

# Slip Slidin' Away – The Erosion of APA Adjudication

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In 1946, the Administrative Procedure Act (APA) established a uniform set of procedures applicable to adjudications “required by statute to be determined on the record after opportunity for an agency hearing.”<sup>1</sup> Those provisions, like the rest of the APA, “represent[ed] a long period of study and strife; [they] settle[d] long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces ha[d] come to rest.”<sup>2</sup> With the exception of the addition of prohibitions on ex parte communications in 1976,<sup>3</sup> those procedures have not been substantively altered since 1946.<sup>4</sup> Nevertheless, driven at least in part by a desire to avoid the use of Administrative Law Judges (ALJs), agencies have consistently resisted application of those procedures, lobbying Congress when enacting new laws to create non-APA adjudicatory procedures and interpreting ambiguous laws as not requiring APA procedures. The result has been to reduce the protections afforded to defendants in agency actions. One measure of the decrease in APA adjudications, albeit imperfect, is that the number of ALJs outside of the Social Security Administration has declined from 464 in 1980 to 257 in 2016.<sup>5</sup> And this includes declines in the Securities and Exchange Commission from eight to five and in the Environmental Protection Agency from seven to four, agencies whose enforcement activities have if anything increased since 1980.

Part I of this paper will explain the nature of adjudication under the APA in order to contrast it with what agencies would like to substitute for it. Part II will then describe the original history of the law regarding when APA adjudicatory procedures are required. Part III extends this history by telling how the original requirement for APA adjudication has been eroded over the years. Part IV asks the question whether this erosion is something to be concerned about and suggests a positive answer to that question. Part V then identifies and discusses a number of alternatives to address the erosion.

## I. APA Adjudication

Under the APA, adjudications are of two types: those subject to sections 554, 555, 556, and 557 to Title 5 and those subject only to section 555. Inasmuch as a practical matter section

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<sup>1</sup> See Section 5, Administrative Procedure Act of June 11, 1946, 60 Stat. 237 (1946).

<sup>2</sup> *Wong Yang Sung v. Clark*, 339 U.S. 33, 40 (1950).

<sup>3</sup> See Pub. L. No. 94-409, Sept. 13, 1976, 90 Stat. 1246.

<sup>4</sup> In 1966, the original APA was repealed and re-enacted without substantive change as part of the codification of Title 5 of the United States Code. Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 387. In 1978, the title of Hearing Examiner was changed to Administrative Law Judge. Pub. L. No. 95-251, Mar. 27, 1978, 92 Stat. 183. In 1990, the existence of alternative dispute resolution procedures created by the Alternative Dispute Resolution Act, 5 U.S.C. §§ 581 *et seq.*, was acknowledged. Pub. L. No. 101-552, Sec. 4(a), Nov. 15, 1990, 104 Stat. 2737.

<sup>5</sup> Compare Antonin Scalia, *The ALJ Fiasco – A Reprise*, 47 U. Chi. L. Rev. 57, 63 n.27 (1979) with [www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency](http://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency).

555 only requires that an agency allow a person to be represented by counsel and that it issue subpoenas for a party, the APA in effect provides no procedural requirements for adjudications subject only to section 555. Of course, if the agency action may deprive a person of liberty or property, due process requirements will be applicable, but the *Mathews v. Eldridge*<sup>6</sup> factors afford agencies significant flexibility in devising procedures subject only to due process.

Sections 554, 556, and 557, however, establish adjudicatory procedures in some detail, and adjudications performed subject to these sections are colloquially known as “formal adjudications.” First, persons subject to the proceedings must be given notice of the time, place, and nature of the hearing; the legal authority and jurisdiction for the hearing; and the matters of fact and law asserted.<sup>7</sup> Second, parties are entitled to submit facts, arguments, offers of settlement, or, when appropriate, proposals for adjustment.<sup>8</sup> They may present their case by oral or documentary evidence, submit rebuttal evidence, and conduct cross examination.<sup>9</sup> If the parties cannot reach a consent agreement, the agency must provide them a hearing.<sup>10</sup> Third, at the hearing, if not presided over by the agency or one or more members of a board or commission, an administrative law judge (ALJ) shall preside.<sup>11</sup>

Administrative law judges are as a formal matter appointed by the agency that employs them,<sup>12</sup> but as a practical matter an agency can only choose among three persons submitted to it by the Office of Personnel Management (OPM), which sets the qualifications for ALJs, administers and grades entrance exams for applicants, and determines which names will be submitted to the agency based upon OPM’s scores.<sup>13</sup> Moreover, although employed by the agency over whose cases they preside, an agency can neither reward nor sanction the ALJs it employs.<sup>14</sup> Only the Merit Systems Protection Board has the authority to determine, after a formal, APA hearing, that for “good cause” some sanction, up to an including removal, is justified.<sup>15</sup> In addition, section 554 prohibits ALJs from consulting any person on a fact at issue in a case except on notice to and an opportunity for all parties to participate, and it prohibits any person involved in the investigation or prosecution of a case (or similar case) from advising an ALJ with respect to a decision.<sup>16</sup> In short, the APA and the OPM regulations ensure ALJ impartiality in making decisions, if not total independence from the agency that technically employs them.

In the hearing, an ALJ performs the ordinary functions that a presiding Article III judge would perform: regulating the course of the hearing, ruling on offers of proof and evidentiary

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<sup>6</sup> 424 U.S. 319 (1976).

<sup>7</sup> 5 U.S.C. § 554(b).

<sup>8</sup> 5 U.S.C. § 554(c).

<sup>9</sup> 5 U.S.C. § 556(d).

<sup>10</sup> 5 U.S.C. § 554(c).

<sup>11</sup> 5 U.S.C. § 556(b).

<sup>12</sup> 5 U.S.C. § 3105.

<sup>13</sup> See generally Vanessa K. Burrows, Cong. Research Serv., *Administrative Law Judges: An Overview* 2-3 (2010).

<sup>14</sup> See 5 U.S.C. § 4301(2)(D); 5 C.F.R. § 930.206.

<sup>15</sup> 5 U.S.C. § 7521.

<sup>16</sup> 5 U.S.C. § 554(d).

objections, and disposing of procedural requests.<sup>17</sup> In addition, the ALJ may issue subpoenas, take depositions or have depositions taken, hold settlement conferences, and suggest the use of alternative means of dispute resolution.<sup>18</sup> No interested party outside the agency is allowed to make any ex parte communication with the ALJ relevant to the merits of the proceeding.<sup>19</sup>

Before the ALJ makes a decision, parties are entitled to submit proposed findings and conclusions and supporting reasons for the proposed findings.<sup>20</sup> The ALJ's decision must include findings and conclusions, and the reasons therefor, on all material issues of fact, law, or discretion presented on the record.<sup>21</sup> Ultimately, the ALJ may make or a recommend decision, but it must be based on the record and supported by reliable, probative, and substantial evidence.<sup>22</sup>

After the ALJ has made a decision, a losing party may appeal that decision to the agency.<sup>23</sup> The party then has the right to submit exceptions to the decision and reasons for those exceptions.<sup>24</sup> Again, there are prohibitions on ex parte communications with interested persons outside the agency<sup>25</sup> or with agency employees involved in the investigation or prosecution of the case or a similar case.<sup>26</sup> The agency, like an appellate court, may consider questions of law de novo, but unlike an appellate court, may review factual questions de novo as well.<sup>27</sup> However, the agency's decision must be based on the record, which includes all of the ALJ's factual findings.<sup>28</sup>

## II. The Background

The Supreme Court's characterization of the APA as settling hard-fought contentions and enacting a formula upon which opposing forces could rest is accurate enough. However, that formula was itself a compromise, and like many compromises was not entirely clear in its execution. While some had fought to have the APA adjudication procedures the general rule, the administration resisted and achieved two major concessions. First, section 554 contains a list of adjudications that are explicitly exempted from APA requirements.<sup>29</sup> Most of these exemptions are sensible and not controversial, but some enable the government to impact private persons in devastating ways without the protections of an APA adjudication. For example, persons in the protected civil service may be fired for cause, but there is no APA adjudication requirement if the person denies the basis for the cause determination.<sup>30</sup> In addition, there is an exemption for

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<sup>17</sup> 5 U.S.C. § 556(c).

<sup>18</sup> *Id.*

<sup>19</sup> 5 U.S.C. § 557(d).

<sup>20</sup> 5 U.S.C. § 557(c).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*; 5 U.S.C. § 556(d).

<sup>23</sup> 5 U.S.C. § 557(b).

<sup>24</sup> 5 U.S.C. § 557(c).

<sup>25</sup> 5 U.S.C. § 557(d).

<sup>26</sup> 5 U.S.C. § 554(d).

<sup>27</sup> 5 U.S.C. § 557(b).

<sup>28</sup> 5 U.S.C. § 557(d).

<sup>29</sup> 5 U.S.C. § 554(a)(1)-(6).

<sup>30</sup> *See* 5 U.S.C. § 554(a)(2).

proceedings in which decisions “rest solely on inspections, tests, or elections.”<sup>31</sup> At least as originally construed, this meant that a pilot could be denied an airman’s certificate from the Federal Aviation Administration and a ship could have its certificate of seaworthiness revoked by the Coast Guard, all without an APA adjudication.<sup>32</sup>

The second concession was to limit the requirement for an APA adjudication only to those adjudications “required by statute to be determined on the record after opportunity for an agency hearing.”<sup>33</sup> The meaning of this phrase has bedeviled courts and agencies ever since its enactment. The Attorney General’s Manual on the Administrative Procedure Act (AG’s Manual) devoted several pages explaining its intent. First, the phrase was not intended to refer to hearings that statutes merely authorized, rather than required.<sup>34</sup> Second, it was not intended to apply to hearings that an agency held simply as matter of agency policy or practice.<sup>35</sup> However, the Manual goes on, if a statute authorizes agency action clearly adjudicatory in nature and specifically requires the agency to hold a hearing, but does not expressly require that the decision be on the record, it is presumed that the adjudication is required to be conducted pursuant to the procedures in the APA.<sup>36</sup> The Manual explained: “It is believed that with respect to adjudication the specific statutory requirement of a hearing, without anything more, carries with it the further requirement of decision on the basis of the evidence adduced at the hearing. . . . In fact, it is assumed that where a statute specifically provides for administrative adjudication ... after opportunity for an agency hearing, such specific requirement for a hearing ordinarily implies the further requirement of decision in accordance with evidence adduced at the hearing.”<sup>37</sup>

Notwithstanding this understanding, the Justice Department did not interpret this language to require an APA adjudication in deportation cases, although it conceded that the Supreme Court had required a hearing as a prerequisite to an order of deportation as a matter of due process.<sup>38</sup> The government insisted that the APA stated that the hearing be “required by statute,” not by due process.<sup>39</sup> The lower courts were split on the subject.<sup>40</sup> In *Wong Yang Sung v. McGrath*,<sup>41</sup> the Supreme Court resolved the issue. It did so by considering the twin purposes of the APA – “to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies”<sup>42</sup> and “to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge.”<sup>43</sup> Applying APA adjudication requirements to deportation proceedings, it believed, would further both of these purposes. The

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<sup>31</sup> 5 U.S.C. § 554(a)(3).

<sup>32</sup> See *Scholnick v. Clark*, 81 F. Supp. 298, 299 (D.D.C. 1948). See also Attorney General’s Manual on the Administrative Procedure Act (hereafter AG’s Manual) 44 (1947).

<sup>33</sup> 5 U.S.C. § 554(a).

<sup>34</sup> *AG’s Manual*, at 41.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*, at 42.

<sup>37</sup> *Id.*

<sup>38</sup> *The Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U.S. 86 (1903).

<sup>39</sup> See *AG’s Manual*, 41 (1947).

<sup>40</sup> Compare *Scholnick v. Clark*, 81 F. Supp. 298 (D.D.C. 1948)(APA does not apply) with *Eisler v. Clark*, 77 F. Supp. 610 (D.D.C. 1948)(APA does apply).

<sup>41</sup> 339 U.S. 33 (1950).

<sup>42</sup> *Id.*, at 41.

<sup>43</sup> *Id.*

“required by statute” language of the APA posed little obstacle to furthering these purposes, the Court said.

We think that the limitation to hearings “required by statute” in s[ection] 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority. 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.<sup>44</sup>

However sound the Court’s reasoning, at the request of the Department of Justice Congress in effect reversed the outcome of *Wong Yang Sung* later the same year.<sup>45</sup> Nevertheless, that a hearing required by due process could satisfy the language “required by statute” survived this statutory override regarding deportation proceedings. In the following year, the Court decided *Riss & Co. v. United States*,<sup>46</sup> in which without opinion, but citing *Wong Yang Sung*, it reversed a lower court decision that upheld the use of a non-APA hearing in a certification proceeding before the Interstate Commerce Commission. In the same year, after the Seventh Circuit had upheld a non-APA hearing by the Post Office, which had issued a fraud order denying the use of the mails to a person, the person sought certiorari. The Solicitor General, however, confessed error in light of *Wong Yang Sung*.<sup>47</sup> Lower courts likewise began using the same analysis.<sup>48</sup> As late as 1998, the Ninth Circuit reaffirmed this analysis.<sup>49</sup>

### III. Erosion of APA Adjudication

Although *Wong Yang Sung* has never been overruled, distinguished, or criticized by the Supreme Court, some of the Court’s later decisions have been seized upon by agencies to suggest that it is no longer good law. First, the Court’s pair of cases restricting when formal rulemaking is required under the APA – *United States v. Allegheny-Ludlum Steel Corp.*<sup>50</sup> and *United States*

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<sup>44</sup> *Id.*, at 50.

<sup>45</sup> See Chapter III of the Supplemental Appropriations Act, 1951, Act of September 27, 1950, 64 Stat. 1048 (1950), 8 U.S.C. § 155a (1946 Supp.) (stating that proceedings relating to either the exclusion or expulsion of aliens shall be without regard to the APA). In 1952, Congress amended the Immigration and Nationality Act specifically to create procedures applicable to deportation, see Immigration and Nationality Act, ch. 477, 66 Stat. 166 (1952), and the Court in *Marcello v. Bonds*, 349 U.S. 302 (1955), acknowledged that this overturned the result in *Wong Yang Sung*.

<sup>46</sup> 341 U.S. 907 (1951).

<sup>47</sup> *Cates v. Haderlein*, 342 U.S. 804 (1951) (per curiam).

<sup>48</sup> See, e.g., *Adams v. Witmer*, 271 F.2d 29 (9<sup>th</sup> Cir. 1958) (Bureau of Land Management could not deny a mining patent without an APA adjudication).

<sup>49</sup> See *Collord v. Department of Interior*, 154 F.3d 933 (9<sup>th</sup> Cir. 1998) (hearing to defend a mining patent required to be an APA adjudication).

<sup>50</sup> 406 U.S. 742 (1972).

*v. Florida East Coast Railway Co.*<sup>51</sup> – were seized upon as suggesting that, like formal rulemaking, formal, APA adjudication was only required when a statute *explicitly* required an adjudication “to be determined on the record after opportunity for an agency hearing.” Some courts have bought this argument.<sup>52</sup> That this argument was inconsistent with the Court’s language in both cases was not enough apparently. In both *Allegheny-Ludlum* and *Florida East Coast Railway*, the Court clearly distinguished between rulemaking and adjudication in assessing when the formal procedures of the APA were required.<sup>53</sup> Moreover, the argument is inconsistent even with the AG’s Manual, which reflected the government’s view at the time the APA was enacted.<sup>54</sup> There, it was said:

With respect to rule making, it was concluded ... that a statutory provision that rules be issued after a hearing, without more, should not be construed as requiring agency action “on the record”, but rather as merely requiring an opportunity for the expression of views. That conclusion was based on the legislative nature of rule making, from which it was inferred, unless a statute requires otherwise, that an agency hearing on proposed rules would be similar to a hearing before a legislative committee, with neither the legislature nor the agency being limited to the material adduced at the hearing. No such rationale applies to administrative adjudication.<sup>55</sup>

Nevertheless, the reading of some lower courts of the reach of *Allegheny-Ludlum* and *Florida East Coast Railway* resulted in an erosion of APA adjudications.

The second Supreme Court case that seemed directly to undermine *Wong Yang Sung* was *Mathews v. Eldridge*.<sup>56</sup> *Mathews* did not cite *Wong Yang Sung*, and with good reason, because the hearing in that case had been a state proceeding and therefore there was no question as to whether there should be an APA adjudication.<sup>57</sup> Nevertheless, because *Mathews* introduced its three-factor, flexible approach to deciding what process is due before depriving someone of liberty or property, some have seen it as supplanting *Wong Yang Sung*’s rigid requirement that a hearing required by due process must be an APA adjudication. For example, in *Girard v. Klopfenstein*,<sup>58</sup> the Agricultural Stabilization and Conservation Service debarred Girard from participating in government contracts for a year pursuant to a non-APA adjudication. There was

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<sup>51</sup> 410 U.S. 224 (1973).

<sup>52</sup> See, e.g., *R.R. Comm’n of Texas v. United States*, 765 F.2d 221, 227 (D.C. Cir. 1985); *City of W. Chicago v. NRC*, 701 F.2d 632, 641 (7<sup>th</sup> Cir. 1983); *United States Lines v. FMC*, 584 F.2d 519, 536 (D.C. Cir. 1978).

<sup>53</sup> See *Allegheny-Ludlum*, 406 U.S. at 756-57; *Fla. E. Coast Ry.*, 410 U.S. at 239.

<sup>54</sup> It has been noted that the AG’s Manual, rather than being a neutral, disinterested document explicating the provisions of the APA, was “a highly political document designed to minimize the impact of the new statute on executive agencies.” John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 119 (1998).

<sup>55</sup> *AG’s Manual*, at 42-43.

<sup>56</sup> 424 U.S. 319 (1976).

<sup>57</sup> See 424 U.S. at 324. Although the case involved a preliminary termination of federal Social Security Disability Benefits, the actual proceeding in question involved a determination by the state agency responsible for making these initial determinations. Because the preliminary termination was carried on by the state agency under regulations adopted by the Department of Health, Education, and Welfare, the Secretary was the defendant in the case. Final determinations of ineligibility are made by the federal agency and are APA adjudications. See *id.*, at 339.

<sup>58</sup> 930 F.2d 738 (9<sup>th</sup> Cir. 1991).

no question that Girard was entitled to due process in the adjudication, but the Ninth Circuit applied *Mathews*' three-factor test to find that he had not been denied due process. As to the applicability of *Wong Yang Sung*, the court said that there the hearing given did not satisfy due process, whereas here it did. "Therefore, the rationale of *Wong Yang Sung* has no application [here]."<sup>59</sup>

The Ninth Circuit's characterization of *Wong Yang Sung* is simply in error. The Court there did not find that the hearing actually given to Wong Yang Sung failed to provide due process, rather it found that a hearing was required in order to satisfy due process, and therefore that hearing had to be an APA adjudication. This was precisely the situation in *Girard*, but the Ninth Circuit's incorrect interpretation of the interplay between *Mathews* and *Wong Yang Sung* led to the denial of an APA adjudication. Thus, there was a further erosion of APA adjudication.

The third Supreme Court case that has in fact, if not in law, undermined *Wong Yang Sung* is *Chevron, U.S.A v. NRDC*.<sup>60</sup> The familiar *Chevron* two-step asks first if a statutory provision is ambiguous, and if it is, then courts are to defer to a reasonable interpretation of the provision made by the agency responsible for administering that law. In *Chemical Waste Management, Inc. v. EPA*,<sup>61</sup> the D.C. Circuit accepted EPA's argument that an APA adjudication was not necessary before issuing certain corrective action orders under 42 U.S.C. § 6928(h), notwithstanding that the statute required a "public hearing."<sup>62</sup> EPA maintained that this provision was ambiguous as to what sort of procedure should be used in the hearing, and that its interpretation that an APA adjudication was not required was reasonable. Similarly, the First Circuit in *Dominion Energy v. Johnson*,<sup>63</sup> overruling its earlier decision in *Seacoast Anti-Pollution League v. Costle*,<sup>64</sup> followed the same analysis to conclude that EPA's elimination of APA adjudications for issuing National Pollutant Discharge Elimination Permits was lawful. As this author and others have commented, applying *Chevron* to the question whether an adjudication is required to follow the APA procedures is an incorrect application of *Chevron*.<sup>65</sup> The Supreme Court has made clear that *Chevron* is inapplicable to agency interpretations of the APA, because the APA is not an act any agency is charged with administering.<sup>66</sup> The courts applying *Chevron* to decide if APA adjudication is required have been led to believe that they should be looking to the agency's statutory provision requiring a hearing, not to the APA's section 554. This is an error. As the Supreme Court proceeded in *Wong Yang Sung*<sup>67</sup> and as the AG's Manual explained<sup>68</sup>, once an agency is required to conduct an adjudicatory hearing – a requirement that was conceded in both *Chemical Waste* and *Dominion Energy* – it is presumed

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<sup>59</sup> *Id.*, at 743.

<sup>60</sup> 467 U.S. 837 (1984).

<sup>61</sup> 873 F.2d 1477 (D.C. Cir. 1989).

<sup>62</sup> See 42 U.S.C. § 6928(b).

<sup>63</sup> 443 F.3d 12 (1<sup>st</sup> Cir. 2006).

<sup>64</sup> 572 F.2d 872 (1<sup>st</sup> Cir. 1977).

<sup>65</sup> See William Funk, *The Rise and Purported Demise of Wong Yang Sun*, 58 ADMIN. L. REV. 881, 896-897 (2006); William S. Jordan, III, *Chevron and Hearing Rights: An Unintended Combination*, 61 ADMIN. L. REV. 249, 254 (2009); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, GEO. L.J. 833, 896-897 (2001).

<sup>66</sup> See *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137-138 n.9 (1997).

<sup>67</sup> *Wong Yang Sung*, 339 U.S. at 48-51.

<sup>68</sup> *AG's Manual*, at 42-43.



that the hearing is one that must be decided on the record, and therefore an APA adjudication is required. In other words, the ambiguity is not in the agency's statutory provision, which explicitly requires a hearing and by necessary implication requires a decision on the record, the ambiguity is in the APA's section 554, as to whether it is an "adjudication required by statute to be determined on the record after opportunity for an agency hearing." In *Allegheny-Ludlum* and *Florida East Coast Ry.* the Supreme Court interpreted the meaning of "rules . . . required by statute to be determined on the record after opportunity for an agency hearing,"<sup>69</sup> and held that *this* language meant that a statute had to require explicitly that the hearing was on the record.<sup>70</sup> Because both the Esch Act in *Allegheny-Ludlum* and the Interstate Commerce Act in *Florida East Coast Ry.* only required a hearing, without specifying that it was to be on the record, these provisions did not trigger the requirement for formal rulemaking. That is, in the rulemaking context, the language that was ambiguous, and which the Supreme Court interpreted in *Allegheny-Ludlum* and *Florida East Coast Ry.*, was the language contained in the APA triggering the requirement for formal rulemaking. Similarly, in assessing whether a particular hearing required by a statute triggers the need for APA adjudication, the language that needs interpreting is the APA provision that requires APA adjudication. Hence, the use of *Chevron* to interpret the meaning of "hearing" in a particular statute is inconsistent with the Court's approach in *Wong Yang Sung*, *Allegheny-Ludlum*, and *Florida East Coast Ry.*

Nevertheless, the use of *Chevron* appears to have become the dominant judicial approach to discerning when an APA adjudication is required, with only the Ninth Circuit still outstanding.<sup>71</sup> Of course, agencies almost always will seek non-APA adjudications if given the opportunity, and the result is a further erosion of APA adjudications.

Sometimes, but rarely, courts resist agency attempts to erode APA adjudication. In *Collord v. Department of Interior*,<sup>72</sup> for example, the Department of Interior held a hearing, presided over by an ALJ, in which it denied the validity of a mining claim made by Collord. On appeal within the agency, that decision was reversed, and Collord filed for attorneys fees under the Equal Access to Justice Act (EAJA).<sup>73</sup> Fees are recoverable under EAJA only if the agency proceeding was an APA adjudication under 5 U.S.C. § 554. Although the hearing had complied in all respects with the requirements of § 554, Interior denied that the hearing was required by statute; it maintained that it had held the hearing it did simply as a matter of policy, not compulsion. The Ninth Circuit, however, agreed that the statute did not require a hearing, but it noted that an unpatented mining claim, such as was involved in this case, is a fully recognized possessory interest. Consequently, due process required a hearing before the government could extinguish it. Citing to *Wong Yang Sung*, the court held that consequently the hearing was held under compulsion and triggered the requirement for an APA adjudication. Of note here is the additional motivation for agencies to avoid having APA adjudications in favor of informal adjudications – avoidance of possible EAJA attorneys fee awards.

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<sup>69</sup> 5 U.S.C. § 553(c).

<sup>70</sup> *Allegheny-Ludlum*, 406 U.S. at 756-757; *Fla. East Coast Ry.*, 410 U.S. at 237-238.

<sup>71</sup> See Kent Barnett, *Against Administrative Judges*, 49 U.C. Davis L. Rev. 1643, 1663 n. 130. (2016).

<sup>72</sup> 154 F.3d 933 (9th Cir. 1998).

<sup>73</sup> 5 U.S.C. § 504.

Another test of an agency attempting to substitute an informal adjudication for an APA adjudication or a trial in district court is ongoing in several courts at the current time.<sup>74</sup> Section 31d of the Federal Power Act, as amended in 1986,<sup>75</sup> enables the Federal Energy Regulatory Commission (FERC) to impose and collect administrative civil penalties in one of two ways. The first procedure involves an administrative penalty imposed through a formal adjudication before an ALJ under the APA<sup>76</sup>; the second procedure involves FERC “promptly” making an assessment of a penalty and, if the penalty is not paid within 60 days, the subsequent filing of a collection action in district court, where the court has the authority to “review de novo the law and the facts involved” and to determine the appropriate assessment.<sup>77</sup> FERC has taken the position that the second procedure is in essence an informal adjudication, albeit one in which the defendant has no right to participate beyond what FERC in its discretion cares to provide the defendant, and the district court can then review FERC’s decision solely on the record provided to it by FERC. In two cases FERC’s argument has been rejected by the district court,<sup>78</sup> and in the two others this author and several other administrative law professors have attempted to file an amicus brief indicating that the text and history of the provision, especially in light of the due process concerns FERC’s position raises, require either an APA adjudication or a trial in district court.<sup>79</sup>

Agencies abetted by lower courts are not the only source of erosion of APA adjudication. Congress has also gotten in the act. Between 1986 and 1990 Congress created six separate statutes explicitly allowing the Environmental Protection Agency (EPA) to assess monetary penalties after a non-APA adjudication.<sup>80</sup> The Affordable Care Act contains at least one hearing requirement that is explicitly exempted from APA requirements.<sup>81</sup>

#### IV. Is it a Problem?

An initial question is whether the erosion of APA adjudication in favor of informal adjudication is a trend to be concerned with. It could be argued that the trend simply reflects

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<sup>74</sup> See *FERC v. Barclay’s Bank PLC*, Case No. 2:13-cv-02093-TLN-EFB (E.D. Cal.); *FERC v. Powhatan Energy Fund*, case no. 3:15-CV-452-MHL (E.D. Va.); *FERC v. City Power Mktg., LLC*, Civ. A. No. 15-1428 (JDB), 2016 U.S. Dist. LEXIS 105421, at \*24-32 (D.D.C. Aug. 10, 2016); *FERC v. Maxim Power Corp.*, Civ. No. 15-30113-MGM, 2016 U.S. Dist. LEXIS 107770, at \*14-21 (D. Mass. July 21, 2016).

<sup>75</sup> Pub. L. No. 99-495, § 12, Oct. 16, 1986, 100 Stat. 1255 (codified at 16 U.S.C. § 823b(d)).

<sup>76</sup> See 16 U.S.C. §§ 823b(d)(2)(A) & (B).

<sup>77</sup> *Id.* § 823b(d)(3).

<sup>78</sup> See *FERC v. City Power Mktg., LLC*, Civ. A. No. 15-1428 (JDB), 2016 U.S. Dist. LEXIS 105421, at \*24-32 (D.D.C. Aug. 10, 2016); *FERC v. Maxim Power Corp.*, Civ. No. 15-30113-MGM, 2016 U.S. Dist. LEXIS 107770, at \*14-21 (D. Mass. July 21, 2016).

<sup>79</sup> The amicus brief for the *Powhatan* case is appended to this article.

<sup>80</sup> See Clean Air Act Amendments of 1990, Pub. L. No. 100-549, §701, 104 Stat. 2672 (1990)(codified at 42 U.S.C. § 7413(d)(Supp. III 1990)); Oil Pollution Control Act of 1990, Pub. L. No. 101-380, § 4301(b)(6), 104 Stat. 51 (1990)(codified at 33 U.S.C. § 1321(b)(6)(Supp. III 1990)); Water Quality Act of 1987, Pub. L. No. 100-4, § 314(a), 101 Stat. 46 (1987)(codified at 33 U.S.C. § 1319(g)(1988)); Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, § 109(a), 100 Stat. 1633 (1986)(codified at 41 U.S.C. § 9609(a)(1988)); Emergency Preparedness and Community Right-to-Know Act, Pub. L. No. 99-499, § 325(b), 100 Stat. 1753 (1986)(codified at 42 U.S.C. § 11045(b)(1988)); Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, § 202, 100 Stat. 654 (1986)(codified at 42 U.S.C. § 300h-2(c) (1988).

<sup>81</sup> 42 U.S.C. § 18054(a)(7).

adaptation to new circumstances unenvisioned in 1946, or that it is merely a modern rebalancing of the costs and benefits of highly formalized adjudication. The D.C. Circuit's consideration at *Chevron's* step two in *Chemical Waste Management*<sup>82</sup> seems to reflect this latter approach. All in all, however, there has been little written in support of the trend away from APA adjudication.

On the other hand, numerous authors have decried the lack of protections afforded private parties in non-APA adjudication. For example, recently, Professor Kent Barnett wrote a fairly scathing indictment of the increasing use of non-ALJ hearing officers – the natural result of an erosion of APA adjudication.<sup>83</sup> The Administrative Conference of the United States (ACUS) over the years issued a number of recommendations in favor of using APA adjudication, rather than non-APA adjudication.<sup>84</sup> Most recently, concerned about the growth of non-APA adjudications, but accepting that reality, ACUS issued a recommendation containing “best practices” for hearings on the record not subject to the procedures for APA adjudication, which practices mirror those of APA adjudications, but minus an ALJ.<sup>85</sup>

Perhaps it would help to understand why agencies so wish to avoid APA adjudication. The initial reaction might be that agencies believe less formal procedures would create greater flexibility as well as savings in time and resources. However, when one actually looks at the procedures agencies have created in lieu of those prescribed by sections 554, 556, and 557 of the APA one finds that generally agencies have virtually reproduced those procedures, but minus an ALJ.<sup>86</sup> For example, the EPA actually applies the same set of procedures to its non-APA adjudications (other than corrective action orders) as to its APA adjudications,<sup>87</sup> except it substitutes a “Regional Judicial Officer” for the ALJ.<sup>88</sup> A Regional Judicial Officer is an agency attorney appointed by the Regional Administrator who may perform other duties within the agency, including prosecutorial and investigative functions, but not such functions regarding any case before him, and he cannot actually prosecute cases.<sup>89</sup> Initially, EPA had proposed a separate set of procedures for non-APA hearings, but ultimately it decided to adopt some of the loosened procedures it had proposed for the non-APA hearings in its APA adjudications and to eliminate the separate procedures for non-APA hearings.<sup>90</sup> Moreover, as this author noted in a study for ACUS in 1993, not only were the non-APA procedures essentially the same as those in APA

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<sup>82</sup> *Chemical Waste Management*, 873 F.2d at 1482-1483.

<sup>83</sup> See Kent Barnett, *Against Administrative Judges*, 49 U.C. Davis L. Rev. 1643 (2016).

<sup>84</sup> See ACUS, Recommendation 72-6, Civil Money Penalties as a Sanction (1972); Agency Assessment and Mitigation of Civil Money Penalties, Recommendation 79-3 (1979).

<sup>85</sup> See Administrative Conference Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, adopted December 13, 2016, available at <https://www.acus.gov/recommendation/evidentiary-hearings-not-required-administrative-procedure-act>.

<sup>86</sup> See Barnett, *supra* at note 83, at 1698-1699.

<sup>87</sup> There are three insignificant differences: the rules for interventions and motions are eliminated. See 40 CFR § 22.50(b).

<sup>88</sup> 40 CFR § 22.51.

<sup>89</sup> See 40 CFR § 22.4(b).

<sup>90</sup> See Proposed Rules, EPA, Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 63 FR 9464 (February 25, 1998); Rules and Regulations, EPA, Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 64 FR 40138 (July 23, 1999).

adjudications, but the time and resources expended in the non-APA proceedings were not notably different from those in APA adjudications.<sup>91</sup> Professor Barnett's study more recently reached similar conclusions looking at a broader range of proceedings.<sup>92</sup>

Indeed, what seems to be the primary issue is the presence of an ALJ as the presiding officer. This author's 1993 study concluded that agencies were frustrated in not being able to control ALJs.<sup>93</sup> By this I do not mean control the outcome of cases but the ability to control the procedures used by ALJs and the volume and quality of the work ALJs performed. As to the procedures, I was told that the ALJs wanted to make "a federal case" out of every case. While it would be fair to say that they all were indeed "federal cases," my impression was that the agency was suggesting that the ALJs over-proceduralized their cases unnecessarily. My study suggested that agencies had not adequately attempted to use rulemaking to control this problem. Indeed, after my study was published, EPA indeed adopted changes to its APA adjudication procedures that had originally been part of its plan for procedures applicable to non-APA adjudications.<sup>94</sup>

Controlling the volume and quality of ALJ work is difficult. For example, the Social Security Administration issued a directive setting as a "goal" for its administrative law judges that each one "manage their docket in such a way that they will be able to issue 500-700 legally sufficient decisions each year."<sup>95</sup> In return, the Association of Administrative Law Judges sued the agency, asserting that it was interfering with the ALJs' decisional independence.<sup>96</sup> Although the agency ultimately prevailed two years later, with the court holding that "administrative law judges' remedy under the Administrative Procedure Act for interference with their decisional independence does not extend to the incidental consequences of a bona fide production quota,"<sup>97</sup> the threat of a lawsuit from the ALJs' union for any increase in ALJs' case clearances is a significant deterrent to attempts to increase case production. Similarly, attempts to channel cases to specific ALJs, perhaps because the agency perceives a particular ALJ is more experienced and better able to handle complex cases, has more expertise in the particular area the case involves, or simply has a currently lighter caseload, may be problematic. For example, in *Mahoney v. Donovan*,<sup>98</sup> an ALJ sued the agency, alleging among other things that cases had not been assigned to him a rotating manner. After three years, the agency again prevailed, but the agency learned the cost of attempting to control workflow of ALJs.

As to being able to have some control over the quality of ALJs' work, agencies are completely at a loss. Unlike other civil service employees, ALJs are exempt from performance

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<sup>91</sup> See William Funk, *Close Enough for Government Work? – Using Informal Procedures for Imposing Administrative Penalties*, 24 Seton Hall L. Rev. 1, 67 (1993).

<sup>92</sup> See Barnett, *supra* at note 83, at 1693-1697.

<sup>93</sup> See Funk, *supra* at note 90, at 67-68.

<sup>94</sup> See Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 64 Fed. Reg. 40138 (July 23, 1999).

<sup>95</sup> See Ass'n of Admin. Law Judges v. Colvin, 777 F.3d 402, 403 (7<sup>th</sup> Cir. 2015).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*, at 406.

<sup>98</sup> 721 F.3d 633 (D.C. Cir. 2013).

reviews.<sup>99</sup> ALJs have no incentive to perform well, other than their own sense of integrity. As a practical matter, they have no upward mobility as an ALJ; that is, there are no promotions or pay raises for excellent work.<sup>100</sup> If an ALJ engages in egregious conduct, the agency may remove, suspend, reduce in level, reduce in pay, or furlough the ALJ for 30 days or less, but only for good cause established and determined by the MSPB, an extended and expensive process for the agency.

Aggravating the inability to reward and punish behavior, agencies have little ability to assure the quality of the person initially hired. Thirty eight years ago, then-Professor Antonin Scalia decried what he called the irrational system of hiring ALJs<sup>101</sup> – sixty points on the basis of experience, forty points on the basis of a prior supervisor’s evaluation, a small upward or downward adjustment on the basis of an interview with an OPM representative, an ALJ, and a practicing lawyer, and the addition of five points for a veteran and ten points for a disabled veteran.<sup>102</sup> This, he suggested, was not the way to hire a life tenured ALJ.

Finally, ALJs just cost more. Or at least agencies believe they cost more, which provides another motivation for preferring non-ALJs. Professor Barnett, although he believes the additional costs of ALJs are overstated, concluded that in most cases ALJs did cost more than non-ALJs.<sup>103</sup>

#### IV. What is to be Done?

##### A. The No-Action Alternative

One alternative is the no-action alternative. That is, nothing should be done; the trend is appropriate. This would presumably be the preferred alternative from the agencies’ perspective. After all, to the extent that courts will defer to their “reasonable” interpretation of an ambiguous hearing directive, agencies will be able to choose their desired method of proceeding – invariably to opt in favor of non-APA adjudication. Inasmuch as in most cases the Due Process Clause will assure fundamental fairness, the argument would be that anything more is simply more time and resource intensive and unnecessary.

However, “realistic” such an approach might be in light of present day realities, it is clear that many are not satisfied with minimal due process as accepted by the Supreme Court. As is often said, the appearance of fairness may be almost as important as fairness itself.<sup>104</sup> While the

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<sup>99</sup> 5 CFR 930.206.

<sup>100</sup> There are raises essentially for time in grade, and there are separate pay schedules for ALJs with significant managerial responsibilities. See <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/administrative-law-judge-pay-system/>; <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/16Tables/exec/html/ALJ.aspx>.

<sup>101</sup> Antonin Scalia, *The ALJ Fiasco – A Reprise*, 47 U. of Chi. L. Rev. 57, 58-62 (1979).

<sup>102</sup> *Id.*, at 60, 61 note 20.

<sup>103</sup> Barnett, *supra* note 83, at 1693-1697.

<sup>104</sup> See, e.g., Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 Marq. L. Rev. 295 (1995).

impartiality of some ALJs has recently come in question,<sup>105</sup> the safeguards against partiality with respect to ALJs are almost totally absent for the AJs who preside at non-APA adjudications. Accordingly, the perception of bias in non-ALJ adjudications is most acute.

## B. Substitute Article III Courts for Administrative Adjudication

Probably the most radical response would be to adopt the position espoused by Professors Phillip Hamburger and Gary Lawson, each of whom conclude on an originalist basis that where liberty or property is involved only an adjudication by an Article III court is a constitutionally permissible.<sup>106</sup> In other words, any administrative adjudication governing liberty or property, including formal APA adjudication, is itself unconstitutional. It is a radical response because it would require overturning more than a century's worth of Supreme Court precedent<sup>107</sup> and at least a century and a half of everyday practice.<sup>108</sup> Moreover, under their view, their solution would not reach administrative deprivation of government "benefits" and "privileges," which as an original matter were not deemed to be liberty or property.<sup>109</sup>

## C. Adopt the ACUS Recommendation

As mentioned earlier,<sup>110</sup> ACUS has recently issued a recommendation that, accepting the current trend away from APA adjudication, describes what it calls "best practices" for agency adjudications that are required to have an evidentiary hearing.<sup>111</sup> Inasmuch as these "best practices" adopt virtually all of the hearing procedures provided by APA adjudication,<sup>112</sup> the recommendation is certainly helpful in addressing the problems identified with non-APA adjudications. However, the "best practices" do not provide for an adjudicator who is independent of the agency, as ALJs are. Indeed, although the "best practices" prohibit staff who take an active part in investigating, prosecuting, or advocating in a case from serving as the adjudicator in that case, it allows for staff who routinely engage in investigating, prosecuting, and advocating in particular cases to be adjudicators in similar cases.<sup>113</sup> In addition, the "best practices" also allow prosecutorial staff to engage in ex parte communications with adjudicators, so long as they are not prosecutors in the particular case in question and so long as they do not

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<sup>105</sup> See, e.g., Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015). *But see* Urska Velikonja, *Are SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. (forthcoming), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2920940](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920940).

<sup>106</sup> See Gary Lawson, *Take the Fifth . . . Please!: The Original Unimportance of the Fifth Amendment Due Process of Law Clause*, copy on file with author; Philip Hamburger, *The Administrative Evasion of Procedural Rights*, copy on file with author.

<sup>107</sup> See, e.g., *Londoner v. Denver*, 210 U.S. 373 (1908).

<sup>108</sup> See, e.g., *Bartlett v. Kane*, 57 U.S. 263 (1853)(describing a penalty imposed by an agency on an importer for the substantially undervaluing its imported material).

<sup>109</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970)(describing the end of the "right"/"privilege" distinction).

<sup>110</sup> See text at note 85 and note 85.

<sup>111</sup> Administrative Conference Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, adopted December 13, 2016, available at <https://www.acus.gov/recommendation/evidentiary-hearings-not-required-administrative-procedure-act>.

<sup>112</sup> *Id.*, at 4-10.

<sup>113</sup> *Id.*, at 4.

introduce new factual materials.<sup>114</sup> Because one of the primary concerns with non-APA adjudication is a concern with bias and unfair agency influence on the decisionmaker, these differences from APA adjudication raise significant doubts as to the sufficiency of these “best practices.” Moreover, because the recommendation only calls upon agencies to provide these “best practices,” the extent to which all or many agencies will adopt them is doubtful.

#### D. Adopt Professor Barnett’s Suggestion

In his article, *Against Administrative Judges*,<sup>115</sup> Professor Barnett suggests that agencies reconsider their preference for non-APA adjudication and opt for APA adjudication.<sup>116</sup> If, indeed, agencies did exercise their claimed discretion under *Chevron* deference to opt for APA adjudication, that would largely solve the problems identified here. And, presumably, if agencies were persuaded to take this course, they would also stop lobbying for Congress to provide for non-APA adjudication in new statutes. However, Professor Barnett recognizes that “agencies continue to prefer AJs,”<sup>117</sup> so his recommendation that this preference should end seems like whistling in the wind. Perhaps that is why in a more recent article, *Why Bias Challenges to Administrative Adjudication Should Succeed*,<sup>118</sup> he argues that “AJs’ lack of statutory protections to shield them from agency oversight likely creates an unconstitutional appearance of partiality. . . .”<sup>119</sup> That is, if non-APA adjudication violates the Due Process Clause because of the appearance of partiality, or at least poses significant constitutional infirmities, agencies and Congress “should act before courts force them to,”<sup>120</sup> by opting for APA adjudications rather than non-APA adjudications.

Professor Barnett reads various Supreme Court decisions to support his argument that the appearance of partiality by AJs violates due process. He notes that some older cases held that “pecuniary incentives (whether flowing directly to the adjudicator or a budget that the adjudicator oversees) create an unconstitutional appearance of partiality.”<sup>121</sup> Because agencies have the power to review and provide performance bonuses to AJs, Barnett believes these cases support a finding of unconstitutional appearance of partiality on behalf of AJs. More recently, in *Caperton v. A.T. Massey Coal Co.*,<sup>122</sup> the Court held that there was an unconstitutional appearance of partiality “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”<sup>123</sup> Because agencies, which have a particular stake in the cases they bring, have more than a significant and disproportionate influence with respect to the appointment of AJs – they actually appoint them –

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<sup>114</sup> *Id.*

<sup>115</sup> 49 UC Davis L. Rev. 1643 (2016).

<sup>116</sup> *Id.*, at 1708.

<sup>117</sup> *Id.*

<sup>118</sup> 81 Mo. L. Rev. 1023 (2017).

<sup>119</sup> *Id.*, at 1026.

<sup>120</sup> *Id.*, at 1042.

<sup>121</sup> *Id.*, at 1028, citing to *Tumey v. Ohio*, 273 U.S. 510, 514-515 (1927), and *Ward v. Village of Monroeville*, 409 U.S. 57, 59-60 (1972).

<sup>122</sup> 556 U.S. 868, 886-887 (2009).

<sup>123</sup> *Id.*, at 884.

Barnett argues that *Caperton* also suggests that there is an unconstitutional appearance of partiality on behalf of AJs.<sup>124</sup>

This short summary of Professor Barnett's arguments does not adequately reflect his full argumentation, but this author remains unconvinced. The cases he cites in his support are all extreme cases, and *Caperton* was a 5-4 decision with bad facts. He does not address the numerous cases in which the Court has upheld decisions made by AJs or their equivalents. For example, in *Marcello v. Bonds*,<sup>125</sup> the Court specifically rejected a claim that in a deportation hearing the use of a special inquiry officer of the INS, who was subject to the supervision and control of officials engaged in the investigative and prosecutorial functions, violated due process. The Court said, "[p]etitioner would have us hold that the presence of this relationship so strips the hearing of fairness and impartiality as to make the procedure violative of due process. The contention is without substance. . . ."<sup>126</sup> While Professor Barnett's solution is not as radical as that of Professors Lawson and Hamburger, it would require the Supreme Court to overturn what has been standard administrative practice in federal and state agencies for decades, if not centuries.

#### E. Have the Supreme Court Correct the Lower Courts' Interpretation of When APA Adjudication is Required

As discussed earlier,<sup>127</sup> the lower courts seem to have reached a consensus that any statutory requirement for an adjudicatory hearing that does not expressly provide that it is a "hearing on the record" is deemed ambiguous as to whether it requires an APA adjudication. From this they have concluded that *Chevron* deference is applicable to the agency's choice of procedure – APA adjudication or otherwise. As the earlier discussion suggested, this is an error. However, it appears to be an error widely held and deeply settled, at least in the lower courts. The Supreme Court has not addressed the issue. If a case could be brought to its attention on this issue, the Court might well grant certiorari, despite the apparent lower court agreement. The Court has recently seemed to be willing to address fundamental issues under the APA when a compelling case could be made that the lower courts have strayed from the original meaning and purpose. For example, in *Sackett v. EPA*,<sup>128</sup> the Court granted certiorari and unanimously reversed the Ninth Circuit's interpretation of final agency action under the APA, despite the fact that the Ninth Circuit's opinion reflected the consensus view of every circuit court to have considered the issue.<sup>129</sup> Moreover, certain justices have expressed some concern as to the existence or reach of *Chevron*<sup>130</sup> and therefore might be eager to consider a case that would

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<sup>124</sup> *Bias Challenges*, 81 Mo. L. Rev. at 1027.

<sup>125</sup> 349 U.S. 302 (1955).

<sup>126</sup> *Id.*, at 311.

<sup>127</sup> *Supra*, at 8-9.

<sup>128</sup> 566 U.S. 120 (2012).

<sup>129</sup> *See Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), cert. denied, 516 U.S. 1071 (1996); *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir.), cert. denied, 513 U.S. 927 (1994); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990); *Southern Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990).

<sup>130</sup> *See City of Arlington, Texas v. FCC*, 133 S.Ct. 1863, 1877 (2013)(Roberts, C.J., dissenting, joined by Justices Alito and Thomas); *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1213, 1218 (Thomas, J., concurring



constrain its use. Were the Court to take the case and reverse the lower court decisions, this would cure the problem identified in this paper by re-establishing the presumption that an evidentiary hearing required by a statute is indeed to be an APA adjudication.

Nevertheless, first there must be a person willing to invest the resources to try to take a relatively arcane administrative law issue to the Supreme Court in a case that may not even involve substantial impositions on the person. And it is always possible that this author's assessment of the merits of the case is itself in error.

#### F. Have Congress Make Explicit that APA Adjudications Are Required

An alternative to having the Court clarify the existing law would be for Congress to amend the APA in such a way as to make clear, as was its original intention, that whenever an evidentiary hearing is required by a statute, that hearing should be an APA adjudication. In a sense this would be the simplest and cleanest solution. Indeed, given the current Congress's interest in regulatory reform, this might be an attractive undertaking, especially because it is not, like some other bills under consideration, a subterfuge for shutting down government regulation.

#### F. Adopt Professor Scalia's Suggestion

As mentioned earlier,<sup>131</sup> in 1987, then-Professor Antonin Scalia wrote an article in which he questioned the quality of ALJs and blamed their lack of quality on the method of their appointment and the manner of their promotion.<sup>132</sup> His focus was on improving the quality of ALJs. Nevertheless, to the extent that agencies today want to avoid APA adjudication because of their dislike for ALJs, Professor Scalia's suggestions for improving their quality might bear consideration, especially if the agencies are involved in improving their quality.

He described their method of appointment, which has not meaningfully changed since, as involving OPM assigning each applicant up to sixty points for experience and up to forty points on the basis of evaluations by persons for whom or with whom the applicant had worked.<sup>133</sup> In addition, the applicants are given a "rudimentary" test of their writing ability and interviewed for a half-hour by a panel of three – an OPM representative, an ALJ, and a member of the practicing bar.<sup>134</sup> However, the test and interview only result in an upward or downward adjustment to the point score of almost always less than five points.<sup>135</sup> OPM then selects the three highest scoring applicants and forwards them to the agency to choose one.<sup>136</sup> Although this system, he wrote, is no worse than what a law school or law firm might use to hire a new assistant professor or new associate, "the point is that the winners in this case do not become associates or assistant professors; they become effectively life-tenured occupants of positions that are within the highest

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in the judgment). *See also* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10<sup>th</sup> Cir. 2016)(Gorsuch, J., concurring).

<sup>131</sup> *Supra*, text at note 101.

<sup>132</sup> *The ALJ Fiasco*, 58 U. Chi. L. Rev. at 58.

<sup>133</sup> *Id.*, at 60.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

levels of the federal career service.”<sup>137</sup> Making permanent appointments of such a nature should require “substantial first-hand evaluation of performance” on the job.<sup>138</sup> Thus, he concluded that the method of appointment of ALJs “makes little sense.”<sup>139</sup>

This led to his second concern, the promotion of ALJs. This, as he noted, is “virtually a non-issue,” because as a practical matter ALJs cannot be promoted, because there is hardly any variation in grades between ALJs in the same agency.<sup>140</sup> When he wrote, only two agencies out of 29 had more than one grade of ALJ.<sup>141</sup> Today, of the 1770 ALJs across the government, 1729 of them, or 97%, are at the highest grade level possible.<sup>142</sup> A system that does not provide for promotion, Professor Scalia argued, does not produce quality performance. “There is no substitute for determining advancement on the basis of actual on-the-job performance. And there is no substitute for determining *nonadvancement* on that basis as well, causing the less competent to depart for fields where their particular skills can be better applied.”<sup>143</sup>

Professor Scalia offered some suggestions to improve the situation. First, it would be necessary to have a multi-grade structure, and then, he said, “[a] sensible system would institutionalize selection of senior judges on the basis of first-hand observation.”<sup>144</sup> In addition, responsibility for promotion decisions should rest in the agency employing the ALJs. He said that it is a “a fundamental tenet of sound administration: he who decides should know.”<sup>145</sup> Moreover, he added, it would further “another tenet [of sound administration]: he who decides should reap the grief or benefit of his decision.”<sup>146</sup> Professor Scalia recognized that putting promotional responsibility in the agencies employing ALJs might raise fears that ALJs would distort their decisionmaking to win the favor of the agency, but he concluded that such fears would be exaggerated.<sup>147</sup> So long as the prosecutorial staff had no role in the promotion process, he believed that the “solid tradition of independence” demonstrated by ALJs in the then-thirty years of experience would practically eliminate the possibility of improper influence.<sup>148</sup>

Professor Scalia raised the idea of a separate ALJ corps as a way of eliminating any fears about improper influence, but he seemed to believe it would be an inferior solution, because it would be “unlikely that the administrator of a unified corps would have the same degree of knowledge concerning the judges’ performance, or the same degree of incentive to maximize the quality of that performance, as the agencies whose substantive programs are affected.”<sup>149</sup> Moreover, he said, it would constitute a fundamental change in the role of the ALJ from being the “front line” of the agency to that of an impartial outsider, a change he appeared to disapprove

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<sup>137</sup> *Id.*, at 61 (footnote omitted).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*, at 62.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*, at 63 n. 27.

<sup>142</sup> See [www.opm.gov/services-for-agencies/administrative-law-judges?url=ALJs-by-agency](http://www.opm.gov/services-for-agencies/administrative-law-judges?url=ALJs-by-agency).

<sup>143</sup> *The ALJ Fiasco*, 58 U. Chi. L. Rev. at 73 (emphasis in the original).

<sup>144</sup> *Id.*, at 75.

<sup>145</sup> *Id.*, at 77.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*, at 78.

<sup>149</sup> *Id.*, at 79.

of.<sup>150</sup>

With all due respect to Professor Scalia, today it seems highly unlikely that placing promotion responsibility in the agency would not be viewed as raising unacceptable dangers of bias on behalf of ALJs. Even if an agency did not intentionally communicate a desire for special treatment, it would be impossible to prove the negative – that it was not implying that promotions would go to those who provided favorable results for the agency. After all, Professor Scalia said that a tenet of sound administration is that he who decides should reap the benefit or grief from the decision, which certainly sounds like an invitation to promote those who would benefit the agency. Moreover, some ALJs might believe that providing favorable results would aid their promotion, even if it was not true. The appearance of partiality decried by Professor Barnett with respect to AJs would become reality with respect to ALJs. Merely insulating the prosecutorial staff from the promotion process would not obviate this problem, but at the same time it would undercut Professor Scalia’s other tenet of sound administration. By keeping those with first hand knowledge about the ALJ’s performance – the prosecutorial staff – from participating in the promotion decision, it would violate the tenet that he who decides should know.

Nevertheless, a system that provided agencies with promotional authority over ALJs would likely go a long way to reducing agencies’ distaste for APA adjudication.

#### G. Variations on the Central Panel

Professor Scalia’s one paragraph allusion to the possible creation of a central panel of ALJs, not attached to specific agencies, does not break new ground.<sup>151</sup> In fact, as he recognized,<sup>152</sup> this idea was floated in 1941 in the Attorney General’s Commission on Administrative Procedure<sup>153</sup> and repeated in the Conference on Administrative Procedure established by President Eisenhower in 1951,<sup>154</sup> the 1955 Hoover Commission Report,<sup>155</sup> and in 1973 by the Federal Administrative Law Judges Conference.<sup>156</sup> Presumably agency resistance has stymied federal legislative efforts to create a central panel.<sup>157</sup> Nevertheless, beginning in the 1970s, several states adopted central panel systems for their ALJs, and the movement has been gaining adherents ever since, so that by 2001 more than half the states had adopted some form of central panel.<sup>158</sup> The central panels differ among the states, both in terms of the cases and

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*, at 58-59.

<sup>153</sup> ATTORNEY GENERAL’S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8, 77<sup>th</sup> Cong., 1<sup>st</sup> Sess. 47 (1941).

<sup>154</sup> PRESIDENT’S CONFERENCE ON ADMINISTRATIVE PROCEDURE, REPORT 58-59 (1955).

<sup>155</sup> COMM’N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOV’T, LEGAL SERVICES AND PROCEDURE 93 (1955).

<sup>156</sup> FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE, STATEMENT AND RECOMMENDATIONS TO THE UNITED STATES CIVIL SERVICE COMM’N 12-13 (1973).

<sup>157</sup> *See, e.g.*, Administrative Law Judge Corps Act: Hearings on S. 1275 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. 109-10 (1983) (statement of Loren A. Smith, Chairman, Administrative Conference of the United States).

<sup>158</sup> *See* John W. Hardwicke, *The Central Panel Movement: a Work in Progress*, 53 ADMIN. L. REV. 419,

agencies they cover and in the finality of their decisions.<sup>159</sup> Generally speaking, however, the consensus is that state central panels are superior to ALJs belonging to the agencies whose cases they adjudicate.<sup>160</sup>

While attempts to establish a central panel at the federal level have been unavailing, Congress has created three entities in which ALJs are employed by an agency other than the agency whose cases they were adjudicating. This is known as the split-enforcement model.<sup>161</sup> In the Occupational Safety and Health Act, Congress created the Occupational Safety and Health Review Commission (OSHRC).<sup>162</sup> It employs ALJs who adjudicate enforcement actions brought by the Occupational Safety and Health Administration (OSHA). ALJ decisions are subject to discretionary review by the full Commission,<sup>163</sup> but they are not subject to review by OSHA or the Department of Labor. The Federal Mine Safety and Health Review Commission (MSHRC) was likewise created to hear cases brought by the Department of Labor under the Federal Mine Safety and Health Act.<sup>164</sup> Initial decisions are made by ALJs appointed by the Commission, and these decisions are subject to discretionary review by the whole Commission,<sup>165</sup> but again these decisions are not subject to review by the Department of Labor. When the Department of Energy (DOE) was created in 1977,<sup>166</sup> it was tasked with administering the Emergency Petroleum Allocation Act of 1973 (EPAA),<sup>167</sup> and the Department of Energy Organization Act (DOE Act) authorized DOE to issue remedial orders to persons violating the EPAA or the regulations under it and to grant exceptions from its regulations in particular circumstances.<sup>168</sup> In both cases, the DOE Act provided that persons adversely affected or aggrieved with DOE's remedial or exception order could obtain review from the Federal Energy Review Commission (FERC),<sup>169</sup> where the case would be heard by an ALJ with possible review by the whole Commission, but not by the DOE.<sup>170</sup>

Although OSHRC and MSHRC have not been without some difficulties, largely arising out of a confusion as to whether deference should be given to interpretations made by the

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420 (2001).

<sup>159</sup> See Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75, 78-80 (1994)(describing the differing jurisdictions of states' central panels); Larry J. Craddock, *Final Decision Authority and the Central Panel*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 471 (2013)(describing how the decisions of some states' central panel ALJs are subject to review by the substantive agency and in some states they are not).

<sup>160</sup> See, e.g., *id.*; AMERICAN BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES, FEBRUARY 14, 2011 (available at [http://www.americanbar.org/content/dam/aba/directories/policy/2011\\_my\\_112.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2011_my_112.authcheckdam.pdf)).

<sup>161</sup> See The Split-Enforcement Model for Agency Adjudication, Recommendation 86-4, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1986), available at <https://www.acus.gov/sites/default/files/documents/86-4.pdf>.

<sup>162</sup> 29 U.S.C. § 661.

<sup>163</sup> 29 U.S.C. § 661(j).

<sup>164</sup> 30 U.S.C. § 823.

<sup>165</sup> 30 U.S.C. § 823(d).

<sup>166</sup> See Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat 565 (1977).

<sup>167</sup> 15 U.S.C. § 751 et seq. (1976).

<sup>168</sup> See 15 U.S.C. §§ 7193 and 7194.

<sup>169</sup> *Id.*

<sup>170</sup> While FERC is for administrative purposes located within DOE, it remains an independent regulatory agency. See 44 U.S.C. § 3502(5). As a result, its ALJs are not hired by or functionally employed by DOE.

enforcing agency or to the adjudicating agency,<sup>171</sup> there has been no suggestion of bias or partiality on the part of the ALJs or Commissions. And although supervision and promotion within OSHRC and MSHRC do not comport with Professor Scalia's recommendations for a multi-grade structure – twenty-five of the twenty-seven ALJs in those agencies are at the highest level – and actual oversight and supervision is lacking to reward high quality and demerit low quality, both could be added to those and like structures through legislation.

If current regulatory reform efforts wished to address some of the problems that have been identified with the current organization and use of ALJs, whether from the agency perspective or the public's perspective, consideration of some mix of split-enforcement models or central panels should probably be included. For example, the current complaints concerning the use of SEC ALJs<sup>172</sup> would be largely addressed if the SEC was subject to a split-enforcement model like OSHA and the Department of Labor. The same could be said for the National Labor Relations Board, whose adjudicatory system has long been accused of being subject to the political whims of the party in power.<sup>173</sup> One might argue that the SEC has too few ALJs – five – to justify a separate agency like OSHRC or MSHRC. This, however, could be addressed by the creation of a central panel whose ALJs would hear SEC and other cases. Agencies might then argue that their cases require ALJs with specialized knowledge and expertise in the area regulated rather than generalist judges.<sup>174</sup> Without deciding here whether that argument has merit,<sup>175</sup> it could be easily addressed, as some state central panels have done, by having the central panel hire and assign judges with the appropriate knowledge and expertise to cases from the agencies requiring it.<sup>176</sup> Of course, there is an argument that generalist judges are precisely who should be adjudicating these cases.<sup>177</sup>

The split-enforcement model does more than merely make the ALJ independent from the agency prosecuting the case; it also deviates from the APA model by depriving the agency of having the last word. In APA adjudication, after the ALJ has rendered either a recommended or initial decision, a disappointed party may appeal that decision to the agency, which reviews the ALJ decision *de novo* as to both the facts and law. The split-enforcement model eliminates that agency review, and undoubtedly agencies would fight hard to avoid losing that privilege. After all, OSHRC, MSHRC, and even FERC's review of DOE EPAA cases were created out of whole cloth with the creation of new agencies; no agency lost its historical prerogative. That is why a central panel (or central panels) system might be an easier sell. Under the more usual central panel system,<sup>178</sup> the ALJ's decision can be appealed to the agency.<sup>179</sup> Thus, the agencies' ability

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<sup>171</sup> This confusion was largely settled by the Supreme Court's decision in *Martin v. OSHRC*, 499 U.S. 144 (1991), holding that courts should give deference to the Department of Labor's interpretation of its regulations.

<sup>172</sup> See, *supra*, at note 105.

<sup>173</sup> See, e.g., *ALJ Fiasco*, *supra*, 47 U. Chi. L. Rev. at 77.

<sup>174</sup> See, e.g., John W. Hardwicke, *The Central Panel Movement: A Work in Progress*, 53 ADMIN. L. REV. 419, 432 (2001).

<sup>175</sup> See John W. Hardwicke, *The Central Panel: A Response to Critics*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES 231, 237-238 (2004).

<sup>176</sup> *Id.*, at 238.

<sup>177</sup> See, e.g., Hardwicke, *supra*, at 432-433.

<sup>178</sup> See Model State APA.

<sup>179</sup> Some state central panels limit the grounds upon which the agency may reverse the ALJ's decision.

to have the last word could be preserved.

One size probably does not fit all. The Social Security Administration's 1500 ALJs are a case in point. Their number dwarfs that of all the other agencies combined,<sup>180</sup> and almost surely these ALJs should be put into their own separate agency. Moreover, the cases that come before them are not adversary proceedings; there is no agency lawyer prosecuting the case.<sup>181</sup> They are almost more in the mode of an inquisitorial system, inasmuch as the ALJs are tasked with "the responsibility to ensure that the record is complete, as well as to make a decision on the claim."<sup>182</sup> Finally, their decisions are subject to appeal to the Social Security Appeals Council.<sup>183</sup> In light of these distinctive features, the creation of a separate Social Security Review Commission with multi-grade levels and the real power and responsibility for supervising and promoting ALJs would seem to be in order.

Both central panels and split-enforcement models for specific agencies relate to how ALJs are organized and supervised. So, again, one might ask how this would provide any solution to the erosion of APA adjudication, the subject of this paper. And, again, the answer is that it might be that agencies would be less reluctant to use APA adjudication if they believed that ALJs were indeed subject to *someone's* supervision and oversight.

## V. Conclusion

This paper has tried to describe the erosion of APA adjudication in favor of non-APA adjudication, which provides less procedural protections for defendants and a judge who is not insulated from the policy and prosecutorial branches of the agency. It has further tried to show how this erosion is consistent with neither the APA's original design nor good public policy. It then provided several different alternatives to improve the situation – including a no action alternative. Some of those alternatives, such as Professor Barnett's suggestion and ACUS's recommendation, would be positive but would hardly achieve a full solution. Other of the alternatives might also improve ALJ adjudication as well, either by bringing ALJs under a supervision and promotion system that could improve the quality of their decisionmaking or by eliminating completely any relationship between an ALJ and the agency bringing a case, or by both. The paper concludes that either a Supreme Court decision reinstating the original conception of when APA adjudication is required or a legislative amendment to clarify (or reinstitute) that original conception would certainly cure the identified problem. The likelihood of either of the two alternatives that would solve the problem is unclear, but there are reasons to hope that one or the other could occur in the not very distant future.

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<sup>180</sup> See [www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency](http://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency).

<sup>181</sup> See, e.g., <http://www.disabilitysecrets.com/what-happens-hearing.html#> (describing what happens at a Social Security disability hearing).

<sup>182</sup> Paul Verkuil, Daniel Gifford, Charles Koch, Richard Pierce, and Jeffrey Lubbers, *The Federal Administrative Judiciary*, 1992 ACUS 779, 863.

<sup>183</sup> See Your Right to an Administrative Law Judge Hearing and Appeals Council Review of your Social Security Case, at 3, available at [https://www.ssa.gov/appeals/odar\\_pubs/70-10281.pdf](https://www.ssa.gov/appeals/odar_pubs/70-10281.pdf).