficiaries. It is immediately obvious that protecting SSA beneficiaries requires *both* granting benefits to qualified claimants *and* denying benefits to ineligible claimants.²⁴ But one need not question SSA's beneficent motives to recognize that a claimant appearing in a hearing is unavoidably in an adversarial position vis-à-vis the ALJ's employing agency. This becomes apparent only when SSA hearings are viewed in administrative context. Most Social Security claims are processed informally, without resort to a hearing, because the claimants are granted the benefits they seek and to which they are entitled. Reflecting the staged structure described above, SSA holds a hearing only when a claimant's application for benefits *has been denied*. From the claimant's perspective, then, the hearing is an opportunity to prove that the agency got it wrong. And the person to whom the claimant must prove this is an ALJ employed by the agency.

Even in regimes in which an agency is responsible for adjudicating disputes between two private parties, the administrative context may give rise to structural threats to impartiality. Recall that Congress has vested adjudicatory authority in an agency rather a court *for a reason*. Typically, the agency is responsible for administering federal policy that Congress has established by statute. The agency's authority to conduct hearings is typically only one of several ways in which Congress expects the agency to pursue that policy. The goal is to leverage the agency's expertise so that the disputes are

²¹ Two realities add some complexity to this structure. First, informal techniques may be interspersed with formal techniques. In other words, as in litigation in courts, attempts to resolve a dispute by negotiation and settlement often continue as judicial proceedings move forward and can obviate the need for a full trial. The APA recognizes this possibility and encourages agencies to reduce the time and cost of hearings by settling matters if possible. *See* 5 U.S.C. § 554(c); Bremer, *Rediscovered Stages*, *supra* note 11, at 411, 429. Second, intra-agency appeals and review (including review by the agency head) are typically available after the conclusion of an agency hearing and before agency action becomes final. Bremer, *Rediscovered Stages*, *supra* note 11, at 418.

²² *Cf.* 5 U.S.C. § 706(2)(E) (providing that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute").

²³ *See Carr v. Saul*, 141 S. Ct. 1352, ___ (2021).

²⁴ SSA's task is considerably more complex than this, but in ways that extend well beyond the scope of this article. *See generally* JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983).

resolved in a way that furthers the statutory mandate. Even though the agency is not a party to the cases, it has an institutional interest in seeing that the disputes are resolved in a particular fashion. In the context of adjudicatory hearings, expertise can bring with it a certain kind of well-meaning partiality. **[Note:** A future draft will make this point more concrete by offering a few examples.]

What is at stake in the design of adjudicatory hearings, then, is a core requirement of due process: for one's case decided by an impartial decisionmaker. **[Note:** A future draft will expand upon this point.]

In pre-APA administrative hearings, the right to a neutral arbiter was especially threatened by the widespread practice of combining investigative, prosecutorial, and adjudicative functions in a single person. A good example is found in immigration, where the same agency officials were responsible for investigating persons alleged to be illegally present in the U.S. and also adjudicating the agency's request to deport those persons. A modicum of separation was provided by having Immigration Agent A investigate Person X and adjudicate the deportation of Person Y, while Immigration Agency B would investigate Person Y and adjudicate the deportation of Person X.²⁵ But this approach was insufficient to ensure the adjudicators' impartiality.²⁶ [Pull more examples from the final report (first) and monographs (second). Including the one where the agency's lawyer and its adjudicator would travel together to hearings, often sharing meals and staying in the same hotel.]

Another problem in pre-APA adjudicatory hearings was the incompetence of the presiding officers. **[Note:** A future draft will elaborate on this problem, including by telling the tale of how the FCC eliminated its hearings program because it wanted to fire its hearing officers and could not (or would not) do so directly.]

A final problem in pre-APA adjudicatory hearings was the tension between the needs of fact-finding and the need for the agency head to retain policymaking control. This tension particularly was evident in independent regulatory commissions. The heads of these agencies—i.e., the multi-member regulatory commissions—needed the assistance of subordinates to conduct hearings but were also extremely reluctant to delegate to these subordinates the authority necessary to do the job efficiently

²⁵ The Attorney General's Committee on Administrative Procedure included the Immigration and Naturalization Service in its study, *see* Final Report, *supra* note ____, at 3, but did not prepare its own monograph examining the agency's procedures, *see id.* at 4 n.2. This was because "subsequent to th[e] Committee's appointment, an exhaustive analysis of the Service, then a part of the Department of Labor, was completed by three investigators, one of them a member of this Committee; the results of their study were made available to the Committee." *Id.* The study was commissioned as part of the effort, later completed, to relocate the INS to DOJ. *See* Report of the U.S. Department of Labor Committee on Administrative Procedure, Immigration and Naturalization Service (May 17, 1940) [hereinafter DOL REPORT].

²⁶ *See* *Wong Yang Sung v. McGrath*, 339 U.S. 33, 42-44 (1950) (quoting from DOL Report, *supra* note 25, at 81-82).

and properly. These agencies tended to micromanage the hearings. Presiding officers were often required to get interlocutory approval for routine and essential functions, such as decisions about the admissions of evidence. Moreover, the independent regulatory commissions tended to discourage or prohibit their subordinates from making factual findings, issuing initial or tentative decisions, or even recommending how the cases ought to be decided. The presiding officers in these agencies were often limited to summarizing the record, leaving as much of the decisionmaking to the agency head. These practices were problematic for several reasons. First, they were inefficient. Second, they may have contributed, both directly and structurally, to the reported incompetence of the presiding officers. This is because the agency's micromanagement of the hearings limited the appeal of the presiding officer's job and discouraged these subordinates from taking responsibility for and pride in their important work. Finally, the approach threatened the exclusive record principle. It did so by preventing the person who presided over the hearing from making a decision, while preserving the task of deciding for persons who were not present at the taking of evidence.

B. *The APA's ALJ Regime*

Congress addressed these problems by enacting the APA's hearing provisions, which establish minimum procedural requirements for quasi-judicial hearings conducted by administrative agencies.²⁷ That is, the requirements apply "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."²⁸ The statute's "on the record" language, as well as several other provisions of the APA's hearing provisions, codified pre-APA case law under the Due Process Clause. Most notable in this regard is the Supreme Court's 1936 decision in *Morgan v. United States*, which held that a final decision of the Secretary of Agriculture, made on review of a ratemaking hearing, violated due process because it was based on considerations outside the hearing record.²⁹ Ratemaking proceedings such as the one at issue in *Morgan* had a dual character: they were both quasi-legislative and quasi-judicial.³⁰ The agency was required first to determine whether the named party or parties had violated a legal duty to charge reasonable and non-discriminatory rates and, upon such a finding, the agency was authorized to establish a just and reasonable rate to be charged in the future.

²⁷ See 5 U.S.C. § 554, 556, 557; see also Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 148-53 (2019) (describing the APA's hearing regime).

²⁸ 5 U.S.C. § 554(a).

²⁹ See *Morgan v. United States*, 298 U.S. 468, 481-82 (1936); see also *Arizona Grocery Co. v. Atchison*, 284 U.S. 370, 389 (1931) (explaining how ICC ratemaking similarly was "dual in nature").

³⁰ See Emily S. Bremer, *Blame (or Thank) the Administrative Procedure Act for Florida East Coast Railway*, 97 CHI.-KENT L. REV. 79, ___ (2022) [hereinafter Bremer, *Blame (or Thank)*].

Simplified and stated in modern terms, ratemaking thus entailed adjudication (quasi-judicial) as a precondition to rulemaking (quasi-legislative).³¹ The quasi-judicial aspect of the proceeding demanded that certain minimum procedural requirements be observed in the hearing and also required that the agency's ultimate decision be based on the record so compiled.³² The APA's "on the record" language distinguishes between this kind of hearing, which is defined by the exclusive record principle,³³ and a quasi-legislative hearing, which was not subject to the same due process limitation and was also left unregulated by the APA.³⁴

The APA's hearing regime is predominately focused on structuring the position and powers of the officers who preside over hearings.³⁵ Although the APA allows "the agency" or "one or more members of the body which comprises the agency" to preside over hearings, it encourages and regulates the use of administrative law judges (ALJs) to perform this function.³⁶ Over all, the APA's structure is designed to vindicated several related goals, each of which can be readily tied to the pre-APA problems discussed in the previous section. The statute was designed to ensure (1) ALJ

³¹ This simplification risks conveying the possibility of separating out these two components, when in fact ratemaking's character is *dual* in the sense that the components are inextricably intertwined. In the APA, Congress forced ratemaking into the definition of rulemaking, thereby obscuring its dual character. *See* 5 U.S.C. §§ 551(4) & (5). I suspect this contributed to the loss over time of knowledge of the APA's due process foundation and, therefore, confusion about the reach of the APA's hearing provisions.

³² *Morgan*, 298 U.S. at 480-82.

³³ This principle is reflected in the APA's "on the record" language, 5 U.S.C. §§ 553(c) & 554(a), and is also codified in its provision stating that "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title," 5 U.S.C. § 556(e). As I have argued elsewhere, the APA was based on an understanding that this was the one kind of hearing to be used in adjudication. In other words, under the APA, to say that a hearing is to be held "on the record" is to say that the hearing is "formal," "quasi-judicial," "adjudicatory," or "evidentiary." These labels are synonymous.

³⁴ *Cf.* *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 246 (1973) (holding that neither the APA nor due process requires a formal hearing when an agency is engaged in "the formulation of a basically legislative-type judgment"). A legislative-type hearing is akin to a congressional committee hearing and lacks the trappings of the courtroom. The purpose is not to find adjudicative facts but to air views and inform the decisionmaker's "legislative judgment on questions of law and policy." Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404 (1942). The exclusive record principle has no place here.

³⁵ The current text of APA refers to these people as "employees," *see* 5 U.S.C. § 556(c), but the APA as enacted in 1946 referred to them as "officers," *see* Administrative Procedure Act of 1946, § 7(b), Pub. L. No. 79-404 (1946), available at <https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf>, and the Supreme Court has recently held that they are "officers" for Appointments Clause purposes. *See Lucia v. SEC*, 138 S. Ct. 2044 (2018).

³⁶ 5 U.S.C. § 556(b). The APA originally referred to ALJs as "examiners." *See* Administrative Procedure Act of 1946, § 7(b), Pub. L. No. 79-404 (1946), available at <https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf>. This was changed first to "hearing examiner" when the APA was codified in 1966, *see* [cite 1966 act], and then to "administrative law judge," by the Civil Service Commission, a change that Congress ratified by statutory amendment in 1978, *see* Pub. L. No. 95-251. *See* Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 110 n.8 (1981). The APA also recognizes that Congress may deviate from the APA's defaults by enacting statutes that provide for specialized adjudicators, either in the form of boards or individual officers. *See* 5 U.S.C. § 556(b). A good example of each is found in the adjudication scheme at issue in *Arthrex*, which includes both the Patent Trial and Appeal Board (PTAB) and its administrative patent judges (APJs).

impartiality; (2) ALJ competence; and (3) agency head control over the policymaking aspects of adjudicatory hearings.³⁷

ALJ Impartiality. Perhaps the most important aspect of the APA is its provisions designed to ensure that ALJs are impartial. The statute explicitly imposes on ALJs a duty of impartiality, declaring that “[t]he functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner,” and recognizing the possibility of ALJ disqualification in circumstances in which impartiality is not possible.³⁸ The statute also provides various structural protections of impartiality, seeking to achieve an internal separation of functions. ALJs “may not perform duties inconsistent with their duties and responsibilities as administrative law judges,” which would include duties related to investigation and prosecution³⁹ or engage in *ex parte* communications, including with other employees of the same agency who are involved in investigation or prosecution.⁴⁰ Furthermore, “[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review” of a formal hearing.⁴¹ Finally, the APA provides that ALJs should “be assigned to cases in rotation so far as practicable,”⁴² thus making it more difficult for the agency to seek to control the conduct of the hearing indirectly, through ALJ assignment decisions.⁴³

ALJs are also protected from aspects of the employment relationship that might impair their impartiality as adjudicators. ALJ salaries are established not by the employing agency, but by the Office of Personnel Management.⁴⁴ ALJs are not subject to performance evaluations⁴⁵ and “may not . . . be responsible to or subject to the supervision or direction of an employee or agent engaged in the

³⁷ Many but not all the provisions designed to vindicate these goals apply to all presiding officers, including non-ALJ presiding officers. This paper is particularly concerned with defending the constitutionality of the ALJ regime, so it focuses on ALJs.

³⁸ 5 U.S.C. § 556(b). “A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.” *Id.*

³⁹ 5 U.S.C. § 3105.

⁴⁰ *See* 5 U.S.C. § 554(d).

⁴¹ 5 U.S.C. § 554(d). These *ex parte* restrictions do not apply “in determining applications for initial licenses,” *id.* § 554(d)(A), or in “proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers.” *id.* § 554(d)(B). pursuant to section 557 of this title, except as witness or counsel in public proceedings

⁴² 5 U.S.C. § 3105.

⁴³ This possibility may remind the reader of the “panel stacking” practices of the PTAB, which presented the appearance of impropriety even if they were lawful. *See Arthrex*, ___ S.Ct. at ___; Walker & Wasserman, *supra* note 27, at ___.

⁴⁴ *See* 5 U.S.C. § 5372. ALJ positions are “super grade” positions, which is to say that the ALJ pay scale is offers higher pay than what would ordinarily be provided by the GS scale. *Compare* ALJ pay scale, *with* GS pay scale.

⁴⁵ *See* 5 U.S.C. § 4301(2)(D).

performance of investigative or prosecuting functions for an agency.”⁴⁶ An employing agency may take adverse employment action against an ALJ “only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.”⁴⁷ Such adverse employment actions including “removal,” “suspension,” “a reduction in grade” or “pay,” and “a furlough of 30 days or less.”⁴⁸ Exempted from this process are suspensions or removals by the head of an agency as “necessary in the interests of national security,”⁴⁹ reductions in force under OPM regulations,⁵⁰ This obligation, which was initially vested in the Civil Service Commission (CSC),⁵¹ was transferred to a newly created agency, the Merit Systems Protection Board (MSPB), in 1978.⁵² The MSPB has three members, each of which is appointed to a seven-year term by the President with the advice and consent of the Senate.⁵³ MSPB members have for-cause removal protection: the statute provides that “[a]ny member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.”⁵⁴

ALJ Competence. There are several ways in which the APA’s regime seeks to ensure that ALJs are competent to perform their functions and “highly responsible” for the work they produce.⁵⁵ First, the APA ensures that ALJs are able to exercise the powers necessary to conduct hearings, such as by “administer[ing] oaths and affirmations,”⁵⁶ “issu[ing] subp[er]enas authorized by law,”⁵⁷ ruling on the admission of evidence,⁵⁸ and streamlining the proceeding by facilitating the parties’ settlement or resort to alternative dispute resolution.⁵⁹ These powers first must be conveyed to the agency by Congress in some other statute.⁶⁰ The APA’s effect is to automatically subdelegate them to the agency’s ALJs, thus ensuring the ALJs are empowered to perform their function.⁶¹ To this end, although an

⁴⁶ 5 U.S.C. § 554(d).

⁴⁷ 5 U.S.C. § 7521.

⁴⁸ 5 U.S.C. §§ 7521(b)(1)-(5).

⁴⁹ 5 U.S.C. § 7532; *see id.* § 7521(b)(A).

⁵⁰ *See* 4 U.S.C. §§ 3502, 7521(b)(B).

⁵¹ Fuchs, *Fiasco*, *supra* note 51, at 738.

⁵² This was accomplished by the Reorganization Plan No. 2 of 1978, which was codified by the Civil Service Reform Act of 1978 (CSRA), Public Law No. 95-454, 92 Stat. 1111 (Oct. 13, 1978).

⁵³ *See* 5 U.S.C. §§ 1201, 1202(a).

⁵⁴ 5 U.S.C. § 1202(d).

⁵⁵ Fuchs, *Fiasco*, *supra* note 51, at 739 (explaining that the APA “embodies the conception of a corps of highly responsible hearing officers, originally put forward by the Attorney General’s Committee”).

⁵⁶ 5 U.S.C. § 556(c)(1).

⁵⁷ 5 U.S.C. § 556(c)(2).

⁵⁸ *See* 5 U.S.C. § 556(c)(3). The APA does not require agencies to observe the Rules of Evidence, but it does address some matters relating to the introduction of evidence of the parties right to engage in, for example, cross-examination. *See* 5 U.S.C. § 556(d).

⁵⁹ *See* 5 U.S.C. §§ 556(c)(6) & (7). This is merely a representative sampling of the powers enumerated in § 556(c).

⁶⁰ *See* 5 U.S.C. § 556(c).

⁶¹ *See* AG’S MANUAL, *supra* note ____, at 74.

agency may by rule “lay down policies and procedural rules which will govern the exercise of such powers by presiding officers,”⁶² the agency “is without power to withhold such powers.”⁶³ Second, the APA is designed to enable and encourage ALJs to take ownership and responsibility for the conduct of the hearing, the record it produces, and the initial decision based on that record. It does this by requiring that “[t]he employee who presides at the reception of evidence . . . shall make the recommended decision or initial decision . . . unless he becomes unavailable to the agency.”⁶⁴ This structure limits agency head micromanagement, thereby providing the space and incentive for the ALJ to take responsibility for her function and work product. Third, the placement of the ALJs within the civil service structure, in addition to promoting their independence and impartiality, was also intended to ensure their competence.⁶⁵ A critical component of this was ALJ examination and register, which was centrally managed, first by the CSC and later by the Office of Personnel Management (OPM). As will be discussed in greater detail below, this aspect of the regime has recently been dismantled by executive order.⁶⁶

Agency Head Control. Finally, the APA preserves agency head control over the various policymaking aspects of adjudication.⁶⁷ This control manifests both *ex ante* and *ex post*. *Ex ante*, the head of each adjudicating agency is responsible for appointing the ALJs it requires to conduct formal hearings.⁶⁸ The agency may also issue rules and guidance that ALJs must follow in the performing their duties. This may include procedural regulations governing the conduct of the hearing,⁶⁹ as well

⁶² AG’S MANUAL, *supra* note ____, at 74.

⁶³ AG’S MANUAL, *supra* note ____, at 74. “This follows not only from the statutory language, ‘shall have authority’, but also from the general statutory purpose of enhancing the status and role of hearing officers.” *Id.*

⁶⁴ 5 U.S.C. § 554(d).

⁶⁵ Recognizing that some agencies may not conduct enough hearings to warrant hiring ALJs and preferring that such hearings nonetheless be conducted internally to those agencies by ALJs hired through the civil service system and subject to all the relevant protections (including the prohibition on non-hearing related duties), Congress permitted agencies to share ALJs. 5 U.S.C. § 3344.

⁶⁶ *See infra* at notes ____-____ and accompanying text.

⁶⁷ The discussion of this aspect is brief here but elaborated upon below. *See infra* at Part II.A.

⁶⁸ “Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.” 5 U.S.C. § 3105. Elsewhere in the hearing provisions, the APA seems to use “the agency” to refer to what we might now understand to be the head of the agency. *See* 5 U.S.C. § 556(b)(1)-(2); *see also* 5 U.S.C. § 551(1) (defining “agency” as used in the APA to mean “each authority of the Government of the United States, whether or not it is within or subject to review by another agency”). This becomes clearer in contemplation of Congress’s standard practice of vesting the agencies’ authority in the head of the agency. *See, e.g.*, 10 U.S.C. § 1098bb (“[T]he Secretary of Education . . . may waive or modify any statutory or regulatory provisions applicable to the student financial assistance programs under title IV of the Act as the Secretary deems necessary in connection with a war or other military operation or national emergency . . .”); [add to string cite]; *but see* Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1 (2023). If there was any doubt about that interpretation, the Supreme Court has clarified that, by operation of the Appointments Clause, the agency *head* must appoint ALJs. *See Lucia*.

⁶⁹ *See* 5 U.S.C. § 556(c). As previously noted, the agency may regulate how ALJs exercise their powers, but may not withhold the powers listed in § 556(c). *See supra* at notes ____-____ and accompanying text.

as substantive rules and guidance establishing the law and policy that the ALJ must apply when making the initial decision. The statute also preserves the agency head's ability to personally preside over the hearing, in lieu of an ALJ.⁷⁰ If the agency does not preside over the hearing, it may choose, "either in specific cases or by general rule" to have the ALJ recommend a decision and certify "the entire record" to the agency head "for decision."⁷¹ Alternatively, the agency may have the ALJ issue an initial decision that may become final in the absence of review by the agency head.⁷² The APA firmly protects the agency head's authority to review ALJ decisions, providing that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."⁷³ This structure affords agencies broad discretion to design and implement a structure for intra-agency appeals from ALJ decisions, which may include an appeals body that stands between the ALJ and the agency head.⁷⁴ The only limitations on the agency head's review of the substance of an ALJ's decision are those that would constrain the agency if the agency presided over the hearing itself. That is, the agency head must comply with the various requirements imposed by due process, statutes, and the agency's own regulations. Notably, this includes the due process requirement (codified in the APA) that the agency's final decision be based exclusively on the hearing record.⁷⁵

C. *Emerging Threats to the APA's ALJ Regime*

There are numerous threats to the continued viability of the APA's hearing regime. The most direct, salient threat comes from the Supreme Court's changing views regarding the President's role in the separation of powers. But there are other threats as well. Indeed, the APA's hearing regime has suffered a long, slow unraveling by a combination of forces over the decades.⁷⁶ Recent executive

⁷⁰ See 5 U.S.C. § 556(b)(1)-(2).

⁷¹ 5 U.S.C. § 557(b); see 5 U.S.C. § 556(c)(10). The inclusion of the power to "make or recommend decisions in accordance with section 557" in § 556(c)'s list of automatically subdelegated powers suggests the agency may not prevent the ALJ from at least recommending a decision. See *supra* notes ____-____ and accompanying text.

⁷² See 5 U.S.C. § 557(b); see also 5 U.S.C. § 556(c)(10).

⁷³ 5 U.S.C. § 557(b).

⁷⁴ For excellent study of how agencies have exercised this discretion, see CHRISTOPHER J. WALKER & MATTHEW WIENER, AGENCY APPELLATE SYSTEMS: FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (Dec. 14, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3728393. The agency may even, by rule, decide that the agency head will not exercise its right under the APA to review decisions. This is rare in practice, although the SSA has taken this approach. See Eisenberg & Mendelson, *supra* note 68, at ____-____.

⁷⁵ See 5 U.S.C. § 556(e); *Morgan v. United States*, 298 U.S. 468, 481-82 (1936).

⁷⁶ In prior work, I have extensively documented these forces and their collective effect of establishing a paradoxical norm of exceptionalism in agency adjudication. See Emily S. Bremer, *The Exceptionalism Norm in Agency Adjudication*, 2019 Wis. L. Rev.

action, purportedly taken in response to the Supreme Court, dealt a significant blow to the APA's regime and has made the regime's peril more acute.

On the judicial front, the Supreme Court has issued developed a body of case law that has called into question the constitutionality of the APA's ALJ regime. The threat is multi-layered. Most narrowly, it implicates the Court's precedents interpreting the Appointments Clause and the scope of the President's authority to remove executive officers at will. The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States," but also permits Congress to "by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."⁷⁷ Although the Constitution is silent as to the President's authority to remove executive officers, older Supreme Court precedents view removal as part of the executive power vested in the President by Article II,⁷⁸ while also upholding Congress's authority to limit the President's authority to remove officers vested with administrative authority as opposed to purely executive duties.⁷⁹ The Court has begun to reconsider these older precedents in ways that, at a broader level, have begun to embrace a unitary theory of the President's executive power. The result has been to narrow Congress's authority to structure the administrative state and, of particular importance in the ALJ context, to cast doubt on statutory structures that insulate agencies from Presidential control, particularly through restrictions on the President's power to remove officers at will. These developments, as I have noted in prior work, have implicitly introduced an executive conception of administrative power that is in significant tension with the quasi-legislative and quasi-judicial conception of administrative power that was dominant in the New Deal era and informed the APA.⁸⁰ Three cases have particularly paved the way to today's widespread concern for the continued viability of the APA's ALJ structure.

The most obvious threat to the APA's ALJ regime emerged in 2010 when the Supreme Court held in *Free Enterprise Fund v. PCAOB*⁸¹ that two layers of for-cause removal protection violates the

⁷⁷ U.S. Const. Art. II, § 2. The clause thus creates a distinction between principal officers, which must be appointed by the President with the Senate's advice and consent, and inferior officers, whose appointment Congress may vest in the President alone, the

⁷⁸ See *Myers v. United States*, 272 U.S. 52 (1926).

⁷⁹ See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Perhaps it goes without saying, but I am summarizing aggressively here. Much more could be—and has been—said about the President's and Congress's respective authority regarding the removal of executive officers. That debate is beyond the scope of this paper, which is more narrowly focused on the present threats to the APA's ALJ structure.

⁸⁰ See *Bremer, Rediscovered Stages*, *supra* note 11, at 436-437.

⁸¹ *Free Enterprise Fund*, 130 S.Ct. 3138 (2010).

separation of powers.⁸² The case involved the Public Company Accounting Oversight Board (PCAOB), a multi-member quasi-governmental agency created by the Sarbanes-Oxley Act of 2002 in the wake of the Enron accounting scandal.⁸³ Modeled on the private self-regulatory entities common in the securities industry, the PCAOB was organized as private, nonprofit corporation and vested with expansive authority over the accounting industry.⁸⁴ The Securities and Exchange Commission (SEC) is authorized, “after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury,” to appoint members of the Board, who serve a term of five years.⁸⁵ “A member of the Board may be removed by the Commission from office . . . for good cause shown before the expiration of the term of that member.”⁸⁶ The statute defines good cause somewhat narrowly and requires the SEC to find the requisite cause “on the record, after notice and opportunity for hearing.”⁸⁷ The SEC is itself a multi-member, independent regulatory commission composed of five members who are appointed by the President, with the advice and consent of the Senate, for a term of five years.⁸⁸ Although the SEC’s organic statute (the Securities and Exchange Act of 1934) contains no provision addressing the removal of SEC commissioners, the parties before the Supreme Court in *Free Enterprise Fund* agreed that the commissioners enjoy for-cause removal protection.⁸⁹ The majority accepted this premise and held “that the dual for-cause limitations on the removal of Board members contravene the Constitution’s separation of powers”⁹⁰ because it resulted in “a Board that is not accountable to the President, and a President who is not responsible for the Board.”⁹¹

The problem for the APA is that its hearing regime entails *at least* two layers of for-cause protection. As noted above, ALJs can be removed from office only for cause, which is determined on the record by the MSPB. Members of the MSPB also enjoy for-cause removal protection. When the

⁸² *Free Enterprise Fund*, 130 S.Ct. at 3147.

⁸³ *Free Enterprise Fund*, 130 S.Ct. at 3147. For an excellent discussion of the many quasi-governmental entities that have been created by Congress, see Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2014).

⁸⁴ See *Free Enterprise Fund*, 130 S.Ct. at 3147-48 (describing the Board’s powers); see also 15 U.S.C. § 7211(a) (“The Board shall be a body corporate, operate as a nonprofit corporation, and have succession until dissolved by an Act of Congress.”). Although the statute declares that “[t]he Board shall not be an agency or establishment of the United States Government,” and “[n] member [of] . . . the Board shall be deemed to be an officer . . . of . . . the Federal Government,” no party in *Free Enterprise* relied on that declaration to support its arguments before the Supreme Court. 15 U.S.C. § 7211(b).

⁸⁵ 15 U.S.C. § 7511(4)(A); see *id.* § 7511(5).

⁸⁶ 15 U.S.C. § 7211(e)(6).

⁸⁷ 15 U.S.C. § 7217(3).

⁸⁸ 15 U.S.C. § 78d(a).

⁸⁹ See *Free Enterprise Fund*,

⁹⁰ *Free Enterprise Fund*, 130 S.Ct. at 3151.

⁹¹ *Free Enterprise Fund*, 130 S.Ct. at 3153.

ALJ's employing agency is an independent agency, that would seem to add yet another layer of for-cause removal protection into the regime. Thus, for example, in the case of APA hearings conducted by the SEC, for-cause removal protections are afforded to: (1) SEC commissioners; (2) SEC ALJs; and (3) MSPB members.

The APA's ALJ structure would not be threatened by *Free Enterprise Fund* if ALJs were employees rather than officers—but the Supreme Court foreclosed this possibility in 2018, in the case of *Lucia v. SEC*.⁹² Before 2018, the SEC had delegated its authority to appoint ALJs to certain members of its staff. If the ALJs were employees, this approach was lawful. But if the ALJs were inferior officers, then the appointments clause demands that they be appointed (as the APA requires) by the head of the agency. Resolving a circuit split,⁹³ the Supreme Court held in *Lucia* that ALJs are inferior officers and must therefore be appointed by the agency head. The Court further held that the SEC—and not its Chairman or some subset of commissioners—is the “head[] of Department[]” for Appointments Clause purposes. The SEC responded to the decision by retroactively approving of the appointments of the agency's ALJs. *Lucia* was provided a hearing before a new ALJ.

Most recently, in *United States v. Arthrex*,⁹⁴ the Supreme Court held that for-cause removal protection for Administrative Patent Judges (APJs) on the Patent Trial and Appeals Board (PTAB) combined with a provision prohibiting the agency head (the Director of the Patent and Trademark Office (PTO)) violated the separation of powers. The problem with this combination is that it made the APJs principal officers who could not be constitutionally appointed by the head of the agency, as the statute contemplates, rather than by the President with advice and consent of the Senate. Interestingly, the Supreme Court remedied the problem by inserting agency head control into the regime rather than by severing the APJ's for-cause removal protection. Some have interpreted *Arthrex* as a significant shift from the straightforward formalism of *Free Enterprise Fund* and *Lucia* to a more functional analysis.

The current consensus seems to be that the APA's ALJ structure is unconstitutional under this line of Supreme Court cases.⁹⁵ But is it?

⁹² See 138 S.Ct. 2044.

⁹³ In *Lucia*, a panel of the D.C. Circuit held that ALJs are employees and not officers, see 832 F.3d 277, 283-89 (2016), a decision that was affirmed en banc by a per curiam opinion because the en banc split equally, see 868 F.3d 1021 (2017). The decision conflicted with the 10th Circuit's contrary decision in *Bandimere v. SEC*, 844 F.3d 1168, 1179 (2016).

⁹⁴ 141 U.S. 1970 (2021).

⁹⁵ See, e.g., Linda D. Jellum, “*You're Fired!*” *Why the ALJ Multi-Track Dual Removal Provisions Violate the Constitution and Possible Fixes*, 26 GEO. MASON L. REV. 705 (2019). [add to string cite]

II. Presidential Duties in Adjudication

There is an unavoidable tension in adjudicatory hearings: Article II requires presidential responsibility for agency policymaking, while the Due Process Clause requires some insulation for the officers who must preside impartially over quasi-judicial administrative hearings. This part will argue that the APA's ALJ regime strikes an optimal balance between the Constitution's competing demands. Indeed, it enables the President to discharge three categories of duties simultaneously, ensuring responsibility for agency policymaking while ensuring fair adjudication within agency programs and in removal (and other adverse) actions against ALJs.

A. *Presidential Responsibility for Agency Policymaking*

In recent separation-of-powers cases, the Supreme Court has emphasized the constitutional imperative for the President to retain authority over and responsibility for administrative policymaking. A full view of this emphasis requires one to venture beyond the cases most directly threatening the ALJ regime, to include others that have contributed to the Court's development of an executive theory of administration. Particularly noteworthy are two cases in which the Supreme Court invalidated for-cause removal protection for the single principal officer at the head of an agency vested with significant administrative authority.

First, in *Seila Law*, the Supreme Court invalidated for-cause removal protections for the Director of the Consumer Financial Protection Bureau (CFPB), an agency that was created by Congress in 2010 “as an independent financial regulator within the Federal Reserve System.”⁹⁶ Reacting in response to the subprime mortgage crisis, Congress tasked the CFPB with “the administration of 18 existing federal statutes” governing consumer credit, lending, and debt collection and also “vested the CFPB with potent enforcement powers.”⁹⁷ The structure of the agency was also non-traditional: the CFPB was headed by a single Director rather than by a multi-member commission. The Director could be removed only for “inefficiency, neglect of duty, or malfeasance in office.”⁹⁸ Moreover, “[i]n addition to lacking the most direct method of presidential control—removal at will—the agency’s unique structure also forecloses certain indirect methods of control.” First, the control afforded to the President by virtue of the appointment power was blunted by the establishment of a 5-year term of service for the Director of this single-headed agency, and the

⁹⁶ 140 S.Ct. at 2193; *see* Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376.

⁹⁷ 140 S.Ct. at 2193.

⁹⁸ 12 U.S.C. § 5491(c)(1), (3).

agency's operations were funded outside the usual appropriations process.⁹⁹ The consequence of this institutional design was that “[t]he Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.”¹⁰⁰ The Court held that such an officer, who wields executive power and policymaking authority, must be responsible to the President.¹⁰¹ To remedy the constitutional defect, the Court severed the for-cause removal provision.¹⁰²

Second, in *Collins v. Yellen*,¹⁰³ the Court invalidated for-cause removal protection for the single Director of the Fair Housing Finance Administration (FHFA).¹⁰⁴ The FHFA is an “independent agency”¹⁰⁵ created by Congress in Housing and Economic Recovery Act of 2008 to oversee Fannie Mae and Freddie Mac in response to the financial crisis.¹⁰⁶ The statute grants the agency broad regulatory, supervisory, investigatory, and enforcement authority, and also empowers the agency “to act as the companies’ conservator or receiver for the purposes of reorganizing the companies, rehabilitating them, or winding down their affairs.”¹⁰⁷ Although the FHFA has more limited duties than the CFPB and principally regulates “Government-sponsored entities” rather than “purely private actors,” the Court found these factors insufficient to distinguish the FHFA from the CFPB for Article II purposes.¹⁰⁸ It reasoned that the “[t]he President’s removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies.”¹⁰⁹ These purposes include: “help[ing] the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch,” “ensur[ing] that these

⁹⁹ *Seila Law*, 140 S.Ct. at 2204.

¹⁰⁰ *Seila Law*, 140 S.Ct. at 2203-04; *see also id.* at 2191 (explaining that the agency’s structure was especially problematic because the CFPB director was a principal officer, with “no boss, peers, or voters to report to,” and vested with “vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy.”; *see* Kevin M. Stack, *Agency Independence After PCAOB*, 32 CARDOZO L. REV. 2391, ___ (2011).

¹⁰¹ *See Seila Law*, 140 S.Ct. at 2199-200. [Note: A future draft will contain significantly more analysis of *Seila Law* and particularly how it rejects the quasi-legislative/judicial conception of administration reflected in *Humphrey’s Executor*, replacing it with an executive conception. This might go in Part III.]

¹⁰² *See Seila Law*, 140 S.Ct. at 2211.

¹⁰³ *Seila Law*, 141 S.Ct. 1761 (2021).

¹⁰⁴ *Collins*, 141 S.Ct. at 1783. The statute provides that “[t]he Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President.” 12 U.S.C. § 4512(b)(2).

¹⁰⁵ 12 U.S.C. § 4511(a).

¹⁰⁶ *See Collins*, 141 S.Ct. at 1770, 1771.

¹⁰⁷ *Collins*, 141 S.Ct. at 1772.

¹⁰⁸ *See Collins*, 141 S.Ct. at 1783-84.

¹⁰⁹ *Collins*, 141 S.Ct. at 1784.

subordinates serve the people effectively and in accordance with the policies the people presumably elected the President to promote,” and “subject[ing] Executive Branch actions to a degree of electoral accountability.”¹¹⁰ As in *Seila Law*, the Court held that the for-cause removal provisions violated the separation of powers.¹¹¹

A core feature of the APA’s hearing regime—its preservation of agency head control—ensures that the President retains control over and responsibility for the policymaking functions of adjudicatory agencies. Under the APA’s regime, each agency is responsible for appointing its ALJs¹¹² and has the authority to issue procedural rules to govern how ALJs use the powers delegated to them to conduct hearings.¹¹³ It can also issue policy statements, interpretive rules, or legislative rules governing the substantive law and policy that ALJs must apply or follow when deciding the cases that come before them. The APA also recognizes broad agency procedural discretion to design and implement the process for internal agency review of ALJ decisions. The ALJs’ initial decisions may become final if the agency chooses (by rule or adjudication) not to review them. But the APA also provides that “[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.” Agency head review is not plenary. But the limits on the agency head’s discretion—which may come from the Constitution, applicable statutes, and the agency’s own regulations—are those which would apply even if the agency did not use ALJs to conduct its hearings. Moreover, the MSPB’s duties, which will be discussed in greater detail below, are extremely narrow and do not implicate the policymaking aspects of the adjudicatory hearings conducted within the individual agencies. For this reason, the for-cause protection afforded to the MSPB’s members erects no barrier between the President and those vested with the authority and responsibility for that substantive policymaking.

In a traditional executive agency headed by a single principal officer subject to at-will removal by the President, the agency head control afforded by the APA’s regime undoubtedly preserves the President’s responsibility for the policymaking aspects of formal adjudication. The agency head retains the responsibility for appointing ALJs, procedural and substantive control over the hearing program, and the authority to review the individual, initial decisions issued by the agency’s ALJs. And the President retains control over the agency head through the executive power of at-will removal. In this

¹¹⁰ *Collins*, 141 S.Ct. at 1784.

¹¹¹ *Collins*, 141 S.Ct. at 1787.

¹¹² See 5 U.S.C. § 3105.

¹¹³ See 5 U.S.C. § 556(c); *supra* at note ____ and accompanying text.

context, the APA's structure is indistinguishable from the structure of the *inter partes* review process that emerged from the Supreme Court's decision in *Arthrex*. Indeed, the main difference between the two regimes is that the agency head control the Supreme Court injected into the *inter partes* review structure is already supplied expressly by the APA. If anything, an agency adjudicating under the APA has greater control over its hearing program than the control the Supreme Court found sufficient in *Arthrex*: the APA's minimum procedural requirements for adjudicatory hearings appear skeletal in comparison to the detailed statutory requirements that Congress imposed upon the PTAB in the America Invents Act of 2011.¹¹⁴

At this point it becomes apparent that the APA's ALJ structure poses no special threat to the separation of powers in the context of adjudication by an independent regulatory commission such as the SEC.¹¹⁵ As in an executive agency, the APA ensures that every policymaking aspect of adjudicatory hearings—from ALJ appointment to the applicable procedural rules to the substantive law and policy to the form and content of the final decisions—are subject to agency head control. The only difference is that the head of the agency is a multi-member body rather than a single principal officer.¹¹⁶ Between the President and those responsible for the policymaking aspects of adjudicatory hearings, including the agency's final decisions, there is only one effective layer of for-cause protection: that which protects the individual principal officers who together form the agency head.

Free Enterprise Fund thus has no application in the context of APA adjudication, regardless of whether the adjudicating agency is an executive agency or an independent regulatory commission. The APA's robust preservation of agency head control ensures that those vested with the administrative function of developing policy through individual adjudications are responsible to the President.

This conclusion is further bolstered by the fact that ALJs are inferior officers vested with important but sharply limited duties.¹¹⁷ The Court has long distinguished between principal and inferior officers, suggesting that Congress has broader authority to restrict the President's power to remove inferior officers. In *United States v. Perkins*,¹¹⁸ the Supreme Court upheld Congress's authority

¹¹⁴ See generally, Bremer, *Exceptionalism*, *supra* note ____, at ____-____ (offering a deep dive into the statutory and regulatory provisions governing the *inter partes* review process).

¹¹⁵ Or to put it another way, if there is a threat, it's to be found in the *commissioners'* for-cause removal protections. Although it seems that the Court has rejected *sub silentio* the rationale of *Humphrey's Executor*, it has so far retained its holding.

¹¹⁶ See *Lucia*, 138 S.Ct. at 2050.

¹¹⁷ See *Seila Law*, 10 S.Ct. at 2192 (noting that one of “only two exceptions to the President's unrestricted removal power” allows “Congress [to] provide tenure protections to certain *inferior* officers with narrowly defined duties”).

¹¹⁸ 116 U.S. 483 (1886).

to restrict the Secretary of the Navy's ability to remove a cadet engineer, an inferior officer whose appointment was vested by statute in the Secretary as the head of department.¹¹⁹ The Court explained:

We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto.¹²⁰

But will this recognition of greater latitude for Congress to restrict the removal of inferior officers survive? Although the Court has so far distinguished *Perkins* from the structures it has invalidated, there is language to suggest the officer's rank may not be enough to justify removal protections.¹²¹ For example, the Court has explained that "[a]t-will removal ensures that 'the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.'"¹²² On the other hand, *Arthrex* preserved the APJ's for-cause removal protection by inserting agency head control into the *inter partes* review structure, thereby transforming the APJs from principal to inferior officers.¹²³

More important than an ALJ's status as an inferior officer, however, is the nature of the function the ALJ is responsible for performing. The next section considers this, arguing that the APA's structure enables the President to discharge his executive duty to ensure fair hearings.

¹¹⁹ See *Perkins*, 116 U.S. at 484. The case contains no mention or discussion of whether Congress's broad authority to restrict the department head from removing the inferior officer would have similar effect against a President who sought to remove the inferior officer. *Myers* seems to approve of *Perkins* and of the proposition that Congress generally has the authority to specify the qualifications of an executive office. See *Myers v. United States*, 272 U.S. 52, 127-28 (1926). [Note: A future draft will include deeper analysis of *Perkins* and *Myers*.]

¹²⁰ *Perkins*, 116 U.S. at 485.

¹²¹ CFPB's extensive regulatory authority seemed to have significant effect on the outcome in *Seila Law*, but the Court disclaimed that effect in *Collins*, declaring that "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head." *Collins*, 141 S.Ct. at 1784. This flip has produced some distrust of the Court's reasoning and distinguishing factors. See, e.g., Jack Beermann, *The Anti-Innovation Supreme Court: Major Questions, Delegations, Chevron and More*, WM. & MARY L. REV. (forthcoming 2023), available at a https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4383132.

¹²² *Collins*, 141 S.Ct. at 1784 (quoting *Free Enterprise Fund*, 561 U.S. at 498).

¹²³ See *Arthrex*, 141 S.Ct. at ____.

B. *Presidential Duty to Ensure Fair Agency Adjudication*

The exclusive function of the ALJ—presiding over the formal hearings necessary to finally adjudicate individual cases—is different from other kinds of administrative responsibilities.¹²⁴ The Supreme Court has consistently recognized this distinction. In *Humphrey’s Executor*, the quasi-judicial responsibilities of the Federal Trade Commission (FTC) provided significant support for the Court’s conclusion that the for-cause removal protections afforded to the commissioners was constitutional.¹²⁵ In *Wiener v. United States*, the Court *read into a statute* limitations on the President’s power to remove an officer vested exclusively with adjudicatory duties.¹²⁶ This marked a departure from the general rule that statutory silence on the question of removal is interpreted to leave in place the executive power to remove an officer at will.¹²⁷ More recently, in *Seila Law*, the Court distinguished the constitutional (if narrowly so) single Administrator at the head of the SSA from the unconstitutional single Director of the CFPB on the grounds that SSA’s “role is largely limited to adjudicating claims for Social Security benefits.”¹²⁸ Even in *Free Enterprise Fund*, the inclusion of rulemaking and enforcement functions in the PCAOB’s statutory mandate contributed significantly to the Court’s disapproval of the dual for-cause removal provisions and provided the basis for distinguishing officers such as ALJs that are vested with exclusively adjudicatory functions.¹²⁹

But *why* is adjudication—and particularly the conduct of adjudicatory hearings—different from other sorts of administrative responsibilities? The simple answer is that it is a quasi-judicial function that is not primarily about policymaking or enforcement discretion.¹³⁰ An ALJ’s function is find facts and develop a record that can support an ultimate determination of how established law and policy apply to individual cases.¹³¹ In this way, the ALJ’s job is more like that of a judge in a trial court than

¹²⁴ See, e.g., Harold J. Krent, *Limits on the Unitary Executive: The Special Case of the Adjudicative Function*, 46 VT. L. REV. 86 (2021).

¹²⁵ See *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). Today, the Court seems more inclined to preserve *Humphrey’s Executor* on the basis that the FTC is headed by a *multi-member* body, rather than by a single director. See *Colins*, 141 U.S. at ____; *Seila Law*, 140 U.S. at 2192. Indeed, *Humphrey’s Executor* is an exemplar of the non-executive conception of administrative power that was dominant in the New Deal era but seems to have been discarded in recent decades. See Bremer, *Rediscovered Stages*, *supra* note 11, at ____.

¹²⁶ 357 U.S. 349 (1958).

¹²⁷ See *Shurtleff v. United States*, 189 U.S. 311, 316 (1903).

¹²⁸ *Seila Law*, 140 S. Ct. 2183, 2202 (2020).

¹²⁹ See *Free Enterprise Fund*, 561 U.S. at 507 n.10; Stack, *supra* note ____, at 2392.

¹³⁰ *Cf.* *United States v. Mead Corp.*, 533 U.S. 218, 243 (2001) (Scalia, J., dissenting) (explaining that APA formal adjudication “is modeled after the process used in trial courts” and “the purpose of such a procedure is to produce a closed record for determination and review of the facts”).

¹³¹

it is like that of a legislator participating in committee work or deliberating on proposed legislation.¹³² Only in rare cases does a formal hearing in an individual dispute require resolving an undetermined policy matter. And when it occurs, the policy matters in question are typically quite narrow. This reality explains much of the modern disfavor for administrative policymaking through adjudication: it is incremental, *ad hoc*, narrow in legal effect, and slow to emerge and evolve. The APA's regime ensures that ALJs have the structural position and protection to faithfully discharge their narrow adjudicative function, while (for the reasons previously discussed) preserving agency head control of the policymaking aspects of agency adjudication.

Adjudicatory hearings are also different because they implicate concerns at the heart of the Due Process Clause. Due process requires a fair hearing: one that is procedurally fair and also one that has the appearance of fairness.¹³³ Crucially, a fair hearing is conducted by an impartial adjudicator.¹³⁴ While the APA's various protections of agency head control ensure presidential control over policymaking, its for-cause protections enable the president to ensure that due process is satisfied in the quasi-judicial component of adjudication (which is most of the task).

The President's lawful exercise of executive power under Article II—just like Congress's lawful exercise of the legislative power under Article I—presupposes conformity with the demands of due process. In the context of administrative adjudication, both of these propositions are implicated, although the Supreme Court has historically focused on the legislative implications rather than executive implications.¹³⁵ A good example is found in *Wong Yang Sung v. McGrath*,¹³⁶ in which the Court held that immigration deportation hearings were subject to the APA's hearing provisions.¹³⁷ The government argued that the APA did not apply because the hearing in deportation was not “required by statute”¹³⁸ but rather by due process as determined by pre-APA judicial precedent.¹³⁹ While Congress had authorized the Immigration and Naturalization Service (INS) to deport persons found unlawfully within the United States, the statute conveying this authority did not require the agency to

¹³² *Cf.* Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 884, 882-83 (2009) (describing the mental processes involved in judicial decisionmaking).

¹³³ *See* Concrete Pipe & Prods. Of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 619 (1993).

¹³⁴ *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004); *Concrete Pipe & Prods.*, 508 U.S. at 617. “A fair hearing necessarily includes an impartial tribunal.” *Marcello v. Bonds*, 349 U.S. 302, 315 (Black, J., dissenting).

¹³⁵ This may be because: (1) all administrative action is undertaken pursuant to statute and thus always implicates Congress's legislative power; and (2) as previously noted, the New Deal conception of administrative power neglected and even denied administration's executive character.

¹³⁶ 339 U.S. 33 (1950).

¹³⁷ *Wong Yang Sung*, 339 U.S. at 51.

¹³⁸ 5 U.S.C. § 554(a).

¹³⁹ *See* *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86 (1903).

conduct pre-deportation hearings. In response to a claim that the statute so written violated due process and “to save the statute from invalidity,” the Supreme Court read a hearing requirement into it.¹⁴⁰ Justice Jackson, writing for the Court in *Wong Yang Sung*, treated the APA as a legislative specification of the minimum requirements of due process in adjudicatory hearings, reasoning that to place the Immigration Act outside of the APA’s hearing requirements would “again bring into constitutional jeopardy.”¹⁴¹ Justice Jackson explained that the “constitutional requirement of procedural due process of law derives from the same source as Congress’ power to legislate and, where applicable, permeates every valid enactment of that body.”¹⁴² In similar fashion, the President’s duty to take care that the laws be faithfully executed arises from the same source as the constitutional requirement of procedural due process of law. In the context of adjudicatory hearings conducted by administrative agencies, the constitutional requirement of procedural due process permeates every valid exercise of the executive power.

From this perspective, it emerges that APA’s hearing regime enables the President to fulfill his constitutional obligation to ensure fair hearings in administrative adjudication. This is not necessarily to say that the APA’s regime is constitutionally mandated. Indeed, at least under current doctrine, it probably is not. For example, the Supreme Court has suggested that due process does little to mandate a separation of functions in federal agency adjudication,¹⁴³ although some D.C. Circuit precedent has held that due process may require some ex parte restrictions in agency rulemakings that have some quasi-judicial character.¹⁴⁴ More broadly, the modern approach to procedural due process is managerial in its focus, sharply limited by the public rights doctrine,¹⁴⁵ and governed by the highly flexible cost-benefit framework of *Matthews v. Eldridge*.¹⁴⁶ On the other hand, as Part III will elaborate, the APA’s

¹⁴⁰ *Wong Yang Sung*, 339 U.S. at 50; see also *The Japanese Immigrant Case*, 189 U.S. at 101 (“In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution.”).

¹⁴¹ *Wong Yang Sung*, 339 U.S. at 50.

¹⁴² 339 U.S. at 49. [Note: I understand that the continued vitality of *Wong Yang Sung* is questionable after *Marcello v. Bonds* and other developments in due process precedent. I do believe, however, that Justice Jackson had it right, and I suspect that the APA’s enactment had the unintended consequence of arresting the development of procedural due process doctrine in the context of federal administrative adjudication. Part III will elaborate on these themes, but I will confess that my thinking is nascent and will benefit considerably from our discussion.]

¹⁴³ See Stack, *supra* note 100, at 2397-98 (discussing *FTC v. Cement Institute*, 333 U.S. 683 (1948)).

¹⁴⁴ See *Home Box Office, Inc. v. Fed. Comm’n Comm’n*, 567 F.2d 9 (D.C. Cir. 1977); *Action for Children’s Television, v. Fed. Comm’n Comm’n*, 564 F.2d 458 (D.C. Cir. 1977); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959); see generally ESA SFERRA-BONISTALLI, EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING, FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (May 1, 2014); Ernest Gellhorn & Glen O. Robinson, *Rulemaking Due Process: An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201 (1981).

¹⁴⁵ See generally Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007).

¹⁴⁶ 424 U.S. 319 (1976).

1946 enactment largely relieved the Supreme Court of continuing responsibility for determining the minimum requirements of due process in federal administrative hearings. In the APA, Congress took on that responsibility, with the likely effect of radically reducing the need for litigation on the subject. The Court should be reluctant to dismantle the APA's regime, which quelled a vigorous and longstanding fight over the basic impartiality and competence of ALJs and the fundamental fairness of vesting in administrative agencies (rather than courts) the primary jurisdiction to conduct the hearings necessary to resolve disputes that arise out of administrative programs.¹⁴⁷ Surely it is preferable to enforce the legislature's hard-fought compromise on these issues and its determination that the benefits of using ALJs outweigh their costs.¹⁴⁸ And by upholding and enforcing the APA, the Supreme Court will ensure the President's continued access to a hearing regime that ensures presidential responsibility for executive policymaking through fair adjudicatory hearings. In short, the Court should recognize that the APA was well designed to ensure properly presidential adjudication.¹⁴⁹

C. *Presidential Duty to Ensure Fair MSPB Adjudication*

The MSPB's duties with respect to the APA's ALJ regime are extremely narrow: it is responsible conducting the formal hearings to necessary to determine whether there is good cause to remove or take other adverse action against an ALJ. As noted above, the MSPB has no role whatsoever in the execution of the agency programs in which the various ALJs serve.¹⁵⁰ Nor is the MSPB vested with the prosecutorial discretion to decide whether and when an ALJ should be accused of conduct that might constitute good cause for removal. These responsibilities—i.e., to oversee the policymaking aspect of agency hearings and to prosecute ALJs for good cause—are vested in the head of each adjudicatory agency. The MSPB is responsible for conducting hearings and adjudicating good cause against ALJs. Only one layer of for-cause protection stands between the President and the MSPB members who are responsible for discharging these duties. And that layer of for-cause protection enables the President to meet the demands of due process and ensure the fair adjudication of adverse

¹⁴⁷ See Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57 (1979); Ralph F. Fuchs, *The Hearing Examiner Fiasco Under the Administrative Procedure Act*, 63 HARV. L. REV. 737 (1950).

¹⁴⁸ Cf. *Wong Yang Sung*, 339 U.S. at 46-47 (acknowledging that adjudication under the APA can be costly, but also recognizing that “the power of the purse belongs to Congress, and Congress has determined that the price for greater fairness is not too high”).

¹⁴⁹ Some may suggest this is a functional conclusion at odds with the Supreme Court's formalist approach to the separation of powers. Cf. Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1699-700, 1717 (2020). But surely a formalist approach should be able to accommodate the unavoidable confluence of multiple legal commands. That is, the Court's formalist approach to separation of powers is not undermined by a simultaneous, formalist approach to enforcing the APA or (in the alternative) the Due Process Clause.

¹⁵⁰ See *supra* at notes ___ - ___ and accompanying text.

actions taken against the ALJs. From the President's perspective, then, the MSPB's role in the APA's ALJ regime respects both the separation of powers and the demands of due process.

III. Existential Threats to Administrative Adjudication

Even if the Supreme Court sustains the APA's ALJ regime against the imminent constitutional challenge, the regime faces other threats that are more profoundly existential. First, the APA is based on a New Deal-era conception of administrative action that the Supreme Court has slowly but persistently eroded in favor a purely executive conception. If fully realized, this new conception may be incompatible with the longstanding practice placing hearings in agencies instead of in courts and ensuring due process according to the APA's legislative specifications. Second, there is strong evidence that the political will to enforce the APA's hearing regime has dissipated over time and may now be collapsing entirely. Third, even if the APA could be reinvigorated and enforced, there is some evidence to suggest that its regime may be ineffective in ensuring ALJ impartiality. A forthright analysis of these threats raises the unpalatable possibility that we may be back at square one in the project of ensuring due process in intra-agency adjudicatory hearings. Worse, it suggests there may not be a viable alternative to the APA's hearing regime. If so, it may be necessary to consider moving adjudicatory hearings out of the executive branch and into an Article I or Article III court.

A. *A Deeper, Conceptual Problem?*

One objection to the argument set forth in Part II is that its close, technical analysis saves the APA only by losing the forest for the trees, that is, by focusing intently on the individual aspects of the APA's regime and thereby obscuring the reality that it effectively insulates the ALJs from their employing agencies and, in turn, from presidential control. From this perspective, singling out any one aspect of the regime for constitutional analysis is misleading, although the problem cuts in both directions in the quest to determine whether the regime is consistent with the separation of powers. Cutting in one direction, the ALJs' for-cause removal protection is only one element of the APA's regime that contributes to the overall goal of insulating ALJs from the political pressures that might impair their adjudicatory function. To focus on for-cause removal is to ignore all the other provisions designed to insulate ALJs from their agencies so that they can perform their function independently and impartially. Cutting in the other direction, the APA's preservation of agency head authority to review individual decisions seems sufficient to save the regime under *Arthrex*.¹⁵¹ But to focus on this

¹⁵¹ See 5 U.S.C. § 557(b); *Arthrex*,

one element of the regime is to ignore other provisions that contribute to ensuring the agency head retains ultimate responsibility for the policymaking and executive functions that the agency fulfills through the conduct of its hearing program. A complete, forthright evaluation of the APA's hearing regime should be more holistic, combining formal attention to the law's details with a functional understanding of the regime's operation.

While the APA's regime preserves agency head control of the policymaking aspects of adjudicatory hearings, it *also* seeks to insulate ALJs so that they can be impartial in the performance of their purely adjudicative functions.¹⁵² One might reasonably ask whether the APA is *effective* in its goal of insulating ALJs. No comprehensive empirical evaluation of this question has yet been conducted. There is some limited evidence suggesting that relatively few ALJs feel pressured by their agencies to rule in a particular way in the hearings over which the ALJs preside. One study indicated that twenty-six percent of ALJs in the Social Security Administration (SSA), which employs the vast majority of ALJs,¹⁵³ reported feeling such pressure.¹⁵⁴ Another study reported that the figure was even lower—just nine percent—among ALJs outside of the SSA.¹⁵⁵ Another possible indicia of subjective insulation from agency leadership might be found in ALJ organization and efforts to oppose agency management without an apparent fear of reprisal. For example, the SSA's ALJs have a labor union and professional organization, the Association of Administrative Law Judges (AALJ), that represents their interests.¹⁵⁶ Through the AALJ, SSA's ALJs have pushed back against the efforts of the SSA's leadership to manage its hearings program. Most notably, when the SSA adopted “benchmarks” requiring each ALJ to issue 500-700 decisions per year, the AALJ sued, alleging that this management infringed on the ALJs' decisional independence.¹⁵⁷ Although the court was not receptive to the claim,¹⁵⁸ the ALJs'

¹⁵² Cf. James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1192 (2006) (arguing that administrative judges neither have nor require independence in the judicial sense to perform their function of “presid[ing] impartially over fair hearings that implement and administer agency policy”).

¹⁵³ Of the approximately 1700 ALJs employed government-wide, about 1500 are employed by SSA. See [cite more detailed statistics].

¹⁵⁴ Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 280 (1994). This measurement of perceived independence, of course, may or may not correlate with actual independence.

¹⁵⁵ Koch, *supra* note 154, at 278. Non-ALJ administrative judges, who lack the APA's protections, reported “less anxiety over their impartiality and independence than ALJs.” Kent Barnett, *Resolving the ALJ Quandary*, 66 VANDERBILT L. REV. 797, 819 (2013) (citing Koch, *supra* note 154, at 279). Does this mean the APA is less effective in achieving its aims than a formal analysis might suggest? If so, perhaps the statute is consistent with the separation of powers but for unfortunate, self-defeating reasons. Further implications of concluding that the APA is ineffective in insulating ALJs are examined in greater detail below. See *infra* at Part III.B & C.

¹⁵⁶ See <https://aalj.org/>.

¹⁵⁷ Ass'n of Admin. Law Judges v. Colvin, 2014 WL 789704 (N.D. Ill. 2014).

¹⁵⁸ The district court dismissed the suit, see Ass'n of Admin. Law Judges v. Colvin, 2014 WL 789704, and that disposition was affirmed on appeal, see 777 F.3d 402 (7th Cir. 2015). Other courts presented with similar claims by ALJs

pursuance of this and related litigation suggests that the APA's regime does facilitate a distinct ALJ identity that stands apart from the institutional structure and identity of each agency that employs ALJs. If one embraces the proposition that "personnel is policy," this evidence might suggest that the APA's ALJ regime erects too strong a barrier between the President and the agencies' execution of the law through adjudicatory hearings.¹⁵⁹

More profoundly, the ability to distinguish between an agency's policymaking functions and its adjudicative functions—which is essential to defend the APA—relies upon continued fidelity to the conception of administrative power that was dominant in the New Deal era. This conception is exemplified by the Court's reasoning in *Humphrey's Executor*,¹⁶⁰ which upheld for-cause removal protection for FTC commissioners on the theory that the insulation enabled the agency to discharge functions that were fundamentally non-executive and required the application of impartial expertise. The Court explained, somewhat enigmatically, that: "To the extent that [the FTC] exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government."¹⁶¹ Administrative power was, by definition, quasi-judicial and quasi-legislative—and therefore fundamentally *not* executive. This conception was not reserved for the independent regulatory commissions but was also applied to the administrative functions of traditional executive departments.¹⁶² The Attorney General's Committee on Administrative Procedure employed this conception in defining the scope of its study of the procedures and practices of "administrative" agencies. That is, it examined only those agencies or divisions of agencies that affected private parties through the performance of quasi-legislative or quasi-judicial functions. Purely executive agencies, departments, and programs were therefore out of the study and omitted from the APA's regulation.

Over the last several decades, the Supreme Court increasingly has rejected this conception of administrative power, implicitly constructing an executive conception that might demand presidential

objecting to employing agencies' efforts to manage hearing programs have gotten a similarly chilly reception. *See, e.g., Mahoney v. Donovan*, 721 F.3d 633, 634-35 (D.C. Cir. 2015).

¹⁵⁹ *See, e.g.,* Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 Admin. L. Rev. 259, 271 (2017) ("The adage that 'personnel is policy' has long been used in Washington to describe the importance for a new president to appoint political loyalists.").

¹⁶⁰ 295 U.S. 602 (1935).

¹⁶¹ *Humphrey's Executor*, 295 U.S. at 602.

¹⁶² *See, e.g.,* *Morgan v. United States*, 298 U.S. 468, 481-82 (1936); Bremer, *Rediscovered Stages*, *supra* note 11, at ____.

control over *all* aspects of agency adjudication.¹⁶³ Today, the Supreme Court increasingly views administrative action as inherently executive and has accordingly struck down and called into question a variety of design features (such as for-cause removal protection for unitary agency heads) that were previously thought to be necessary because of the non-executive characteristics of agencies and agency action. But these decisions have emerged from judicial review of new agencies vested with significant policymaking authority that is exercised predominantly through rulemaking and enforcement discretion. The Court's concern with preserving presidential control and political accountability fits more naturally here, and perhaps also has corrected some of the apparent errors in the New Deal-era conception.¹⁶⁴ The current fight over the constitutionality of the APA's hearing regime presents a new and difficult challenge: sorting through the implications of applying the Court's modern conception to older forms of agency action that have some genuine quasi-judicial character.

Whether the APA's regime is compatible with an executive conception of administrative power will depend on one's theory of the executive power. A strong unitary executive theory, which has been urged by some originalists, may require complete presidential control over and responsibility for administrative adjudication.¹⁶⁵ It seems unlikely that the APA's hearing regime could be sustained under this model. In addition, the APA is premised on the idea that, if adjudicatory hearings are placed within administrative agencies, due process demands some minimal level of procedural and impartiality protection. If that premise is retained (the possibility that it might be rejected is addressed below), then the demands of due process and a unitary executive theory might be incompatible. Congress would need to relocate adjudicatory hearings, taking them out of the individual agencies.¹⁶⁶ On the other hand, a theory of executive power that recognizes congressional authority to structure the executive branch and to define executive offices might be able to accommodate protections, such as those afforded by the APA, which are designed to ensure fair and faithful execution of the quasi-judicial function of presiding over adjudicatory hearings. Under this theory, it might be possible to reconcile the demands of due process and executive power. A full analysis of competing theories of executive power is beyond the scope of this paper. For present purposes, the important point is that

¹⁶³ See Bremer, *Rediscovered Stages*, *supra* note 11, at ____; see also Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. ____ (forthcoming 2023).

¹⁶⁴ See, e.g., Daniel A. Crane, *Debunking Humphrey's Executor*, 83 GEO. WASH. L. REV. 1835 (2016).

¹⁶⁵ See, e.g., [string cite to unitary executive scholarship].

¹⁶⁶ Possibilities for relocation might include a central adjudicatory panel within the Executive branch or an Article I or Article III court.

the APA's viability might ultimately depend on the resolution of larger questions regarding the executive power and the interrelationship between Articles I and II of the Constitution.

The APA's viability might also depend on one's theory about the relationship between due process and the separation of powers. Some originalists have urged that due process in adjudication necessarily is provided by resort to an Article III court.¹⁶⁷ From this perspective, the notion that due process can or must be provided through procedural or impartiality protections in administrative hearings is incomprehensible. Whatever the merits of this view, the historical reality is that courts long ago accepted congressional authority to make the institutional choice to place adjudicatory hearings within administrative agencies rather than in Article III courts.¹⁶⁸ And the modern administrative state and the APA were based on the premise that, once this institutional choice has been permitted and effectuated, there is a need to undertake a project to ensure due process in the adjudicatory hearings that are within administrative agencies. If the Supreme Court rejected this premise and concluded that due process can only be provided by Article III courts, then at least some hearings (those involving vested private rights) would have to be moved out of agencies and into Article III courts.¹⁶⁹ At the same time, the constitutional imperative to ensure due process in the public rights cases that could continue to be adjudicated by federal agencies would evaporate, thereby rendering the APA's regime obsolete.¹⁷⁰

B. *An Otherwise Doomed Regime?*

Putting aside questions of high constitutional theory, the practical reality is that the APA's hearing regime has suffered a long, slow decline, and whatever political will once supported it seems presently to be collapsing.¹⁷¹ Every branch of government has contributed to this reality. Efforts to narrow the scope of the APA began immediately upon the statute's enactment and bore fruit within

¹⁶⁷ See *Arthrex*, 141 S.Ct. at 1993 (citing Chapman & McConnell, *supra* note 17, at 1801-04). The extent to which this approach would upset administrative adjudication depends on scope of the public rights doctrine. See *id.*; see also Nelson, *supra* note ____, at ____.

¹⁶⁸ [cite cases.]

¹⁶⁹ Again, the validity and scope of the private rights doctrine would determine how far this disruption would reach. Note also that this approach takes off the table, on constitutional grounds, the possibility of a central panel within the Executive branch.

¹⁷⁰ This analysis accepts the soundness of the private rights doctrine and its currently understood scope. If that doctrine was rejected or narrowed, more hearings would need to be moved from agencies to courts. If the doctrine was expanded, fewer hearings would need to be moved from agencies to courts.

¹⁷¹ Some of the material in this section is adapted from Emily S. Bremer, *Power Corrupts*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4375200.

a decade.¹⁷² In the decades since, Congress has often ignored the APA’s hearing provisions, creating unique “informal” hearing requirements for new adjudicatory programs.¹⁷³ Meanwhile, agencies have assiduously avoided adjudication under the APA, largely to avoid the costs and hassles associated with employing ALJs.¹⁷⁴ More recently, and for a variety of reasons, judicial unwillingness to enforce the APA’s hearing requirements has ratcheted up,¹⁷⁵ while political support for the APA’s regime has waned in the executive branch. In 2018, in response to the Supreme Court’s decision in *Lucia v. SEC*,¹⁷⁶ President Trump issued Executive Order 13843, dismantling a significant component of the structure that was designed to promote ALJ impartiality and competence.¹⁷⁷ The order retracted a longstanding delegation to the Office of Personnel Management (OPM) of the President’s authority to regulate the hiring of ALJs. For decades, OPM carried out this responsibility by establishing qualifications for ALJ candidates, administering an ALJ examination, and maintaining a register of qualified candidates from which agencies wishing to appoint ALJs could select.¹⁷⁸ The immediate reaction among administrative law scholars to President Trump’s executive order was negative—it was viewed as a significant threat to ALJ impartiality and independence (and therefore to the fairness and soundness of ALJ decisions).¹⁷⁹ But although President Biden retracted many of President Trump’s regulatory executive orders, he has left Executive Order 13843 in place. Congress, too, has resisted calls to override

¹⁷² See Bremer, *Power Corrupts*, *supra* note ____, at ____ (discussing how the Attorney General, Congress, and the Supreme Court together contributed to exempting deportation hearings from the APA’s hearing requirements).

¹⁷³ When the APA was adopted, an “informal hearing” in adjudication was a contradiction in terms. See Bremer, *Rediscovered Stages*, *supra* note 11, at 426–30.

¹⁷⁴ See Jeffrey Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering*, 10 ADMIN. L.J. AM. U. 65, 70-74 (1996).

¹⁷⁵ Among the reasons are a loss of understanding of the APA’s meaning and application, see Bremer, *Rediscovered Stages*, *supra* note 11, at ____–____, as well as the unfortunate application of *Chevron* deference to agency determinations of the APA’s application, see William S. Jordan, *Chevron and Hearing Rights: An Untended Combination*, 61 ADMIN. L. REV. 249 (2009).

¹⁷⁶ 138 S.Ct. 2044 (2018). In this case, the Court held that an ALJ had been unconstitutionally appointed by Securities and Exchange Commission (SEC) staff instead by the head of the agency (i.e., the SEC itself).

¹⁷⁷ See Exec. Order 13843, *Excepting Administrative Law Judges from the Competitive Service*, 83 Fed. Reg. 32,755 (July 10, 2018).

¹⁷⁸ For a discussion of how this regime affected agency discretion to appoint ALJs, see Office of the Chairman, Admin. Conf. of the United States, *Equal Employment Opportunity Commission: Evaluating the Status and Placement of Adjudicators in the Federal Sector Hearing Program* 27–32 (Mar. 31, 2014), available at <https://www.acus.gov/report/equal-employment-opportunity-commission-evaluating-status-and-placement-adjudicators-federal>. Executive Order 13843 left in place other ALJ protections, including salary levels, prohibitions on agency supervision, and the for-cause removal structure discussed below.

¹⁷⁹ See Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 54 (2020); Paul R. Verkuil, *Presidential Administration, The Appointment of ALJs, and the Future of For Cause Protection*, 72 ADMIN. L. REV. 461, 465 (2020); Jeffrey Lubbers, *The Regulatory Accountability Act Loses Steam but the Trump Executive Order on ALJ Selection Upturned 71 Years of Practice*, 94 CHI.-KENT L. REV. 741, 747-49 (2019); Jennifer Nou, *Dismissing Decisional Independence Suits*, 86 U. Chi. L. Rev. 1187, 1187 (2019); Peter M. Shane, *Trump’s Quiet Power Grab*, THE ATLANTIC (Feb. 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/trumps-quiet-power-grab/607087>.

Executive Order 13843 by statute. This suggests a basic lack of political will to reinstate the regime,¹⁸⁰ and it leaves agencies with the latitude to determine their own qualifications for their ALJs and to hire whomever they want, using whatever process they think is best.¹⁸¹ The danger is that agencies may hire ALJs with background and skills that predispose them to taking the agency’s perspective in deciding the cases that come before them. A final development relevant to this discussion is that the SSA, which employs more of the ALJs in the federal government,¹⁸² has recently suggested that perhaps its statutes don’t require formal APA adjudication after all.¹⁸³ If SSA were to follow through on that suggestion, most of what remains in practice of the APA’s ALJ regime would evaporate.

The result of these various developments across time and institutions has been a steady expansion of adjudicatory hearings conducted “outside” the APA,¹⁸⁴ as well as a general weakening of the APA’s ability to ensure competent and impartial presiding officers. While the APA was intended to establish uniform minimum procedures for adjudicatory hearings, administrative law has instead embraced a paradoxical norm of exceptionalism in administrative adjudication.¹⁸⁵ Years of studying both the contemporary realities of administrative adjudication and the APA’s history and meaning has led me to the stark but unavoidable conclusion that the APA’s hearing regime has failed.¹⁸⁶ In theory, it is possible that the APA could be reinvigorated. This would require a significant, interbranch undertaking: to inculcate in Congress the conviction that the APA’s procedures are *the* procedures for evidentiary hearings within agencies; to convince the courts to enforce the APA as written; to commit the Executive branch to the faithful and effective implementation of the APA’s regime; and to persuade agencies to use ALJs. Unfortunately, there is little evidence that any of these institutions value the APA’s regime and have the political will necessary to undertake these laborious initiatives.

¹⁸⁰ OPM’s implementation of the regime was *abysmal*, so this may reflect a collective judgment about the regime in practice rather than in principle.

¹⁸¹ See Admin. Conf. of the U.S., Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*, 84 Fed. Reg. 38,930 (Aug. 8, 2019); Jack M. Beermann & Jennifer L. Mascott, Research Report on Federal Agency Hiring after Lucia and Executive Order 13843 (May 31, 2019), available at <https://www.acus.gov/report/final-research-report-federal-agency-alj-hiring-after-lucia-and-eo-13843>.

¹⁸² See *supra* at note ___ and accompanying text.

¹⁸³ Social Security Administration, *Hearings Held by Administrative Judges of the Appeals Council*, 85 Fed. Reg. 73,138, 73,140 (Nov. 16, 2020).

¹⁸⁴ See generally MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE APA (2019).

¹⁸⁵ According to this norm, most adjudicatory hearings are conducted according to unique procedures design to accommodate the unique needs of the agency or regulatory program. See generally Bremer, *Exceptionalism Norm*, *supra* note ___; see also Bremer, *Reckoning*, *supra* note ___.

¹⁸⁶ Emily S. Bremer, *The Administrative Procedure Act: Failures, Successes, and Danger Ahead*, 98 NOTRE DAME L. REV. ___, ___ (forthcoming 2023). Some agencies still conduct hearings under the APA, and one might reasonably point out that the APA’s hearing regime is only mostly dead. And “[m]ostly dead is slightly alive.” THE PRINCESS BRIDE (Rob Reiner dir., 1987).

If all this were not enough, there is one additional problem: there are persistent concerns that the APA's regime is ineffective at ensuring ALJ impartiality. At the SEC, critics have alleged that the agency wins so often before its ALJs because the ALJs are biased in favor of the agency that employs them.¹⁸⁷ For example, between October 2010 through March 2015, "the SEC boasted a 90% win rate in administrative proceedings, and only a 69% win rate in federal court."¹⁸⁸ Although Professor Urska Velikonja conducted an empirical study suggesting the apparent disparity disappears when "one controls for the subject matter, or once one includes cases decided by dispositive motions and not only after trial," many have continued to believe that ALJ bias is a significant contributing factor.¹⁸⁹ There have also been accusations of bias or incompetence at other agencies as well. For example, at the SSA, such accusations have been made because of the wide variability across ALJs in terms of the rates at which benefits are granted or denied to claimants.¹⁹⁰ [Note: A future draft will include a more robust evaluation of these and related concerns.]

One might reasonably conclude from all this that even if the Supreme Court sustains the constitutionality of the APA's hearing regime, the federal government is unwilling to enforce that regime and, even if it were otherwise inclined, there are many who believe the regime is ineffective. Abandon hope all ye who enter here.

C. *Back to Square One?*

If we cannot or will not enforce the APA's hearing provisions, we may be back to square one in the project of ensuring due process in adjudicatory hearings conducted within administrative agencies.¹⁹¹ This is a substantial project. Congress has often preferred to give primary jurisdiction over the disputes that arise out of administrative programs to the same administrative agencies that are otherwise responsible for statutory implementation. To affirm and support this institutional choice, the demands of due process must be tailored to the administrative context. It is my considered judgment that the APA offers the best solution—at least on paper—for achieving this end. But the APA's regime has been poorly and incompletely implemented, and so perhaps it is time to admit and reckon with its failure. Discarding the APA's core compromise, however, leaves us without a solution,

¹⁸⁷ See e.g., Comment, Lucille Gauthier, *Insider Trading: The Problem with the SEC's In-House ALJs*, 67 EMORY L.J. 123, 125-27 (2017).

¹⁸⁸ Gauthier, *supra* note ____, at 127.

¹⁸⁹ Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. U. L. REV. 315, 321 (2017).

¹⁹⁰ See, e.g., TRAC Social Security Administration, *Social Security Awards Depend More on Judge than Facts: Disparities Within SSA Disability Hearing Offices Grow*, <https://trac.syr.edu/tracreports/ssa/254/> (July 4, 2011).

¹⁹¹ See Richard J. Pierce, *Agency Adjudication: It's Time to Hit the Reset Button*, 28 Geo. Mason L. Rev. 643 (2020).

facing anew the drafters' considered judgment that there were serious problems in adjudicatory hearings—incompetence, bias, procedural unfairness, and unreliable outcomes—that warranted legislative intervention. Since 1946, agency hearing programs have proliferated, and so too have concerns about non-ALJ adjudicators and the minimal adequacy of the procedures observed in the many hearings that are conducted “outside the APA.”¹⁹² Reform is desperately needed. Although a thorough evaluation of the options for reform is beyond the scope of this paper, a few thoughts that emerge from this paper's analysis can be offered.

To begin, reform solutions that retain hearings within individual administrative agencies have the benefit of affirming Congress's institutional choice but fail to address the central structural challenges of that choice. For example, Professor Kent Barnett has argued that the problem of actual or perceived bias of agency adjudicators could be addressed through agency or Executive branch self-regulation.¹⁹³ This would entail the adoption of “impartiality regulations” by individual agencies, with or without centralized support, encouragement, or compulsion. There is some reason to think that this approach has yet to attract enough support. A few years ago, an ACUS committee came to consensus on a proposed recommendation on this subject. At the Plenary session, however, the ACUS Assembly voted the recommendation down and did not adopt it. This extremely unusual outcome may have been driven by an abundance of caution: the Supreme Court was at the time poised to hand down its decision in *Lucia*. It's also possible, however, that the Assembly's decision reflected significant objections to impartiality regulations.¹⁹⁴ Various objections may be possible. An advocate of a strong unitary executive theory of presidential power might object to this kind of self-regulation, though not imposed by Congress, would interfere with the President's Article II obligations to retain control over and responsibility for adjudicators. Another possible objection is that internal self-regulation cannot overcome the structural threats to adjudicator impartiality. To put it crudely, it would be allowing the fox to guard the henhouse, and it would be unlikely to dispel either the appearance or actuality of bias that might afflict an adjudicator who is employed by the very agency that has such a keen interest in the conduct and outcome of the hearings that adjudicator conducts.

Middle course solutions such as the creation of a central panel appear to offer the worst of all possible worlds: less robust due process without the countervailing benefit of giving agencies primary

¹⁹² See, e.g., Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643 (2016); ACUS Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016) (recommending procedural best practices in adjudicatory hearings conducted outside the APA).

¹⁹³ See generally Barnett, *supra* note 149.

¹⁹⁴ [Note: A future draft will support this description with citations to ACUS documents and transcripts.]

jurisdiction for resolving the disputes that arise in the course of statutory implementation. The current incarnation of this approach is modelled after state administrative structures in which all adjudicatory hearings government-wide are conducted by adjudicators who are members of a central panel that is located within the executive branch but outside of the individual agencies.¹⁹⁵ This approach has a long pedigree: a similar proposal was offered to Congress during the debate over the APA and was rejected at that time in favor of the APA's hearing regime.¹⁹⁶ Over the decades, this approach has maintained a modest level of support and has bobbed along beneath the surface of administrative reform dialogue. The advantage of a central panel is that it directly addresses the core structural problem of agency adjudication. An adjudicator is less likely to suffer from apparent or actual bias if she is employed by an agency that is *not* party to the disputes she hears. But this advantage is obtained by pulling adjudicatory hearings out of the individual agencies that are otherwise responsible for statutory implementation. This reduces or eliminates the primary advantage of administrative adjudication: giving expert agencies primary responsibility for resolving administrative disputes. Worse still, it defeats the purpose of administrative adjudication while depriving private parties of recourse to the fulness of due process that would be available if the disputes were litigated in courts.

This leads one to the conclusion that, if administrative adjudication cannot be conducted within the agencies subject to appropriate structural and procedural protections, it should instead be conducted outside of the executive branch, such as in an article I or III court. Several scholars have suggested such reform.¹⁹⁷ It's an extreme approach that would entail a reversal of Congress's consistently expressed preference for administrative adjudication. But if the APA's hearing regime cannot be saved, and other administrative reforms are undesirable, it may be time to seriously consider this fundamental restructuring of administrative adjudication.

Conclusion

[The conclusion will conclude.]

¹⁹⁵ [Cite recent ABA resolution and report; analysis of state central panels.]

¹⁹⁶ [**Note:** A future draft will elaborate on this history and cite to the relevant legislative history and scholarly discussion.]

¹⁹⁷ *See, e.g.,* Michael S. Greve, *Why We Need Federal Administrative Courts*, 28 GEO. MASON L. REV. 765 (2020). [**Note:** A future draft will include a more robust discussion of this possibility. It's not one I've previously supported: I strongly prefer the APA's regime. But I am beginning to believe that the APA is beyond saving. I'm still processing the consequences of this conclusion and will be grateful for your thoughts and suggestions.]