TO FIND THE BEST FUTURE SYSTEM OF AGENCY ADJUDICATION WE SHOULD RETURN TO THE PAST

RICHARD J. PIERCE, JR.*

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INTRODUCTION

I wrote the original version of this essay as my contribution to a workshop entitled "Should Agency Adjudication Be Ended?"[1] The workshop was sponsored by the Pacific Legal Foundation, a conservative advocacy organization that represents and supports parties who argue that most agency adjudications are unconstitutional.[2] Conservative activists are attempting to eliminate all agency power to adjudicate.[3] For instance, a

* Lyle T. Alverson Professor of Law, George Washington University. Portions of this article are taken from an amicus brief co-authored with Professor Pierce on behalf of administrative law scholars in SEC v. Jarkesy. Brief of Amici Curiae Administrative Law Scholars in Support of Petitioner, SEC v. Jarkesy, 143 S. Ct. 2688 (2023) (No. 22-859).

1. *Should Agency Adjudication Be Ended?: Call For Papers*, PAC. LEGAL FOUND., https://pd.pacificlegal.org/l/590711/2023-05-05/7grmbl/590711/1683315751Iam3JsUB/On_Agency_Adjudication_Call_for_Papers_.pdf (last visited Mar. 15, 2024).

2. *About*, PAC. LEGAL FOUND., https://pacificlegal.org/about/ (last visited Mar. 15, 2024) (outlining the Foundation's goals and activities in detail); *see, e.g.*, *End Agency Adjudication*, PAC. LEGAL FOUND., https://pacificlegal.org/separation-of-powers/agency-adjudication/ (last visited Mar. 15, 2024).

3. *See, e.g.*, Stone Washington and Ryan Young, *Conflict of Justice: Making the Case for Administrative Law Court Reform*, COMPETETIVE ENTER. INSIT. (Dec. 14, 2023), https://cei.org/wp-content/uploads/2023/12/Are_Administrative_Courts_Unlawful_final.pdf.

December 14, 2023, report of the Competitive Enterprise Institute concludes that all agency adjudications are unfair and unconstitutional and urges reallocation of all agency adjudication to Article III courts.[4] During this 2023–24 term, the Supreme Court will decide four challenges to the constitutionality of agency adjudications.[5]

My goal was to persuade the conservative participants in the workshop that agency adjudication is not as bad as they believe it to be, and that the Supreme Court can improve the fairness of agency adjudications by issuing a single opinion in which it clarifies the scope of an opinion it issued in 1973.[6] I think I succeeded in achieving that modest goal.

Many of the conservative participants in the workshop were not aware of the history of agency adjudication. They were not aware that Congress unanimously created the method of agency adjudication that is referred to today as "formal adjudication" in 1946 after fifteen years of study and debate.[7] Many were not aware that Congress designed the requirements for formal adjudication to replicate the procedures that federal district courts use and that the many statutory safeguards of the decisional independence of Administrative Law Judges (ALJs) were intended to confer approximately the same level of decisional independence as federal judges.[8] They were also not aware that two other provisions of the statute assure that all issues of law and policy raised by an ALJ's initial decision are subject to control by an officer of the United States who is directly accountable to the President.[9]

Most of the conservative activists were also not aware of the Supreme Court opinions in which the Justices unanimously praised the formal

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4. *Id.*

5. In *SEC v. Jarkesy*, No. 22-859, the Court will decide whether adjudication by the SEC violates the Seventh Amendment, the Vesting Clause of Article II, and the nondelegation doctrine. 34 F. 4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (U.S. June 30, 2023) (No. 22-859). In *Consumer Fin. Prot. Bureau (CFPB) v. Cmty. Fin. Servs. Ass'n of Am.*, No. 22-448, the Court will decide whether the method of funding adjudication at CFPB violates the Appropriations Clause. 51 F. 4th 616 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2453 (U.S. May 15, 2023) (No. 22-448).

6. United States v. Fla. E. Coast Ry., 410 U.S. 224 (1973).

7. *See* Administrative Procedure Act, Pub. L. No. 79-404, §§ 5–10, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C §§ 554–558, 701–706); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 6 (1947).

8. Administrative Procedure Act §§ 554–556 (imposing requirements such as timely and sufficiently informative notice, discovery and settlement opportunities, and impartiality by adjudicators); *accord Butz v. Economou*, 438 U.S. 478, 513–14 (1978) (examining the similarities of safeguards within administrative and judicial adjudication).

9. Administrative Procedure Act §§ 556–557.

adjudication procedure as a codification of the principles of due process.[10] They were also not aware of the problems of communication between Congress and the courts that led to the gradual replacement of formal adjudication by what we now call informal adjudication in most contexts. Unlike formal adjudication, there are no statutorily required procedures that an agency must use when it engages in informal adjudication.[11] The agency has a wide degree of discretion with respect to the procedures it uses, and the administrative judges (AJs) who preside in informal adjudications have none of the safeguards of decisional independence that ALJs have.[12] They were also not aware that the Supreme Court could require almost all agencies to use formal adjudication procedures in all agency adjudications simply by clarifying the scope of an opinion it wrote in another context in 1973.

When the conservative activists who participated in the workshop became aware of the care that went into the process of creating the procedures applicable to formal agency adjudication and the ease with which the Supreme Court could require agencies to use those procedures, many of them provided constructive comments on the initial version of my essay that helped me improve it. I hope that this final version persuades some of the other harsh critics of agency adjudication to become more receptive to efforts to improve the process of agency adjudication rather than to abolish agency adjudication.

In Part I, I describe and evaluate the method of agency adjudication that Congress adopted in the Administrative Procedure Act of 1946 after years of

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10. Wong Yang Sung v. McGrath, 339 U.S. 33, 38–41, 41–45 (1950).

11. *See* Administrative Procedure Act § 554 (applying the statutory requirements for formal adjudication only when a statute requires a procedure to be "on the record"). When a statute does not call for an "on the record" procedure, the adjudication is informal and only subject to the requirements of an agency's own internal procedural regulations and the due process clause. Without more, a legislation demanding a "hearing" does not mandate an "on the record" or formal adjudication. *See* Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886 (1961); Goldberg v. Kelly, 397 U.S. 254 (1970); Mathews v. Eldridge, 424 U.S. 319 (1976).

12. *Compare Rules of Practice*, U.S. SEC. & EXCH. COMM'N (2023), https://www.sec.gov/rulesprac072003#100, *with* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEO-MD-110, EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE FOR 29 C.F.R. PT.1614 at ch. 7 (2015), https://www.eeoc.gov/federal-sector/management-directive/management-directive-110. The use of administrative judges (AJs) rather than administrative law judges (ALJs) happened by accident as a result of the *United States v. Fla. E. Coast Ry.* decision. 410 U.S. 224 (1973). There is no formalized or standard definition of an AJ, but none have the statutory safeguards of decisional independence that apply to ALJs. For more discussion on the distinction, see Kent H. Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status,Selection, Oversight, and Removal*, 53 GA. L. REV. 1 (2019) and Christopher J. Walker & Melissa F.Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141 (2019), along with discussion *infra* notes 26–27 and accompanying text.

study and debate. In Part II, I describe and criticize the changes that we have made in that method. In Part III, I explain why a return to the original 1946 method of agency adjudication is entirely consistent with the Supreme Court's recent emphasis on separation of powers.

I. ADOPTION OF A SYSTEM FOR AGENCY ADJUDICATION IN 1946

The New Deal Congress responded to the Great Depression by enacting many statutes that created new agencies and empowered them to take a variety of actions to regulate businesses and to distribute government benefits to citizens.[13] Most of the statutes said little about the procedures the agencies were required to use when they took actions of various types.[14] Agencies used many different procedures to take similar actions.

The actions of the new agencies produced a great deal of controversy about the procedures that agencies should use and about the appropriate relationship between the agencies and courts.[15] There was broad agreement that all agencies should be required to use the same procedures to take similar actions and that courts should play important roles in ensuring that agencies act only within the boundaries created by statutes and the Constitution.[16] There were lively debates about the nature of the required procedures and the roles that courts should take in reviewing agency actions.

These debates took place continuously and simultaneously in Congress and in law reviews for over a decade.[17] The most important steps in the process of study and debate were the publication of a series of monographs that described the procedures that every major agency used,[18] the publication of a 474-page report of the twelve person bipartisan Attorney General's

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13. *See* George W. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557, 1562 (1996); *see, e.g.*, Securities Exchange Act of 1934, Pub. L. No. 73-291, § 4, 48 Stat. 881 (1934).

14. *See, e.g.*, §§ 19, 21-22, 48 Stat. at 898–900.

15. PRESIDENT'S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES, S. DOC. NO. 75-8, at 67 (1st Sess.1937) ("They constitute a headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers.").

16. *See* Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 542 (1978) (maintaining, unanimously, that "a totally unjustified departure from well-settled agency procedures of long standing might require judicial correction").

17. *See generally* KRISTIN HICKMAN & RICHARD PIERCE, ADMINISTRATIVE LAW § 1.4 (7th ed. 2024).

18. *See, e.g.*, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES: MONOGRAPHS OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE PT. 1, S. DOC. NO. 77-10 (1st Sess. 1941).

Committee on Administrative Procedure,[19] and the emergence of a trio of experts to draft a statute that would require every agency to use the same procedures when adjudicating disputes and issuing rules and also confer upon courts the power to review agency actions.[20]

The three experts drafted what became the Administrative Procedure Act (APA)—a statute that was enacted unanimously by both congressional houses in 1946.[21] It described the process for issuing rules in § 553[22] and the relationship between agencies and courts in §§ 701 through 706.[23] Sections 554 through 557 described a process for agency adjudication that was modeled after the process for adjudication used by federal courts in bench trials.[24] It included the right to present evidence and cross-examine opposing witnesses in an oral evidentiary hearing conducted before an adjudicative officer who is independent of the agency where she presides.[25]

One of the core issues Congress resolved when it enacted the APA was the status of the hearing examiners who were authorized to preside over oral evidentiary hearings in adjudications when the head of the agency did not personally preside.[26] This issue challenged Congress as it sought to accomplish two potentially competing goals: the unbiased resolution of factual disputes by hearing examiners and maintaining agency control over its policy decisions.[27]

Members of Congress had received many complaints that the hearing examiners who presided over agency hearings prior to enactment of the APA were biased in favor of the agency.[28] Congress responded to that concern by conferring on the new hearing examiners a high degree of independence from the agencies at which they presided.[29]

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19. ATT'Y GEN.'S COMM. ON ADMIN. PROC., S. DOC. NO. 77-8 (1st Sess. 1941).

20. *Id.* at 251–53; HICKMAN & PIERCE, *supra* note 17, at § 1.4 (narrating that the final enacted version of the Administrative Procedure Act reflected the views of three primary architechts: Walter Gellhorn, Carl McFarland and Dean Acheson).

21. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 561–570a, 701–706.

22. § 553.

23. §§ 701–706.

24. §§ 554–556.

25. §§ 554–557.

26. § 556.

27. PAUL R. VERKUIL, DANIEL J. GIFFORD, CHARLES H. KOCH, JR., RICHARD J. PIERCE & JEFFREY S. LUBBERS, ADMIN. CONF. OF THE U.S., THE FEDERAL ADMINISTRATIVE JUDICIARY: REPORT FOR RECOMMENDATION 92-7, at 801–02 (1992); ADMINISTRATIVE PROCEDURE ACT–LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 269 (2d Sess. 1946).

28. *See, e.g.*, Ramspeck v. Fed. Trial Exam'rs Conf., 345 U.S. 128, 131–32 (1953).

29. ADMINISTRATIVE PROCEDURE ACT–LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 215 (2d Sess. 1946); *accord* 5 U.S.C. § 554(a), (d) (limiting the ability of agencies to interfere with or communicate with hearing examiners).

Congress also wanted to further the potentially conflicting goal of ensuring that the agencies themselves would retain control of policy decisions in implementing their statutory directives.[30] Congress recognized that hearing examiners who were sufficiently independent of the agency that employed them had the potential to usurp some of the policymaking power Congress had conferred on their agencies through their decisions in adjudications.[31] Congress responded by including in the APA provisions that ensure that agencies retain the ability to make all the policy decisions that might be raised in an adjudication in which a hearing examiner presides.[32]

During its fifteen years of deliberation about what became the APA, Congress considered many possible ways of reconciling the tension between those two potentially conflicting goals. Congress eventually settled on a combination of statutory provisions that further both goals simultaneously.[33] The APA includes provisions that are designed to confer a high degree of independence on hearing examiners by regulating the agency processes of managing and removing hearing examiners.[34] But it also includes provisions that ensure that agencies retain complete control of the policy implications of adjudicatory decisions by conferring on the agency the authority to issue rules that bind hearing examiners and to substitute the agency's decision for the initial decision of the hearing examiner.[35] Except for some changes in terminology and compensation, Congress has not made material changes in those provisions since Congress enacted them in 1946.[36]

In the APA, Congress gave agencies the power to appoint hearing examiners.[37] In 1972, the Civil Service Commission changed the name of

30. *See* 5 U.S.C. § 557(b) (granting the agencies discretionary power to review its hearing examiners' decisions, maintaining control over its policy decisions).

31. As Professors Eisenberg & Professor Mendelson explain, agency adjudications rarely raise policy issues. They usually focus on the specific facts of the case. Rebecca Eisenberg & Nina Mendelson, *The Not-So-Standard Model: Reconsidering Agency Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 56 (2023).

32. *See* 5 U.S.C. § 557(b); VERKUIL ET AL., *supra* note 27, at 801–02.

33. *See, e.g.*, 5 U.S.C. §§ 554(a), (d), 557(b) (limiting an agency's ability to interfere and communicate with hearing examiners outside the adjudication and granting the agency the ability to review an examiner's decision).

34. 5 U.S.C. § 7521.

35. 5 U.S.C. §§ 553, 557(b) (granting agencies rulemaking authority and the ability to review the examiners' decisions).

36. *Compare* Administrative Procedure Act of 1946, Pub. L. No. 79-404, § 4(a), 60 Stat. 237, *with* 5 U.S.C. § 553(b) (noting the lack of change in the statutory language).

37. 5 U.S.C. § 3105.

hearing examiners to Administrative Law Judges (ALJs).[38] In 1978, Congress ratified that decision by statute.[39] In 2018, the Supreme Court held that ALJs who preside in adjudications at regulatory agencies are inferior officers who must be appointed by the head of a department.[40]

Congress limited agency power to manage ALJs in several ways that are designed to confer decisional independence on them, thereby protecting the due process rights of the regulated entities involved in adjudications.[41] Congress's goal was to reduce the risk of pro-agency bias by the person presiding at an adjudicatory hearing.[42] It accomplished that goal by precluding agencies from using managerial tools as a means of inducing ALJs to conduct hearings in ways that favor the agency and disfavor the private parties who are on the other side.[43]

Thus, the employing agency cannot discipline an ALJ,[44] cannot determine the compensation of an ALJ,[45] cannot assign a case to an ALJ except in rotation,[46] cannot assign an ALJ any duties that are inconsistent with the duties and responsibilities of an ALJ,[47] cannot communicate with the ALJ off the record,[48] and cannot subject an ALJ to supervision or direction by any agency employee who engages in "the performance of investigative or prosecuting functions for an agency."[49] Finally, and most importantly, a disciplinary action can be taken 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."[50]

38. Change of Title to Administrative Law Judge, 37 Fed. Reg. 16,787 (Aug. 19, 1972).

39. Pub. L. No. 95-251, 92 Stat. 187 (1978).

40. Lucia v. SEC, 138 S. Ct. 2044 (2018). In the remainder of this article, the terms hearing examiner and Administrative Law Judge (ALJ) are used interchangeably.

41. *See* 5 U.S.C. § 7521(a) (giving ALJs for-cause removal protections); *see also id.* § 554(d) (requiring separation of functions, thus fostering independent decisionmaking).

42. *See* BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV., LSB10823, REMOVAL PROTECTIONS FOR ADMINISTRATIVE ADJUDICATORS: CONSTITUTIONAL SCRUTINY AND CONSIDERATIONS FOR CONGRESS 2 (2022) ("The APA's formal adjudication procedures were aimed at addressing lingering due process concerns and bolstering faith in administrative adjudications by limiting bias").

43. 5 U.S.C. § 554(d)–(e).

44. § 7521.

45. § 5372.

46. § 3105.

47. § 3105.

48. § 554(d)(1).

49. § 554(d)(2).

50. § 7521; *see* §§ 1202(d), 7104(b) (outlining that members of the Merit Systems Protections Board (MSPB) can only be removed for good cause).

At the same time that Congress protected the integrity of the hearing process by conferring decisional independence on ALJs, Congress ensured that agencies retained complete control over the legal basis and policy content of any decision in an adjudication.[51] Congress accomplished that goal in two ways. First, it clarified that ALJs are bound by the rules that agencies issue to resolve most policy matters.[52] Second, Congress provided that an ALJ can make only an initial decision and that the agency has complete discretion to replace it: "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision."[53] The Supreme Court has reinforced that congressional decision by holding that the initial decision qualifies only as part of the record on which a court must base its review.[54]

Shortly after Congress enacted the APA, the Supreme Court issued a series of decisions regarding the independence of ALJs in which it praised the APA and urged Congress to use it as a model for all agency decision-making. In *Ramspeck v. Federal Trial Examiners Conference*,[55] the Court upheld the initial rules issued by the Civil Service Commission to govern the compensation and tenure of ALJs and the rules governing the assignment of cases to ALJs.[56] It did so over an objection by an association of ALJs that the rules were not adequately protective of their independence.[57]

The six-Justice majority described the reasons Congress conferred decisional qualified independence on ALJs in the APA: "Many complaints were voiced against the actions of hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations."[58]

51. *See generally* Ronald M. Levin, *Administrative Judges and Agency Policy Development: The Koch Way*, 22 WM. & MARY BILL RTS. J. 407, 410–11 (2013) (elaborating on ALJs' lack of policymaking role). *See* 5 U.S.C § 557(b) (discussing ALJ decisions being subject to review and reversal on law and policy grounds); *cf.* James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1211–12 (2006) (discussing "what makes administrative judges not fundamentally independent is that their very decisions are reviewed and subject to reversal on law and policy grounds by their agency, their nonjudicial branch agency").

52. 5 U.S.C. § 556(c) (stating that an ALJ's authority to offer any ruling is "subject to published rules of the agency"); *see also* Warder v. Shalala, 149 F.3d 73, 83 (1st Cir. 1998) (holding that ALJs are bound by an agency's interpretative rules as well as its substantive rules).

53. 5 U.S.C. § 557(b).

54. Universal Camera v. NLRB, 340 U.S. 474, 496–97 (1951).

55. 345 U.S. 128 (1953).

56. *See id.* at 138 (upholding the Commission's rules).

57. *See id.* at 129–30.

58. *Id.* at 131.

The majority described studies that supported the complaints of bias and that urged Congress to make hearing examiners "partially independent of the agency by which they were employed."[59] The majority then described the congressional deliberations about the best ways of accomplishing that agreed-upon goal and described with apparent approval the treatment of hearing examiners in the APA: "Several proposals were considered, and in the final bill Congress provided that hearing examiners should be given independence and tenure in the existing Civil Service system."[60]

The majority's description of the APA's treatment of hearing examiners and its characterization of the status of hearing examiners left no doubt that the majority understood and approved of the congressional decision to confer decisional independence on hearing examiners:

> Congress intended to make hearing examiners 'a special class of semi-independent subordinate hearing officers' by vesting control of their compensation, promotion and tenure in the Civil Service Commission to a much greater extent than in the case of other federal employees.[61]

The majority upheld the Civil Service Commission's rules based on its conclusion that the rules were consistent with congressional intent.[62] The three dissenting Justices also implicitly approved of the congressional decision to confer qualified independence on hearing examiners.[63] However, they would have held the rules invalid because of their belief that the rules should have gone even further in conferring decisional independence on hearing examiners:

> The Administrative Procedure Act was designed to give trial examiners in the various administrative agencies a new status of freedom from agency control. Henceforth they were to be 'very nearly the equivalent of judges even though operating within the Federal system of administrative justice.' Agencies were stripped of power to remove examiners working with them. Henceforth removal could be effected only after hearings by the Civil Service Commission. That same Commission was empowered to prescribe an examiner's compensation independently of recommendations or ratings by the agency in which the examiner worked. And to deprive regulatory agencies of all power to pick particular

59. *Id.*; *see, e.g.*, ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 55–59 (1st Sess. 1941) ("Creation of independent hearing commissioners insulated from all phases of a case other than hearing and deciding will, the Committee believes, go far toward solving this problem at the level of the initial hearing provided the proper safeguards are established to assure the insulation. A similar result can be achieved at the level of final decision on review.").

60. 345 U.S. at 131–32.

61. *Id.* at 132.

62. *Id.* at 133.

63. *See id.* at 144 (Black, J., dissenting) ("[T]he regulations here sustained go a long way toward frustrating the purposes of Congress to give examiners independence.").

> examiners for particular cases, § 11 of the Act commanded that examiners be 'assigned to cases in rotation so far as practicable * * *.' I agree with the District Court and the Court of Appeals that the regulations here sustained go a long way toward frustrating the purposes of Congress to give examiners independence.[64]

The Court was even more forceful in its approval of, and praise for, the congressional decision to confer qualified independence on hearing examiners in *Wong Yang Sung v. McGrath.*[65] The question before the Court was whether the APA provisions applicable to hearing examiners applied to deportation proceedings.[66] The Court held that they did, even though no statute explicitly made the APA applicable to those hearings.[67]

The Court began by describing the widespread complaints of bias that led to the enactment of the APA and to its treatment of hearing examiners as independent of the agencies at which they preside.[68] It also cited the many studies that had substantiated those complaints and urged statutory changes to reduce the pro-agency bias.[69] It then described the years of study and deliberation that led to enactment of the APA by unanimous votes in both congressional houses.[70] The Court summarized the process through which the APA was enacted: "The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."[71]

The Court then compared the unfair and biased hearing that the government had provided in the case before the Court with the hearing before an impartial hearing examiner that the APA requires.[72] The Court even suggested that the Constitution might compel an agency to use the APA hearing procedures:

> 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 . . .
>
> We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency.
>
> Indeed, to so construe the Immigration Act might again bring it into constitutional

64. *Id.*
65. 339 U.S. 33 (1950).
66. *Id.* at 35.
67. *Id.* at 51–53.
68. *Id*. at 36–40.
69. *Id*.
70. *Id.* at 37–45.
71. *Id.* at 40.
72. *Id.* at 45–47.

> jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality.[73]

The Court concluded that the APA represented an effort by Congress to set forth the "currently prevailing standards of impartiality" and thereby codify the minimum requirements of due process.[74] Based on that conclusion, the Court held that the provisions in the APA relating to hearing examiners applied to deportation proceedings.[75] In later cases, the Court relied on the reasoning in *Wong Yang Sung* as the basis to hold that the APA applies to hearings under the Interstate Commerce Act[76] and to Post Office fraud hearings.[77]

The Court eventually retreated from its suggestion that the APA codified due process when Congress explicitly rejected that interpretation of the Act in the process of enacting a deportation statute that authorized hearings that fell short of the procedural safeguards reflected in the APA.[78] But the Court never retreated from its belief that the APA adjudication provisions created a model of fairness by which all other agency adjudicatory procedures should be judged.[79] Indeed, the Court upheld the procedures Congress authorized in deportation proceedings largely because it believed that Congress was "drawing liberally on the analogous provisions of the Administrative Procedure Act and adapting them to the deportation process."[80]

II. DEPARTURES FROM THE APA AGENCY ADJUDICATION SYSTEM

The APA system of adjudication applies only to a fraction of agency adjudications today.[81] In a few cases, such as the immigration adjudication system that the Court upheld in *Marcelo v. Bonds*,[82] Congress expressly decided to reject the APA system.[83] In most cases, however, the decision not to adopt

73. *Id.* at 49–50.

74. *Id.* at 50.

75. *Id.* at 51.

76. Riss & Co. v. United States, 341 U.S. 907 (1951).

77. Cates v. Haderlein, 342 U.S. 804 (1952); *see* William Funk, *The Rise and Purported Demise of Wong Yang Sung*, 58 ADMIN. L. REV. 881, 887 (2006).

78. Marcello v. Bonds, 349 U.S. 302, 306, 311 (1955) ("Congress provided in the Supplemental Appropriation Act of 1951, 64 Stat. 1048, that proceedings directed toward the exclusion or expulsion of aliens should not be governed by §§ 5, 7 and 8 of the Administrative Procedure Act.").

79. 349 U.S. at 309.

80. *Id.* at 308.

81. Christopher Walker & Melissa Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 143 (2019).

82. 349 U.S. at 310.

83. *See, e.g.*, 8 U.S.C. §§ 1182(h), (i)(2) (precluding judicial review of certain discretionary waivers); § 1252(a)(2)(B) (precluding review of certain discretionary decisions in both the

the APA system was the unintentional result of miscommunications among Congress, the Supreme Court and the lower courts.

In its 1973 opinion in *United States v. Florida East Coast Railway Co.*,[84] the Supreme Court held that a statute that required an agency to conduct a "hearing" before it issued a rule did not require the agency to use the oral evidentiary procedures required by APA §§ 554 through 557.[85] The Court held that an agency must use those procedures only when Congress requires the agency to act "on the record after opportunity for an agency hearing."[86]

In the rulemaking context, the *Florida East Coast* holding had the desirable effect of eliminating the need for an agency to conduct what the Court had characterized as "nigh interminable" oral evidentiary hearings before it could issue a rule.[87] Oral evidentiary hearings are not needed to address the contested issues of law and policy that arise in rulemaking proceedings.[88] They are often essential, however, to resolve the contested issues of adjudicative fact that arise in adjudications.

The Court explained at length that its interpretation of "hearing" was based entirely on the context in which the term was used.[89] The Court emphasized that its interpretation was applicable only to rulemakings in which an agency's task is to make decisions based on law and policy and not to adjudications in which an agency must resolve contested issues of adjudicative fact.[90]

Over time, however, lower courts ignored the important distinction that Supreme Court made in its opinion and held that the interpretation of "hearing" that the Court adopted in *Florida East Coast* applies to adjudications as well as to rulemakings.[91] Since Congress rarely uses the words "on the record after opportunity for agency hearing" in statutes that authorize agencies to adjudicate cases, the effect of the lower courts' application of the *Florida East Coast* interpretation of hearing to adjudications has been to give agencies near complete discretion with respect to the procedures they use to conduct adjudications.[92] Agencies usually provide a right to an oral

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removal and non-removal context); §§ 1252(a)(5), (b)(9) (regulating judicial review over orders of removal and issues rising from removal proceedings).

84. 410 U.S. 224 (1973).

85. *Id.* at 240–41.

86. *Id.* at 241.

87. Fed. Power Comm'n v. Louisiana Power & Light Co., 406 U.S. 621, 643 (1972) (quoting Atl. Refining Co. v. Pub. Serv. Comm'n, 360 U.S. 378, 389 (1959)); *see* 410 U.S. at 240–42.

88. 410 U.S. at 239–40.

89. *Id.* at 239–46.

90. *Id.* at 240–41.

91. See cases discussed in HICKMAN & PIERCE, *supra* note 17, at § 6.2.

92. *Id.* In *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990), the Court held

evidentiary hearing, including the right to cross-examine opposing witnesses.[93] In most cases, however, agencies have chosen not to use ALJs to preside in adjudications.[94] Instead, they have opted to use decisionmakers who lack the many safeguards of decisional independence that the APA provides for ALJs.[95] Agencies use a variety of titles to refer to these adjudicators, but they are often referred to as Administrative Judges, or AJs, to distinguish them from the ALJs whose decisional independence is protected by the APA.[96] There are far more AJs than ALJs.[97]

As a result of this miscommunication among Congress, the Supreme Court, and the lower courts, we have gradually returned to the pre-APA era in which there is a high risk that AJs will experience a great deal of pressure to decide cases in the way that agency management wants them decided. Empirical studies confirm the existence of this pro-agency bias.[98] For instance, the Government Accountability Organization found that 67% of Administrative Patent Judges experience pressure from agency management to decide cases in ways that management prefers.[99]

The results of this pressure to decide cases in accordance with the wishes of agency management are impossible for reviewing courts to detect. As far as the reviewing court can tell, the AJs decision was the product of her independent evaluation of the evidence.[100] By contrast, when an agency replaces an ALJ's decision with the agency's own decision, as it can under the APA, a reviewing court knows it reviews both the views of the

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that only 5 U.S.C. § 554 applies to agency adjudications unless the statute contains the "on the record" language.

93. *See* BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RSCH. SERV, R46930 INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW (2021); Paul Verkuil, *A Study of Informal Adjudication Procedures*, U. CHI. L. REV. 739 (1976).

94. *See* BARCZEWSKI, *supra* note 42, at 1 ("Only some agencies . . . still rely on ALJs as their primary adjudicators").

95. *See* Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control Over Immigration Adjudication*, 108 GEO. L. REV. 579, 631 (2020).

96. 5 U.S.C. § 557(d).

97. ACUS Recommendation 2020-5, Publication of Policies Governing Agency Adjudicators, 86 Fed. Reg. 6622 (Jan. 22, 2021); *see* Michael Asimow, *Best Practices for Evidentiary Hearings Outside the Administrative Procedure Act*, 26 GEORGE MASON L. REV. 923, 936 (2019).

98. *See, e.g.*, Kim & Semet, *supra* note 95, at 587–88.

99. U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105336, PATENT TRIAL AND APPEAL BOARD: INCREASED TRANSPARENCY NEEDED IN OVERSIGHT OF JUDICIAL DECISIONMAKING 23–33 (2022).

100. *See e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 504 (2010) (addressing the independence of the Board from the SEC commissioners despite the board having been appointed by the commissioners).

independent ALJ and the contrasting views of the agency.[101] The court can then evaluate the evidence in the record and decide which findings and conclusions are supported by substantial evidence.

Either Congress or the Supreme Court could easily correct this problem and return the agency adjudication system to the model that Congress and the Court unanimously embraced in 1946. Congress could amend the APA to make it clear that the typical language in a statute that confers the power to adjudicate on an agency—"after hearing"—requires a hearing that complies with APA §§ 554 through 557. Alternatively, the Supreme Court could clarify its holding in *Florida East Coast* by limiting it to rulemakings and interpreting language like "after hearing" to refer to a hearing that complies with APA §§ 554 through 557 in the context of an adjudication.

III. A SYSTEM OF ADJUDICATION THAT IS TRUE TO THE INTENT OF THE CONGRESS OF 1946 WOULD BE CONSTITUTIONAL

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[102] the Supreme Court held that it is unconstitutional for Congress to provide two layers of "for cause" insulation between the president and an officer who has the power to make policy decisions on behalf of the United States.[103] The Court went on to hold that the "for cause" limit on the power of the SEC to remove a member of the Board was unconstitutional.[104]

The Fifth Circuit has held that the *Free Enterprise Fund* holding requires a court to hold that the "for cause" limit on the power of agencies to remove ALJs is unconstitutional in the context of agencies whose members are subject to a for cause limit on the president's removal power.[105] That holding is wrong for many reasons.[106]

In *Free Enterprise Fund*, the Court specifically reserved the issue of the validity of the good cause limit on the power of an agency to remove an ALJ.[107] ALJs are easy to distinguish from the Board members whose tenure was challenged in *Free Enterprise Fund*.[108] The Board members are policymakers, while ALJs

101. 5 U.S.C. § 557(b).

102. 561 U.S. 477 (2010).

103. *Id.* at 514.

104. *Id.* at 514 (Breyer, J., dissenting).

105. SEC v. Jarkesy, 34 F.4th 446, 464 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (U.S. June 30, 2023) (No. 22-859).

106. *See* Brief of Amici Curiae Administrative Law Scholars in Support of Petitioner at 6–21, SEC v. Jarkesy, 143 S. Ct. 2688 (2023) (No. 22-859).

107. 561 U.S. at 507 n.10.

108. Public Company Accounting Oversight Board Hearing Officers, 84 Fed. Reg. 12,906–08 (Apr. 3, 2019).

perform solely adjudicative functions and have no power to make policy decisions.[109] The proper analogy is to the members of the War Claims Tribunal in *Wiener v. United States*.[110] The Court held that they could not be removed except "for cause" because they performed solely adjudicative functions.[111] The analogy between the Tribunal members in *Wiener* and ALJs is so compelling that the Court would have to overrule *Wiener* in order to hold that the "for cause" limit on the removal of ALJs is unconstitutional.

If the Court sees a need to overrule a precedent in order to enforce the ban on multiple levels of "for cause" protection from removal it announced in *Free Enterprise Fund*, it should instead overrule its holding in *Humphrey's Executor v. United States*.[112] There, the Court upheld the "for cause" limit on the power of the president to remove an FTC Commissioner because the FTC's functions are solely "quasi-judicial or quasi-legislative.[113] That is no longer an accurate characterization of the functions of the FTC; it has become an extremely aggressive policymaking agency attempting to change antitrust law dramatically.[114]

CONCLUSION

Congress or the Supreme Court should recreate the model of agency adjudication that both unanimously endorsed in 1946. Our current conditions of extreme political polarity make congressional action unlikely, however.[115] The Supreme Court could and should correct the error that the circuit courts made in their application of the Supreme Court's holding in *Florida East Coast* to adjudications. The Supreme Court needs only to remind the lower courts of the eight pages of the *Florida East Coast* opinion in which

109. *Id.*

110. 357 U.S. 349 (1958).

111. *Id.* at 356.

112. 295 U.S. 602 (1935).

113. *Id.* at 627–29.

114. *See, e.g.*, FTC-DOJ PROPOSED MERGER GUIDELINES (July 19. 2023); FED. TRADE COMM'N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf. *See generally* Aaron L. Nielson, *Is the FTC on a Collision Course with the Unitary Executive?* NOTICE & COMMENT (July 2, 2021), https://www.yalejreg.com/nc/is-the-ftc-on-a-collison-course-with-the-unitary-executive/; Richard J. Pierce, Jr., *Fasten Your Seatbelts, The FTC Is About to Take Us on a Rollercoaster Ride*, NOTICE & COMMENT (July 1, 2021), https://www.yalejreg.com/nc/fasten-your-seatbelts-the-ftc-is-about-to-take-us-on-a-rollercoaster-ride-by-richard-j-pierce-jr/; Richard J. Pierce, Jr., *The Court Should Change Its Approach to the Removal Power by Adopting a Purely Functional Approach*, 26 GEO. MASON L. REV. 657 (2019).

115. *See* Richard J. Pierce, Jr., *Delegation, Time and Congressional Capacity: A Response to Adler and Walker*, 105 IOWA L. REV. ONLINE 1, 73 (2020).

the Court explained in detail why the interpretation of "hearing" that it adopted in that case applies only to rulemakings and not to adjudications.[116]

116. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 239–46 (1973).