# OUT OF SIGHT, OUT OF MIND: AMERICA'S BROKEN ADMINISTRATIVE JUDICIARY AND THE TOOLS TO FIX IT

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*"The court is the bureaucracy of the law. If you bureaucratise popular justice then you give it the form of a court."—Michel Foucault*

## I. INTRODUCTION

The sheer size of America's "administrative state" is truly impressive.[1] In fact, to do anything in the United States without regulatory intervention or interference of some kind is nearly impossible.[2] And, underneath each such regulation, rule, or policy interpretation at the federal level, lies a vast network of agencies and courts largely hidden from plain view—an *imperium in imperio*. The administrative state is comprised of some 450 executive agencies and roughly three million government employees.[3] Thus, if "[t]hat government is best which governs least," perhaps the United States has some significant culling to do.[4]

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1. *See generally* DWIGHT WALDO, THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION (The Ronald Press Company, 1st ed. 1948) (coining, while not expressly defining, the term "administrative state" as used today).

2. *See, e.g.,* Ryan Young, *Regulations, Regulations Everywhere*, Op-Eds/Articles, COMPETITIVE ENTER. INST. (May 7, 2010), https://cei.org/opeds_articles/regulations-regulations-everywhere ("Federal regulations cover everything from the size of holes in Swiss cheese to the label text on over-the-counter flatulence medication.").

3. *See* Charles J. Cooper, *Confronting the Administrative State*, NAT'L AFFS. No. 53 (2015), https://www.nationalaffairs.com/publications/detail/confronting-the-administrative-state.

4. HENRY DAVID THOREAU, WALDEN AND "CIVIL DISOBEDIENCE" (New York: Signet Classics 1980) (1849). Though this maxim is often spuriously attributed to Thomas Jefferson, it is properly attributed to Thoreau, who began his pamphlet with it in paraphrasing the motto of *The United States Magazine and Democratic Review*. *See* Joshua Gillin, *Mike Pence Erroneously Credits Thomas Jefferson with Small Government Quote*, POLITIFACT, (Sept. 21, 2017), https://www.politifact.com/factchecks/2017/sep/21/mike-pence/mike-pence-erroneously-credits-thomas-jefferson-sm.

This idea of overregulation and bureaucracy within the executive branch has led some to argue in favor of an amorphous "deconstruction of the administrative state."[5] It may also have played a role in the recent United States Supreme Court decision that severely restrained the United States Environmental Protection Agency's ability to regulate private sector carbon emissions.[6] Such concerns, however, are often purely *political* in nature and draw attention away from more *practical* questions surrounding the administrative state that are of equal or greater importance.[7] Namely, short of dismantling it, how might we improve the administrative state so that it functions more fairly, efficiently, and transparently?

This Comment argues that such reform must begin with sweeping changes to the administrative *judiciary* and how it operates. Part II gives a brief but crucial history of the administrative judiciary, its purpose, and its current role within the federal government. Part III identifies two representative examples of failings within the administrative judiciary and critiques earlier proposed solutions thereto. Part IV discusses viable solutions and alternatives to the modern administrative judiciary and proposes a path forward.

## II. THE DEFINITION, HISTORY, PURPOSE, AND CURRENT ROLE OF THE ADMINISTRATIVE JUDICIARY

### *A. The Administrative Judiciary Defined*

Many notable attempts have been made to define the "federal administrative judiciary," a term that at times may feel otherwise ineffable. In 1992, for example, the Administrative Conference of the United States ("ACUS") conducted an exhaustive study of the federal administrative judiciary, using the term "to highlight both the significance of the deciders involved and the scope of their decision

5. Phillip Rucker & Robert Costa, *Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State*,' WASH. POST (Feb. 17, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html.

6. *See generally* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022).

7. *See, e.g.*, Ed Kilgore, *Starving the Beast*, BLUEPRINT MAG. (June 30, 2003), https://web.archive.org/web/20041120220704/http://www.ppionline.org/ndol/print.cfm?contentid=251788 (quoting Grover Norquist who wanted a federal government so small "that it could be drowned in a bathtub").

making mandate under our federal system."[8] One author of that study, which was performed at the request of the Office of Personnel Management,[9] noted that "to define the universe of the administrative judiciary, the scope of inquiry must be limited."[10] Accordingly, the 1992 ACUS Study limited its review "to those administrative judges--whether labeled ALJs, AJs, hearing examiners or something else--who actually preside at some kind of hearing, whether formal or informal."[11]

This Comment is, by necessity, equally limited. It does not extend to those "millions of decisions that are rendered by countless other deciders who adjudicate public rights, opportunities, or obligations in other settings that are nonconfrontational and often not even face-to-face."[12] While such proceedings are important, and those who conduct them essential, this Comment addresses only those administrative proceedings bearing resemblance to procedures in Article III courts.[13] Thus, the recommendations and arguments advanced here concern federal administrative law judges ("ALJs"), the federal agencies for which they hear cases, and the processes and procedures governing their decisions rendered in "some kind of hearing."[14] Together, these institutions, people, and adjudications make up the federal administrative judiciary.

Other conceptions of the federal administrative judiciary, wrapped up in political perspectives regarding the administrative state writ large, are less charitable.[15] For example, conservative political commentator David French describes the situation as follows:

> At present, the vast and bloated executive branch—existing through its alphabet soup of agencies such as the EPA, IRS,

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8. PAUL R. VERKUIL ET AL., *The Federal Administrative Judiciary – Report for Recommendation 92–7, in* 1992 ACUS RECOMMENDATIONS & REPORTS 769, 781 (1992).

9. *See* 5 U.S.C. § 5372(c) (granting the Office of Personnel Management the authority to regulate the practices and procedures of federal administrative law judges, which have historically included hiring procedures).

10. Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341 (1992).

11. VERKUIL ET AL., *supra* note 8, at 785 (punctuation in original).

12. Verkuil *supra* note 10, at 1342.

13. *See* U.S. CONST. art. III, §§ 1–2; for influential scholarship on this topic that includes thorough discussion of nonconfrontational administrative proceedings omitted here, *see generally* Henry J. Friendly, *Some Kind of Hearing*, 123 UNIV. PA. L. REV., 1267 (1975).

14. *See generally* Friendly, *supra* note 13, at 1267 (explaining the origin of the phrase "some kind of hearing").

15. *See*, *e.g.*, David French, *Trump Wants to Deconstruct the Regulatory State? Good. Here's How You Start*, NAT'L REV. (Feb. 24, 2017, 10:36 PM), https://www.nationalreview.com/ 2017/02/administrative-state-deconstruction-trump-steve-bannon-cpac.

> DOE, ATF, and the like—intrudes into virtually every aspect of American life. It regulates your workplace, your home, your car, and your kids' school. It's staffed by legions of bureaucrats who enjoy job security that private-sector employees can only dream of, and it's granted legal authority by the Supreme Court to interpret its own governing statutes and expand the scope of its own authority. In its own spheres of influence, it often acts as legislator, prosecutor, and judge. Let's not forget, the administrative state exists in large part because Congress has intentionally *abdicated* authority.[16]

Such an uncompromising perspective, however, ignores the fact that both the administrative state, and the federal administrative judiciary within it, exist to ameliorate problems the other branches of government are ill-equipped to solve.[17] Thus, in the face of arguments in favor of more expansive federal court jurisdiction over administrative functions, proponents of the administrative state and its judiciary contend that the "[Article III] federal court system would be unable to maintain its primary role of constitutional and statutory interpretation without an extensive administrative decision system."[18]

### *B. The History of the Administrative Judiciary*

As UCLA Professor of Law Michael Asimow once put it, "[i]t all started with the railroads."[19] As the United States industrialized, railroad companies were able to able to exert their economic power to charge low rates to big players in shipping and comparably higher rates to smaller businesses.[20] Presumably, these disadvantaged businesses, such as small farmers, could have pursued a remedy against the railroad companies in federal or state courts, but those courts often lacked either the expertise necessary to adjudicate rate disputes or the capacity to do so efficiently.[21] Thus, some states

16. *Id.*

17. *See, e.g.*, VERKUIL ET AL., *supra* note 8, at 781 ("While they are distinct from our federal judiciary in fundamental respects, these administrative deciders, whether they have the statutory appellation of administrative law judge or are known generally as administrative judges, are nevertheless a vital part of the federal decision system. Without them the federal judiciary would be unable to fulfill its constitutional function.").

18. *Id.*

19. Michael Asimow, *The Administrative Judiciary: ALJ's in Historical Perspective*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 157, 158 (2000).

20. *Id.*

21. *Id.*

created their own agencies designed exclusively to regulate the railroads and, in doing so, created "the model of the combined-function regulatory agency."[22]

It was this model that would eventually be adopted at the federal level in 1887, when Congress created America's first modern regulatory agency, the Interstate Commerce Commission ("ICC").[23] Like its state-agency predecessors, the ICC "combined functions of investigation, prosecution, and adjudication" and was "independent of executive control."[24] But the ICC was, at first, equally ineffective in dealing with the emerging problems between carriers and shippers.[25] Like the federal agencies of today, the ICC "did its business through case-by-case adjudication."[26] Those decisions, however, lacked enforceability and were accorded very little, if any, deference by Article III courts.[27] Later, as the ICC found its footing, it became a respected regulatory institution.[28] Yet, the ICC was still faced with many of the same problems that executive agencies confront today, particularly that it was tasked with a high volume of highly "technical" cases.[29] ICC commissioners were unable to hear so many matters and, in response, "deputized ICC staff members to serve as hearing examiners."[30] Those examiners "conducted trials, made a record, and, after a time, started issuing recommended decisions."[31] As they became more professionalized, "their decisions received greater deference; indeed, the examiners often worked closely with the Commissioners in producing final decisions."[32] Thus, "ICC trial examiners were the genesis of today's ALJs."[33]

This regulatory renaissance continued well into the 20th century. In 1914, the Federal Trade Commission ("FTC") was created to address monopolies.[34] Like those at the ICC, FTC examiners often served as investigators, conducted agency hearings, and worked with FTC leadership to produce final adjudicatory decisions.[35] Then, throughout the 1930s and President Franklin D. Roosevelt's New Deal initiatives, Congress created a variety of new, combined-

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 159.
27. *Id.* at 158–59.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 159.
35. *Id.*

function administrative agencies.[36] The belief, or hope, was that these agencies "would exercise their expertise to solve the problems that the market had failed to solve."[37] These initiatives were unsurprisingly met with skepticism, not only from those averse to government regulation in sectors that were once controlled only by market forces, but from the United States Supreme Court as well.[38] Because the new agencies "had no internal separation of functions . . . agency heads seemed to the private sector to be biased against them" and the fairness of agency decision making was routinely called into question.[39] These struggles raged on, eventually leading to enactment of the Administrative Procedure Act ("APA") in 1946.[40]

An additional piece of context deserves special mention. In 1939, the Roosevelt administration authorized the United States Attorney General's Committee on Administrative Procedure ("AGCAP"), tasked with scrutinizing current executive agency procedures and offering suggestions for legislative reform.[41] One year later, Congress successfully passed the Logan-Walter Bill and sent it to Roosevelt's desk.[42] Logan-Walter, most crucially, would have "subjected agency actions to judicial review of jurisdictional questions as well as whether they were supported by substantial evidence."[43] Roosevelt vetoed the Bill less than one month later.[44] The 1941 AGCAP report, which included majority and minority proposals, explained that "[s]ince this Committee was created, a measure known as the Logan-Walter Bill . . . has received much attention as a solution of the problems of administrative law and procedure . . . The veto was placed in part on the ground that this Committee was about to make its report."[45]

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36. *Id.* (noting that these new agencies were designed "to deal with the actual and perceived causes of the great depression"); *see also* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1995–1996) (tracing the early history of the administrative state from the New Deal era to enactment of the APA).

37. *Id.*

38. *Id.* 159–160.

39. *Id.*

40. *Id.*; *see* Administrative Procedure Act of 1946 § 2, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–559).

41. *See* Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 J. AM. ACAD. OF ARTS & SCIENCES 33, 36 (2021).

42. *Id.*; *see* Logan-Walter Bill, H.R. 6324, 76th Cong. (3d Sess. 1940).

43. Dudley, *supra* note 41, at 36 (Logan-Walter also "would have required agencies to present a record of findings supporting decisions and issue interpretive rules after notice and opportunity for hearings.").

44. *Id.*

45. Urban A. Lavery, *The Administrative Process*, 1 F.R.D. 651, 674–75 (1941) (the quoted language derives from the AGCAP).

Accordingly, having been presented with the AGCAP report, President Roosevelt justified his Logan-Walter veto in the following way:

> Despite the tremendous growth in the business of administration in recent years, I have observed that there has been a substantial improvement in the standards of administration action. That does not mean that further improvement is not needed. I am convinced, however, that in reality the effect of [Logan-Walter] would be to reverse and, to a large extent, cancel one of the most significant and useful trends of the 20th century in legal administration. That movement has its origin in the recognition even by courts themselves that the conventional processes of the court are not adapted to handling controversies in the mass. Court procedure is adapted to the intensive investigation of individual controversies. But it is *impossible* to subject the daily routine of fact-finding in many of our agencies to court procedure.[46]

The AGCAP majority's proposed Bill would have codified certain existing administrative procedures and established an Office of Administrative Procedure to propose additional changes in the future.[47] The minority's proposal went substantially further, recommending "judicial review provisions similar to the Walter-Logan bill."[48] While Congress debated both proposals following the Logan-Walter veto, the deliberations were eventually put aside due to America's entry into World War II.[49]

From all these struggles emerged the APA, which was (and still is) effectively "the bill of rights for the new regulatory state."[50] Broadly, the APA established the relationship between the combined-function agencies, those subject to their regulations and decisions, and the government responsible for their mandates and oversight.[51] Several years after its enactment, Justice Jackson

46. Franklin D. Roosevelt, *Logan-Walter Bill Fails*, 27 A.B.A. J. 52, 52 (1941) (emphasis added).

47. *See* Dudley, *supra* note 41, at 36.

48. *Id.*

49. *Id.*

50. Shepherd, *supra* note 36, at 1678.

51. *Id.* at 1558 ("the APA established the fundamental relationship between regulatory agencies and those whom they regulate-between government, on the one hand, and private citizens, business, and the economy, on the other hand. The balance that the APA struck between promoting individuals' rights and maintaining agencies' policy-making flexibility has continued in force, with only minor modifications, until the present.").

described the APA as representing "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. It contains many compromises and generalities and, no doubt, some ambiguities."[52] Today, the APA requires ALJs (or the head of a given agency) to preside "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[53] Particularly in light of the APA, the role of the administrative judiciary—and thus ALJs—within our administrative system cannot be overstated.[54] Professor Asimow contends that "the big story of the APA is that it transformed the disrespected crew of agency hearing examiners into the highly respected and highly protected corps of ALJs we know today."[55] Indeed, the APA simply preserved the combined-function agency model, sustaining those agencies' ability to regulate, investigate, prosecute, and adjudicate all under the same proverbial roof.[56] Importantly, however, "[o]n appeal from or review of the [agency's] initial decision, the agency has all the powers which it would have in making the initial decision."[57] In other words, "agency heads get the final call on *all* issues of fact, law, and discretion."[58]

52. Wong Yang Sung v. McGrath, 339 U.S. 445, 450, *modified*, 339 U.S. 908 (1950).

53. 5 U.S.C. § 554; *see also* VANESSA K. BURROWS, CONG. RSCH. SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW (2010) (noting that, prior to 1978, ALJs were referred to in the APA as "hearing examiners," but that Congress replaced that title with "Administrative Law Judges" through P.L. 95-251, 92 Stat. 183 (1978) (amending 5 U.S.C. §§ 554(a)(2), 556(b)(3), 559, 1305, 3344, 4301, 5335, 5362, 7251)).

54. *See Qualification Standard for Administrative Law Judge Positions*, U.S. OFF. OF PERS. MGMT., https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/#:~:text=ALJs%20rule%20on%20preliminary%20motions,fact%20and%20conclusions%20of%20law. (last visited Sept. 24, 2023) (highlighting the duties of an ALJ, such as serving as an impartial trier of fact, conducting hearings, and issuing decisions on cases involving Federal laws and regulations).

55. Asimow, *supra* note 19, at 163. In light of recent U.S. Supreme Court and circuit courts of appeals decisions, discussed *infra*, one must wonder whether Professor Asimow would still characterize ALJs as either highly protected or highly respected.

56. *Id.*

57. 5 U.S.C. § 557(b).

58. Asimow, *supra* note 19, at 163 (emphasis in original); *but see* Universal Camera Corp. v. N.L.R.B., 340 U.S. 456 (1951) (holding, quite famously, that courts are to review agency head decisions, not decisions made by ALJs, but that, where the agency head and the ALJ disagree, such disagreement weighs against the APA's substantial evidence standard. Thus, ALJ decisions became more significant following *Universal Camera Corp.* as agency heads became less likely to dispute such decisions upon review).

### *C. The Purpose and Current Status of the Administrative Judiciary*

As is evident from the conflicts that defined the history described above, debates about the purpose of the administrative state and its judiciary abound.[59] Such debates are distinctly political. On one hand, progressive advocates of the administrative state as currently conceived argue that the executive agencies "serve an important practical purpose because they can address problems more quickly and, in more detail, than Congress can. Often these agencies are called upon to apply specific scientific, technical, or administrative expertise to implement the broad policy decisions made by Congress."[60] On the other hand, conservative detractors of the administrative state generally oppose its existence on a fundamental level, arguing that unelected, combined-function agencies undermine the separation of powers doctrine and other constitutional norms.[61]

Perhaps, however, a more nuanced view better describes the disagreement. Professor Jon D. Michaels, Professor of Administrative Law at UCLA, for example, discerns two opposing factions:

> those who see the modern administrative state as a threat to or an affront to the constitutional separation of powers, and those who are more or less at peace with the modern administrative state as a constitutional matter but are nevertheless deeply distressed by the highly bureaucratized administrative state in the United States, one that they view as hopelessly inefficient, rigid, and unresponsive.[62]

Thus, just as "[n]obody was happy with the" APA in 1946,[63] legal scholars and laymen alike remain mutually unimpressed with the

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59. *See generally* Dudley, *supra* note 41.

60. Cynthia Scheopner, *Administrative Procedure Act*, BRITANNICA (Dec. 1, 2017), https://www.britannica.com/topic/Administrative-Procedures-Act.

61. *See, e.g.,* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (tracing and advancing the dominant conservative arguments against administrative rulemaking and adjudication on constitutional grounds, largely on separation and nondelegation doctrine grounds); *but see* Adrian Vermeule, *'No' Review of Philip Hamburger, 'Is Administrative Law Unlawful?'*, 93 TEX. L. REV. 1547 (2015) (disagreeing vigorously with Hamburger's arguments and contending that Hamburger "misunderstands what that body of law actually holds and how it actually works.").

62. Jon D. Michaels, *A Constitutional Defense of the Administrative State*, THE REGUL. REV. (Dec 17, 2019), https://www.theregreview.org/2019/12/17/michaels-constitutional-defense-administrative-state.

63. Asimow, *supra* note 19, at 29–30 (noting that "all sides felt they were better off with the [APA] than with the status quo," and describing the APA as a "historic compromise").

administrative state today.[64] The administrative judiciary is not insulated from these debates.[65] For instance, the fact that ALJs are independent adjudicators throughout the decision process, but "not granted the respect of automatic finality or even deference" once those decisions are rendered has served to confuse their role.[66] Moreover, the same questions surrounding the fairness of agency adjudications that preceded even the APA persist.[67] The 1992 ACUS study foreshadowed yet another concern regarding ALJs, finding that the predominant disputes had "become almost trivialized by squabbles over perquisites and benefits."[68]

The United States Supreme Court has addressed some of these questions. Relatively early on, in *Butz v. Economou*, the Court recognized ALJs' judicial status and declared that "[t]here can be little doubt that the role of the modern federal hearing examiner or administrative law judge within [the administrative] framework is 'functionally comparable' to that of a judge."[69] The Court's position on the status of ALJs, however, was not always so cut-and-dry, at one point describing ALJs simply as "these quasi-judicial officers."[70] Later, in its landmark *Chevron v. NRDC* decision, the Court articulated the proper standard of judicial review over an agency's construction of a federal statute that the agency is tasked with implementing.[71] Under *Chevron*, if "Congress has directly spoken to the precise question at issue," then the district court enforces that "unambiguously expressed intent."[72] If Congress is found not to have spoken directly to the question at issue, however, or if the statute is otherwise "silent" or "ambiguous," then the court defers to the agency's interpretation provided that interpretation "is based on a

64. K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1672 (2018).

65. *Id.*

66. VERKUIL ET AL., *supra* note 8, at 796.

67. *See generally*, James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1192 (2006) (analyzing the contemporary questions regarding ALJ judicial independence).

68. VERKUIL ET AL., *supra* note 8, at 796.

69. Butz v. Economou, 438 U.S. 478, 513 (1978) (further holding that, because "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process . . . those who participate in such adjudication should also be immune from suits for damages.").

70. Ramspeck v. Fed. Trial Exam'rs Conf., 345 U.S. 128, 130 (1953) ("With the rapid growth of administrative law in the last few decades, the role of these quasi-judicial officers became increasingly significant and controversial.").

71. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

72. Nat'l Treasury Emps. Union v. Fed. Lab. Rels. Auth., 414 F.3d 50, 57 (D.C. Cir. 2005) (quoting *Chevron*, 467 U.S. 842–843).

permissible construction of the statute."[73] This judicial doctrine has become known as "*Chevron* deference."[74]

*Chevron* is most often thought of as a case dealing with agencies as rule makers, but it has important implications for the administrative judiciary as well.[75] Because "it best comports with democratic government that the [politically] accountable agency officials form the policy," as opposed to politically insulated members of the judiciary, it follows that greater independence for agency adjudicators such as ALJs allows for "greater comparative advantage of the agency as a source of policy decisions."[76] "Independence" in this sense merely means the absence of political accountability.[77]

The dominant view, therefore, is that ALJs—as independent, or non-politically-accountable, adjudicators—"are bound by all policy directives and rules promulgated by their agency, including the agency's interpretations of those policies and rules."[78] Put a different way, "ALJs are subordinate to the [Administrator or agency head] in matters of policy and interpretation of law."[79] And, of course, the APA itself dictates that ALJs may not perform duties inconsistent with their "responsibilities" in that appointed position.[80] The U.S. Department of Justice has also issued guidance to this effect, concluding that ALJs "must abide by the written rules and regulations adopted by the Secretary [that is, the agency head] for the conduct of administrative proceedings and by the Secretary's interpretation of such regulations."[81] Executive agency heads, however, cannot be expected to unfailingly administer the intent of Congress, or to perfectly interpret an authorizing statute in a way that stands up to

73. *Chevron*, 467 U.S. at 843.

74. *Id.*

75. *See* VERKUIL ET AL., *supra* note 8, at 989 ("The Court's reference to judges in *Chevron* was to federal district and circuit judges. The *Chevron* analysis applies equally to independent adjudicatory officers in agencies, however.").

76. *Id.*; for more on the distinctly political history of *Chevron* and the current disputes around its application today, *see* Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 621 (2021).

77. VERKUIL ET AL., *supra* note 8, at 989.

78. U.S. O.L.C., Opinion Letter on Authority of Education Department Administrative Law Judges in Conducting Hearings 1, at 2 (Jan. 12, 1990).

79. Nash v. Bowen, 869 F.2d 675, 680 (2d Cir. 1989) (citing *Mullen v. Bowen*, 800 F.2d 535, 540–41 n. 5 (6th Cir. 1986); *see also* Ass'n of Admin. L. Judges, Inc. v. Heckler, 594 F. Supp. 1132, 1141 (D.D.C. 1984).

80. Appointment of Administrative Law Judges, 5 U.S.C. § 3105.

81. U.S. O.L.C., Opinion Letter on Authority of Education Department Administrative Law Judges in Conducting Hearings 1, at 6 (Jan. 12, 1990).

*Chevron* deference.[82] Nonetheless, the administrative judiciary is effectively powerless in such situations.[83]

Since *Chevron*, the issue has only been further complicated. Indeed, "[a]dministrative law is experiencing a constitutional revolution unlike anything in living memory."[84] At the same time, the number of ALJs making up our administrative judiciary has also grown.[85] In May 1978, for example, there were 1,078.[86] Between 1978 and 1992, the number fluctuated between 989 and a high of 1,185.[87] Today, there appear to be nearly 2,000 ALJs and more than 10,000 administrative judges or other designated hearing officers.[88] While data on this point are unfortunately convoluted (which itself should perhaps be cause for alarm), the below table illustrates the breadth of the administrative judiciary as of March 2017.[89]

| **Agency** | ***ALJs*** | **Agency** | ***ALJs*** | **Agency** | ***ALJs*** |
|---|---|---|---|---|---|
| Commodity Futures Trading Commission | *0* | Dept. of Justice - DEA | *2* | Fed. Trade Commission | *1* |
| Consumer Financial Protection Bureau | *1* | Dept. of Justice - EOIR | *1* | International Trade Commission | *6* |
| Dept. of Agriculture | *3* | Dept. of Labor | *41* | Merit Systems Protection Board | *0* |
| Dept. of Education | *2* | Dept. of Transportation | *3* | National Labor Relations Board | *34* |
| Dept. of Health and Human Services - App. Board | *5* | Environmental Protection Agency | *3* | National Transportation Safety Board | *3* |
| Dept. of Health and Human Services – FDA | *0* | Fed. Communications Commission | *1* | Occupational Safety and Health Review Comm. | *12* |

82. *See, e.g., Id*. at 3.

83. In recent years, however, this truism has come under increasing fire from litigants in administrative proceedings before ALJs. *See infra* Part III.2.

84. Green, *supra* note 76, at 621.

85. VERKUIL ET AL., *supra* note 8, at 786 n.23.

86. *Id.*

87. *Id.*

88. *See ALJs by the Numbers,* Chart related to *Data on Administrative Law Judges,* BALLOTPEDIA, https://ballotpedia.org/Administrative_law_judge-ALJs_by_the_numbers (last visited Oct. 3, 2022).

89. *ALJs by Agency*, *Administrative Law Judges*, OPM.GOV, https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency (effective July 10, 2018).

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|---|---|---|---|---|---|
| Dept. of Health and Human Services - OMHA | *101* | Fed. Energy Regulatory Commission | *13* | Office of Financial Institution Adjudication | *2* |
| Dept. of Homeland Security - Coast Guard | *6* | Fed. Labor Relations Authority | *2* | Securities and Exchange Commission | *5* |
| Dept. of Housing and Urban Development | *2* | Fed. Maritime Commission | *2* | Small Business Administration | *0* |
| Dept. of the Interior | *9* | Fed. Mine Safety and Health Review Commission | *15* | Social Security Administration | *1,655* |
| | | | | United States Postal Service | *1* |
| | | | | **TOTAL ALJs:** | **1,931** |

As the Office of Personnel Management data indicates, the majority of ALJs are concentrated in the United States Social Security Administration ("SSA").[90] The SSA hears roughly 700,000 cases each year,[91] and the hearing process takes an average of 373 days.[92] Suffice it to say that the administrative judiciary both outnumbers and handles far more cases than Article III courts.[93] If anything, this

90. *See* Free Enter. Fund v. PCAOB, 561 U.S. 477, 586–88 app. C (2010) (Breyer, J., dissenting) (indicating that the Office of Personnel Management had told the Court that there were currently 1,584 federal ALJs, 1,334 of whom worked for the SSA).

91. *Program Provisions and SSA Administrative Data*, *Annual Statistical Supplement, 2020,* SSA.GOV, https://www.ssa.gov/policy/docs/statcomps/supplement/2020/2f8-2f11.html (last visited Oct. 6, 2022).

92. Stephen Ohlemacher, *Judges Sue Social Security over Case 'Quotas,'* YAHOO! NEWS (Apr. 19, 2013), https://news.yahoo.com/judges-sue-social-security-over-075118729.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAIw1u1Ck9AgWZR63OcEIRzz48wEb5Tex9LSJ2Pk5krvcuAQA4Vy42eYP1Vw0xUydSNWyhYX52EwkzBvA2RIcVFOZV0567RUuXXlW3we3PL66cktZOBEYUety2xq2uxKq1vt4o59A-1vhssum-eyyJeI4wwtIe8XYxNCUAmfFtR9R ("The Social Security Administration says [ALJs] should decide 500 to 700 disability cases a year."); *see also* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1655 n.64 (2016) ("There is a longstanding debate over whether the SSA, which uses ALJs for its hearings, is required to engage in formal adjudication for its hearings.") (citing *Social Security Subcommittee House Ways and Means Committee* 4–5 (June 27, 2012) (statement of Professor Jeffrey S. Lubbers); *see also* Robin J. Arzt, *Adjudications by Administrative Law Judges Pursuant to the Social Security Act Are Adjudications Pursuant to the Administrative Procedure Act*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 279, 281–82 (2002).

93. Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1652 (2016) (noting that there were only 860 permanently authorized Article III judgeships as of 2014 and, compared to AJ and ALJs presiding "over more than 750,000 proceedings annually,"

makes reforming the administrative judiciary even more urgent and agreement as to its true purpose even more necessary.

## III. ILLUSTRATIONS OF THE BROKEN ADMINISTRATIVE JUDICIARY

Aside from its cumbersome size and exorbitant cost,[94] the failings of the contemporary administrative judiciary are illustrated neatly by two worrying trends.

### *A. Lingering Ambiguity Surrounding Administrative Judicial Appointments*

In June 2018, the U.S. Supreme Court held that ALJs are to be considered officers of the United States for purposes of the Appointments Clause.[95] The Appointments Clause provides:

> [The President of the United States] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such *inferior Officers*, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[96]

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federal district courts received "only about 375,000 civil and criminal-felony case filings in 2015.").

94. Direct budgetary appropriations for ALJs and other members of the administrative judiciary are difficult to determine and often fluctuate. However, it is enough to say that such allocations have been a topic of political dispute. *See, e.g., Role Of Social Security Administrative Law Judges*: *Joint Hearing Before The Subcommittee On Courts, Commercial And Administrative Law Of The Committee On The Judiciary And The Subcommittee On Social Security Of The Committee On Ways And Means*, 112th Cong. 30 (2011) (statement of Congressman Sam Johnson, Chairman, Subcommittee on Social Security, Committee on Ways and Means) ("I hope . . . we can have a frank discussion about whether more money is the only answer or if other reforms would solve the problem more efficiently. [SSA Commissioner] insists that most ALJs are dedicated and conscientious public servants, but he acknowledges that there are a certain number who under perform, approve or deny a suspiciously high number of cases or otherwise misbehave in office. . . . [SSA] will pay OPM $2.7 million this year for personnel services related to administrative law judges. The American taxpayer has the right to know whether the Social Security Administration is getting its money's worth from OPM.").

95. *See generally* Lucia v. S.E.C., 138 S. Ct. 2044 (2018) (noting that ALJs are Officers of the United States and therefore subject to the Appointments Clause).

96. U.S. Const. art. II, § 2, cl. 2 (emphasis added).

The Court in *Lucia* relied largely on its earlier holding in *Freytag v. Commissioner*.[97] In *Freytag*, the Court held that Special Trial Judges of the United States Tax Court were officers, albeit "inferior officers," for purposes of the Appointments Clause.[98] *Lucia* similarly held that ALJs assigned to hear U.S. Securities and Exchange Commission ("SEC") enforcement actions were "Officers of the United States" within the meaning of the Appointments Clause.[99]

Illustrating the gravity of the Court's holding in *Lucia*, the SEC almost immediately issued the following Stay Order in light of the fact that many of its ALJs had apparently not been constitutionally appointed:

> In light of the Supreme Court's decision in *Lucia v. SEC*, we find it prudent to stay any pending administrative proceeding initiated by an order instituting proceedings that commenced the proceeding and set it for hearing before an administrative law judge, including any such proceeding currently pending before the commission.[100]

The *Lucia* opinion itself was silent as to whether the Court's ruling ought to be interpreted to apply to all ALJs within the executive branch or solely to those at the SEC.[101] Yet, commentators quickly noted that it "may be years before the implications of the Supreme Court's opinion are clear, but at first glance the opinion strikes a major blow at one of the centerpieces of the administrative state—the tradition of civil-service appointments of independent administrative law judges."[102] Arguably, *Lucia* may "end[ ] up invalidating all of the existing systems for appointments of ALJs"

97. Freytag v. Comm'r, 501 U.S. 868 (1991).

98. *Id.* at 892.

99. *Lucia*, 138 S. Ct. at 2055. While the SEC undertook to retroactively reappoint their ALJs in response to the *Lucia* decision, the ruling had vast implications elsewhere. *See, e.g.*,Cirko ex rel. Cirko v. Comm'r of Soc. Sec., 948 F.3d 148, 152 (3d Cir. 2020) (allowing plaintiffs to challenge SSA ALJ appointments even where plaintiffs had not satisfied APA exhaustion requirements with SSA); Green, *supra* note 76, at 697 n.477 (explaining that *Lucia* has been so disruptive as to force district courts to pause "current lawsuits concerning [the appointments issue] while awaiting the Third Circuit's [*Cirko*] decision, and all of these Social Security cases will now be remanded for adjudication by ALJs who were properly appointed.").

100. Hazel Bradford, *SEC Puts In-House Cases on Hold After Supreme Court Ruling*, PENSIONS & INV. (June 25, 2018), https://www.pionline.com/article/20180625/ONLINE/180629915/sec-puts-in-house-cases-on-hold-after-supreme-court-ruling.

101. *See Lucia*, 138 S. Ct. at 2055.

102. Ronald Mann, *Opinion Analysis: Justices Invalidate Civil-Service Appointments of Administrative Law Judges*, SCOTUSBLOG (Jun. 21, 2018), https://www.scotusblog.com/2018/06/opinion-analysis-justices-invalidate-civil-service-appointments-of-administrative-law-judges.

across the executive agencies.[103] Interestingly, the 1992 ACUS study mentioned the Appointments Clause only twice—even after *Freytag* was decided—presumably because the group saw no cause for grave concern regarding the status of ALJs on that basis.[104] The group did note, however, that the Appointments Clause could present a challenge to an effort to allocate greater decision making power to ALJs: "Decisionmaking could be allocated to give adjudicatory officers greater responsibility and authority . . . . The only constraint on Congress' discretion in this respect has its source in the Appointments Clause."[105]

But those fears have already been realized *without* the added benefit of ALJs being granted significantly greater authority to render final decisions. Instead, *Lucia* has simply taken the form of a cudgel to be used by conservative elements bent on reigning in the administrative state.[106] Even *Chevron* has been used in this way.[107] Not only is it possible for Congress to grant ALJs greater control over their decisions, but it is also preferable to an administrative judiciary left in the lurch amidst debates regarding their constitutionality.[108] The literature on this point is descriptive enough but fails to offer much in the way of prescriptive solutions.[109] It seems clear that Congress would do well to preempt any further "attacks" on the administrative judiciary on constitutional grounds by amending the APA in light of *Lucia* and later addressing the scope of ALJ authority. That is, nothing in the Constitution would prevent Congress from mandating that all ALJs, across all agencies within the executive branch, be appointed or reappointed pursuant to the Appointments Clause without delay.[110] The Supreme Court's Appointments Clause jurisprudence suggests that any "position, however labeled, is [,]in fact[,] a federal office if (1) it is invested by [a] legal authority with a portion of the sovereign powers of the federal government, and (2)

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103. *Id.*

104. VERKUIL ET AL., *supra* note 8, at 783, 1038.

105. *Id.* at 1038.

106. *See* Steven D. Schwinn, *Lucia v. SEC and the Attack on the Administrative State*, AM. CONST. SOC'Y SUP. CT. REV. 2017-2018 241, 242–43 (2018); Exec. Order No. 13,843, 83 Fed. Reg. 32, 755 (July 10, 2018) (excepting ALJs from the merit-based selection process).

107. *See, e.g.,* REPUBLICAN NAT'L COMM., REPUBLICAN PLATFORM 2016, at 9–10 (2016) (denouncing *Chevron* deference and stating that "courts should interpret laws as written by Congress rather than allowing executive agencies to rewrite those laws to suit administration priorities.") https://www.presidency.ucsb.edu/sites/default /files/books/presidential-documents-archive-guidebook/national-political-party-platforms-of-parties-receiving-electoral-votes-1840-2016/117718.pdf.

108. VERKUIL ET AL., *supra* note 8, at 1038; Green, *supra* note 76, at 621.

109. Green, *supra* note 76, at 621.

110. Jennifer L. Mascott, *Constitutionally Conforming Agency Adjudication*, 2 LOY. U. CHI. J. REG. COMPL. 22, 28–30, 51–52 (2017).

it is 'continuing.'"[111] Any person holding such a position within the executive branch—and thus conceivably all hearing officers of any stripe—could properly be deemed Officers of the United States. Indeed, *Lucia* has continued to have startling ramifications as recently as 2022 for that exact reason.[112]

The Trump Administration took action in this regard.[113] In the weeks following *Lucia*, President Trump issued Executive Order 13,843 which excepted ALJs from "competitive examination and competitive service selection procedures."[114] The Executive Order stated that "[t]he Federal Government benefits from a professional cadre [of ALJs] appointed under section 3105 of [the APA], who are impartial and committed to the rule of law."[115] *Lucia*, President Trump pointed out, illustrated that "ALJs are often called upon to discharge significant duties and exercise significant discretion in conducting proceedings under the laws of the United States."[116] In fact, the Executive Order recognized the role of ALJs "has increased over time and ALJ decisions have, with increasing frequency, become the final word of the agencies they serve."[117] It also recognized that "[r]egardless of whether [competitive service and examination] procedures would violate the Appointments Clause . . . there are sound policy reasons to take steps to eliminate doubt regarding the constitutionality of the method of appointing officials who discharge such significant duties and exercise such significant discretion."[118] Accordingly, the Executive Order placed ALJs within the excepted

111. Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 73–74 (Apr. 16, 2007).

112. *See* Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446, 449 (5th Cir. 2022) (holding, upon a split panel, that SEC's enforcement action against hedge fund manager in administrative proceedings before ALJ violated manager's right to jury trial under Seventh Amendment, Congress failed to articulate an "intelligible principle" when it delegated the power to the commission to choose whether it brings cases before its own administrative law judges (ALJs) or in district court, and removal restrictions on ALJs violate Article II of the Constitution, which dictates the president must "take care that the laws be faithfully executed"). For a thorough analysis of *Jarkesy* and its implications prior to the Fifth Circuit's decision, see Yeatman, W., Shapiro, I. & Schulp, J., *Court Should Check the SEC's Unfair Home Court Advantage*, CATO INSTITUTE (Mar. 18, 2021), https://policycommons.net/artifacts/1428661/court-should-check-the-secs-unfair-home-court-advantage/2043583.

113. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32, 755 (July 10, 2018) (entitled "Excepting Administrative Law Judges From the Competitive Service").

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* For a useful summary of Executive Order 13,843 and its immediate impact, see U.S. Off. of Pers. Mgmt., Memorandum on executive order - Excepting Administrative Law Judges from the Competitive Service, (July 10, 2018).

service, hoping to ultimately "promote confidence in, and the durability of, agency adjudications."[119]

Thus, the executive branch has already recognized the need for ALJs to be positioned in a way that protects their unique discretionary position within the federal government.[120] Congress should similarly recognize these interests and undertake to amend the APA in light of them. Indeed, Congress "has broad discretion to allocate adjudicatory responsibilities and structure the institutional environment in which adjudicatory officers operate."[121] Congress need only exercise that power and could do so while simultaneously promoting specific policy objectives.

### *B. The Near Fiction of Administrative Judicial Impartiality*

The APA articulates three general principles governing the role of the administrative judiciary: (1) the ALJ presides at the hearing and issues an initial decision; (2) the agency has plenary power to review the initial decision and to substitute its judgment for that of the ALJ; and (3) reviewing courts defer to the agency rather than to the ALJ.[122] In case of doubt, the Court in *Lucia* provided a useful example of precisely what this looks like in practice:

> The SEC has statutory authority to enforce the nation's securities laws. One way it can do so is by instituting an administrative proceeding against an alleged wrongdoer. By law, the Commission may itself preside over such a proceeding. But the Commission also may, and typically does, delegate that task to an ALJ. An ALJ assigned to hear an SEC enforcement action has extensive powers [and] issues an 'initial decision.' That decision must set out "findings and conclusions" about all 'material issues of fact [and] law'; it also must include the 'appropriate order, sanction, relief, or denial thereof.'[123]

The agency head (*i.e.,* the "Commission") can then review the ALJ's decision *sua sponte* or upon request or, if not, issue an order stating that the ALJ's decision is final, at which point the ALJ's decision is treated as the final action of the agency.[124] But, because

119. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,756 (July 13, 2018).
120. *Id.* at 32,755.
121. VERKUIL ET AL., *supra* note 8, at 1038.
122. Lucia v. S.E.C., 128 S. Ct. 2044, 2049 (2018).
123. *Id.*
124. *Id.*

agency heads are political appointees appointed by the President—indeed, terminable by the President for cause[125]—what happens when agency heads or their employees selectively delegate cases to their ALJs based on political considerations?

Commentators have not sufficiently addressed a case that dealt with this very question. In *Mahoney v. Donovan*, Judge J. Jeremiah Mahoney, an ALJ at the U.S. Department of Housing and Urban Development ("HUD"), filed suit against his agency for interference with his judicial independence under the APA.[126] David Anderson was Judge Mahoney's supervisor at the time, appointed to the position of Director of HUD's Office of Hearings and Appeals by the HUD Secretary.[127] In the complaint, Judge Mahoney challenged:

> (1) the selective assignment of cases on the basis of political considerations or the Secretary's perceived interests; (2) the failure to provide docket numbers necessary for the administrative law judges to manage their cases, as well as to provide access to legal-research resources; (3) unauthorized *ex parte* communications between [Anderson] and a litigant appearing before [Judge Mahoney]; and (4) the practice of providing the Justice Department with advance warning of notices of election in certain cases.[128]

The district court ruled that Mahoney lacked standing to sue his agency to enforce his own judicial independence under the APA.[129] However, the district court "suggested that federal ALJs—rather than seek to enforce their own independence—might instead bring lawsuits against agencies for interference with their judicial independence 'on behalf of the litigants' who appear before them."[130] However, such a resolution to the standing issue would necessarily place an ALJ "in the awkward position of being the advocate for a litigant from the judge's own courtroom."[131] Indeed, "[o]ne shudders to think of the consequences to administrative adjudication if any ALJ would choose to advocate for one party over another in an Article III

125. Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).

126. Mahoney v. Donovan, 824 F. Supp. 2d 49 (D.D.C. 2011), *aff'd in part*, No. 12-5016, 2012 WL 3243983 (D.C. Cir. Aug. 7, 2012), *aff'd in part on other grounds*, 721 F.3d 633 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 2724 (2014).

127. *Id*. at 53.

128. Mahoney, 721 F.3d 633, 634 (D.C. Cir. 2013).

129. Mahoney, 824 F. Supp. 2d at 53; *see also* Hon. James G. Gilbert, Hon. Robert S. Cohen, *Administrative Adjudication in the United States*, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY 222, 236 (2017) (describing this case and its procedural history).

130. Gilbert & Cohen, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY at 222 (citing *Mahoney*, 824 F. Supp. 2d at 49).

131. *Id.*

federal courtroom regardless of the virtue of the cause."[132] On appeal from the district court's decision, the District of Columbia Circuit Court of Appeals declined to resolve the standing issue, holding instead that Judge Mahoney's claims arose from mere "working conditions" and were thus barred by the Civil Service Reform Act of 1978 ("CSRA").[133] Moreover, the court of appeals made "the astonishing statement that *all claims of interference* with judicial decision making by ALJs are 'working conditions' under CSRA."[134] The court stated:

> The degree of independence of an administrative law judge—the extent to which an administrative law judge may exercise his independent judgment on the evidence before him, free from pressures by officials within the agency, certainly sounds like a working condition.[135]

This is a fairly stunning conclusion, especially when considering its implications for litigants in administrative proceedings. Imagine, for example, a similar but more extreme circumstance: an agency head determines which ALJs most often rule in favor of the agency, assigns all significant cases solely to those ALJs, and allows other ALJs to hear only less significant matters. Or, imagine an agency head being tasked with a specific political mandate (e.g., providing greater protection for landlords against discriminatory housing claims), and then assigning all cases implicating that mandate to ALJs that are politically aligned with the current Presidential Administration. *Mahoney* would apparently allow for each of these scenarios and bar ALJs from seeking relief on their own behalf in an Article III court.[136] This is yet another problem that Congress could directly address by amending the APA. Other commentators have recognized the need for amending the APA, but recognition of the need to do so specifically with respect to the administrative judiciary is noticeably lacking.[137] Incredibly, the APA has been amended only sixteen times

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132. *Id.*

133. *Mahoney*, 721 F.3d 633, 634 (D.C. Cir. 2013) (citing Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978)).

134. Gilbert & Cohen, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY at 222 (emphasis added).

135. *Mahoney*, 721 F.3d 633, 636–37 (D.C. Cir. 2013) (internal punctuation and citation omitted). For more on the impact of this decision and the mere existence of the litigation itself, see In Re Interstate Reality Management Company, HUDALJ 11-F022-CMP-5 (Sept. 11, 2011) (parties to HUD administrative proceeding sought to disqualify HUD ALJ's suing their agency from presiding over pending matters before the agency) available at https://www.hud.gov/sites/documents/INTERSTATEREALTYMGT09111.PDF.

136. *Mahoney,* 721 F.3d 633, 637–38 (D.C. Cir. 2013).

137. *See, e.g.*, Christopher J. Walker, *Modernizing The Administrative Procedure Act*, 69 ADMIN. L. REV., 629–70 (June 9, 2017) https://administrativelawreview.org/wp-

since its 1946 enactment—most recently in 1996—and even that figure is misleading considering that only five such amendments have been significant or substantive.[138] A Congress that fails to amend one of the most far-reaching federal statutes in existence in light of new challenges is a Congress that cannot rationally complain about judicial attacks on the administrative state.

At least some members of Congress, however, have taken the exact *opposite* course of action advanced here.[139] More than two years following President Trump's Executive Order exempting ALJs from the competitive service, and placing them instead in the excepted service, three Republican members introduced a bill that would amend the APA in the other direction.[140] Today, APA Section 3105 reads:

> Each agency shall appoint as many administrative law judges as are necessary for proceedings . . . Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.[141]

Were this Bill to pass, Section 3105 would be amended to include sixteen subsections providing for, *inter alia*: (1) the reinstatement of ALJ examinations as prerequisites for ALJ candidacy; and (2) the repositioning of ALJs within the competitive service.[142] More importantly, it would require an ALJ to:

> . . . report directly to the chief administrative law judge (if any) of the Executive agency at which the ALJ is appointed.

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content/uploads/ sites/2/2019/09/69-3-Christopher-Walker.pdf; *see also* U.S. DEPT. OF JUSTICE, OFFICE OF THE DEPUTY ATT'Y GEN., Report 20-767, MODERNIZING THE ADMINISTRATIVE PROCEDURE ACT (2020).

138. *See* Walker, 69 ADMIN. L. REV. 634–35 (similarly describing the APA's amendment history as displayed via Westlaw's *Popular Name Table*). The author of this Comment also searched for any more recent amendments to the APA and found none. The only significant amendments to the APA throughout its entire history have been those arising from the Freedom of Information Act ("FOIA") (1966), the Privacy Act (1974), the Government in the Sunshine Act (1976), the waiver of sovereign immunity (1976), and, as discussed, the renaming of ALJs (1978).

139. *See generally* Administrative Law Judges Competitive Service Restoration Act, H.R. 4448, 117th Cong. (2021).

140. *Id.* (the Republican cosponsors are Rep. Fitzpatrick, Brian K. (R-PA-1), Rep. Bacon, Don (R-NE-2), and Rep. Smith, Christopher H. (R-NJ-4)).

141. APA §§ 556, 557 are the two provisions generally governing administrative hearings and procedure.

142. Administrative Law Judges Competitive Service Restoration Act, H.R. 4448, 117th Cong. (2021).

> If there is no chief administrative law judge, the ALJ shall report directly to the head of such Executive agency.[143]

Thus, members of the administrative judiciary are potentially poised for further disruptions that will cast doubt on their decisions and purpose. This Republican effort to amend the APA as described may well turn out to be a political play hostile to the administrative state altogether.[144] Instead of waiting for the courts to flesh out these contested provisions of the APA, progressive legislators must tackle administrative judicial reform head-on, ideally involving members of the administrative judiciary themselves. The need for such reform is made more apparent by the fact that ALJs remain powerless to scrutinize their agency's own statutory and policy interpretations.[145]

## IV. RETHINKING THE ADMINISTRATIVE JUDICIARY

A robust and accountable administrative judiciary is the *sine qua non* of a viable administrative state. However, the administrative judiciary, as designed, evolved to solve problems that largely no longer exist, or at least now exist to a much lesser degree.[146] Likewise, the APA was devised as a series of compromises and capitulations following a unique period of political controversy surrounding the administrative process.[147] Times have changed, and so too should the APA.

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143. *Id.* at 3.

144. *See, e.g.*, Christopher S. Kelley, *A Matter of Direction: The Reagan Administration, the Signing Statement, and the 1986 Westlaw Decision*, 16 WM. & MARY BILL RTS. J., 283, 289–90 (2007) ("Reagan was able to take advantage of changes to civil service laws during the Carter administration that expanded the number of political appointees to strategic positions within the bureaucracy.").

145. *See* VERKUIL ET AL., *supra* note 8 and accompanying text. A prominent and contemporary illustration of this problem arises from the federal government's response to the COVID-19 pandemic. Challengers of the way in which the U.S. Small Business Administration ("SBA") has administered Congress' Paycheck Protection Program ("PPP") within the Coronavirus Aid, Relief and Economic Security Act ("CARES Act") have argued that SBA improperly excluded certain employer costs (e.g., workers' compensation insurance premiums) from eligible payroll costs under the PPP. They argue that Congress' declared policy was that "the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns" and to "maintain and strengthen the overall economy of the Nation." *Small Bus. Admin. v. McClellan*, 364 U.S. 446, 447 (1960) (citing Small Business Act, 67 Stat. 232, as amended, 15 U.S.C. §§ 631–651). This congressional intent would potentially weigh against such exclusion. However, SBA's ALJs are bound by the agency's own interpretation of the CARES Act and thus are not permitted to even hear such arguments.

146. Dudley, *supra* note 41, at 36–37.

147. McNollgast. *The Political Origins of the Administrative Procedure Act*, 15 J. OF LAW, ECON., & ORG., 180, 183 (1999) http://www.jstor.org/stable/3554948 (explaining that nine

When he vetoed Logan-Walter, Roosevelt asserted that it was "impossible to subject the daily routine of fact-finding in many of our agencies to court procedure."[148] That may well have been the case eighty years ago, as the combined-function agency model took hold, but it is not the case today.[149] Logan-Walter would have granted the United States Court of Appeals for the District of Columbia broad jurisdiction over administrative adjudications.[150] The APA allows agencies themselves to adjudicate.[151] These proffered solutions, however, likely represent conflicting extremes while a plain middle ground exists. Today, twenty-two states have implemented a "central panel" model expressly in pursuit of independent, efficient, and effective administrative adjudications.[152] Most have done so with great success.[153] In general, these central panels consist of ALJs employed not by individual agencies, but by a single and distinct government institution.[154] Were this model to be imported at the federal level, agencies could maintain their dual functions of rulemaking and prosecution while surrendering their adjudicatory power in the interest of public trust and perceived impartiality. The SSA, with its 1,655 ALJs and uniquely protracted adjudicatory procedures, could remain fully intact, leaving only 276 ALJs to make a federal central panel. If this figure sounds too cumbersome, consider that the state of Washington alone maintains a central panel of more than 120 ALJs.[155] Congress could—and should—amend the APA to reflect the modern world. Specifically, it should codify ALJs into the excepted service while heightening the prerequisite qualifications for ALJ candidates. Congress should also place agency adjudicatory functions in new and separate institutions away from the agencies themselves, ideally pursuing a central panel model as the ultimate goal.

In this sense, Congress would be wise to revisit Logan-Walter altogether. Arguably, "the dominant purpose of [Logan-Walter] was

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sperate administrative procedure bills were introduced in Congress leading up to Logan-Walter, and seven more such bills after Logan-Walter until the APA was eventually passed).

148. *See* Dudley, *supra* note 41.

149. *See generally id.* at 36–37.

150. *See* McNollgast, *supra* note 147, at 196 (describing the relevant Logan-Walter provisions).

151. 5 U.S.C. § 556.

152. *See* La. Div. of Admin. L., *2021 Comparison of States with Centralized Administrative Hearings Panels*, (2021), https://www.adminlaw.la.gov/Documents/ 2021CentralPanelStatesComparisonChart.pdf; *see also* Malcolm C. Rich and Alison C. Goldstein, *The Need for a Central Panel Approach to Administrative Adjudication: Pros, Cons, and Selected Practices*, 39 J. NAT'L ASS'N ADMIN. L. JUDICIARY 2, 4-9 (2019).

153. Rich et al., *supra* note 152, at 74–75.

154. *Id*. at 8.

155. La. Div. of Admin. L., *supra* note 152.

to strengthen individual rights and judicial review."[156] Logan-Walter would have allowed greater opportunities for litigants to pursue remedies or defend against enforcement actions in Article III courts, thereby lightening the load for ALJs.[157] It would also ameliorate due process concerns that continue to pervade administrative proceedings.[158] In 1979, then-professor Antonin Scalia argued, quite presciently, that the most serious issue regarding the administrative judiciary was that of ensuring the quality of its adjudicators.[159] This might at first suggest that ALJs ought to be immediately placed back in the competitive service, but such a conclusion ignores the fact that other barriers could ensure ALJ quality just as well if not more so.[160] As partisan debates around the administrative state continue, reform to the administrative judiciary offers an opportunity for bipartisan amendments.

## V. CONCLUSION

It is more than unfortunate that the administrative judiciary has largely been ignored in recent decades. Yet, Congress is able to prevent further decay by proactively assessing, and then legislating, in a manner that recognizes both the administrative judiciary's value as well as its inherent risks. If nothing else, good governance in the modern age suggests that adjudication should be far removed from rulemaking. Such reform must begin with sweeping changes to the administrative judiciary itself if the administrative state is to survive this period of uncertainty.

156. McNollgast, *supra* note 147, at 196–97.

157. *See* Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENVTL. L. REV. 207, 210 (2016) (explaining that the Special Committee drafted the Walter-Logan bill to address due process concerns and to create a new United States Court of Appeals for Administration that evaluates agency rulings and grants relief for affected firms and individuals).

158. *Id.*

159. *See* Antonin Scalia, *The ALJ Fiasco: A Reprise*, 47 U. CHI. L. REV., 57, 78–79 (1979).

160. One obvious step in this direction would be for Congress to immediately incorporate an administrative judicial code of conduct into the APA itself. For more on efforts to adopt such a code, *see* Steven A. Glazer, *Toward A Model Code of Judicial Conduct for Federal Administrative Law Judges*, 64 ADMIN. L. REV. 337 (2012).