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Saving Agency Adjudication

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SAVING AGENCY ADJUDICATION

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When discussing the federal judiciary, commentators typically fixate on the 800 or so "Article III" judges who are nominated by the President, confirmed by the Senate, and enjoy life tenure and salary protection. Yet most federal adjudication does not take place in federal courthouses at all. Instead, it occurs in nondescript hearing rooms in administrative agencies—if not telephonically. Indeed, the more than 12,000 agency adjudicators scattered across the federal government collectively issue millions of decisions per year on subjects ranging from Social Security and veterans benefits to immigration and patent rights. In recent years, however, scholars and agency adjudicators have raised alarms that agency adjudication may be reaching a crisis point. Following the Supreme Court's lead, federal courts have begun holding that how agency adjudicators are appointed and removed violates Article II of the Constitution because these agency officials are not sufficiently subject to the President's control. Political control, however, threatens the perceived legitimacy of the adjudicatory process, and perhaps sometimes its actual legitimacy as well. The more entrenched the unitary executive theory becomes, reformers argue, the greater the risk that decisional independence will collapse. Reformers therefore have advanced sweeping proposals to save agency adjudication, including most prominently creating a new "central panel" agency to house agency adjudicators, expanding the Article I courts, or even moving agency adjudication into Article III courts.

This Article examines these proposals to save agency adjudication and explains why none of them will work, at least as a general matter. Each of these proposed solutions ultimately will not solve the problem and could have significant unintended consequences—some potentially catastrophic to the millions of individuals who participate in agency adjudication each year. One purpose of this Article therefore is to save agency adjudication from these well-intentioned but ultimately misguided reforms. But just because these proposals will do

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more harm than good does not mean that reformers are wrong to worry about the threat Article II poses to agency adjudication. Instead of fundamentally restructuring agency adjudication, however, we argue that Congress and federal agencies can more creatively use certain independence-enhancing tools that the Constitution itself provides, including prospectively raising the political costs of presidential interference in adjudicatory decisions and adopting self-imposed restrictions on agency-head appointment and removal. Unlike more sweeping and untested proposals, these longstanding tools do not raise constitutional concerns and will not cause systemic disruption. Yet they will safeguard decisional independence, thus saving agency adjudication from both Article II and imprudent reforms.

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INTRODUCTION

When it comes to the federal judiciary, commentators often fixate on those 800 or so "Article III" judges who are appointed by the President with the advice and consent of the Senate.[1] During his one term in office, President Trump nominated and the Senate confirmed 234 judges to Article III federal courts, including three Supreme Court justices, 54 circuit court judges, 174 district court judges, and three judges on the U.S. Court of International Trade.[2] So far, President

[1] ADMIN. OFFICE OF U.S. COURTS, AUTHORIZED JUDGESHIPS 8 (2018), http://www.uscourts.gov/sites/default/files/allauth.pdf.

[2] John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RES. CTR. (Jan. 13, 2021),

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Biden has appointed 140 judges to life-tenured positions in the Article III judiciary, including one Supreme Court justice, 36 circuit court judges, and 104 district court judges.[3] Enormous attention and resources have been dedicated to these judicial confirmations, including millions of dollars and thousands of hours by interest groups such as the American Bar Association and others.[4]

If we care about the federal judiciary, however, focusing on Article III courts alone is myopic. The federal judiciary today expands far beyond the small group of judges with Article III protections.[5] The overwhelming bulk of federal adjudication today takes place in federal agencies. There are more than 1900 administrative law judges ("ALJs") in the federal administrative judiciary,[6] plus more than 10,000 non-ALJ agency adjudicators who conduct evidentiary hearings that are required by statute or regulation.[7] These non-ALJ agency adjudicators have diverse titles, such as administrative judge, administrative appeals judge, immigration judge, hearing officer, and presiding official—just to name a few. Agency adjudicators scattered across the federal government collectively issue millions of decisions per year on subjects ranging from government contracts and veterans

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https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/.

[3] *Judicial Appointment Tracker*, HERITAGE FOUND. (as of July 19, 2023), https://www.heritage.org/judicialtracker.

[4] *See, e.g.*, Paul Kane, *Senate Democrats Vastly Outspent by Right in Gorsuch Fight*, WASH. POST (Mar. 18, 2017), http://wapo.st/2n1dcrc?tid=ss_tw (reporting Republican Party estimates that $3.3 million were spent on ads to support the confirmation of now-Justice Gorsuch); *see also* AM. BAR ASS'N, STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1, 1–3 (2017), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Backgrounder.pdf (detailing the ABA's judicial-nominee evaluation process that has operated since 1953).

[5] Not to mention "the 50 or so Article I judges who populate the territorial courts, the Court of Federal Claims, the Tax Court, the Court of Appeals for the Armed Forces, and the Court of Appeals for Veterans Claims." Christopher J. Walker, *Charting the New Landscape of Administrative Adjudication*, 69 DUKE L.J. 1687, 1687–68 (2020).

[6] *Administrative Law Judges*, U.S. OFF. PERSONNEL MGMT. (as of Mar. 2017), https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency.

[7] Kent Barnett & Russell Weaver, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 22 n.119, 32 (2019).

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benefits to immigration and patent rights.[8] And yet, as one of us has observed, "there is no ABA committee that rates proposed immigration judges or other agency adjudicators. There are no television ads run. The Senate plays no role in their selection—though Congress of course retains its oversight and appropriations authority."[9]

Despite the lack of public attention, scholars and agency adjudicators in recent years have raised alarms that the federal administrative judiciary may be reaching a crisis point.[10] Following the Supreme Court's separation-of-powers lead, federal courts have begun holding that how agency adjudicators are appointed and removed violates the Constitution because, despite being part of the Executive Branch, these officials are not sufficiently subject to the President's control. The Supreme Court has recently supercharged this effort, moreover, by holding that litigants can challenge agency structure—including the role of agency adjudicators—directly in federal court.[11]

The Supreme Court's decision to hear *Jarkesy v. SEC* this coming Term highlights the stakes.[12] In *Jarkesy*, a divided Fifth Circuit panel held that how the Securities and Exchange Commission ("SEC") is structured violates the constitutional rule from *Free Enterprise Fund v. PCAOB* that Congress cannot impose two levels of removal protection between certain Executive Branch officers and the President.[13] After all, the Fifth Circuit reasoned, the President cannot

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[8] And there are tens of thousands of other agency personnel that engage in the hundreds of thousands of less-formal adjudications in countless regulatory contexts. *See* Walker, *supra* note 5, at 1688.

[9] *Id.*

[10] *See, e.g.*, Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1600 (2023).

[11] *See* Axon Enter., Inc. v. FTC, 143 S. Ct. 890 (2023) (allowing constitutional challenges directly in federal district court); *see also* Carr v. Saul, 141 S. Ct. 1352, 1362 (2021) (rejecting issue-exhaustion requirement for structural challenges in one statutory scheme).

[12] SEC v. Jarkesy, 34 F.4th 446 (5th Cir. 2022), *cert granted*, No. 22–859, 2023 WL 4278448 (U.S. June 30, 2023).

[13] *Jarkesy*, 34 F.4th at 463 (citing Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 498 (2010)). The *Jarkesy* majority also held that because enforcement of securities law involves private—rather than public—rights, SEC adjudication offends the Seventh Amendment right to a jury trial and, further, that Congress violated the nondelegation doctrine by not providing the SEC with an "intelligible principle" when deciding whether to pursue an action before an ALJ. *Id.* at 447. These holdings are also significant and will be

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remove SEC Commissioners at will, and those Commissioners in turn cannot remove the SEC's ALJs at will, thereby—in the Fifth Circuit's view—preventing the President from "tak[ing] care that the laws are faithfully executed."[14] In dissenting from the denial of rehearing en banc, Judge Catharina Haynes lamented that the panel decision "deviated from over eighty years of settled precedent."[15] Indeed, commentators openly fear that "[u]nless overturned, the [Fifth Circuit's] decision will be a sea change in both the regulation of the financial industry and administrative law."[16]

Although the Fifth Circuit's "rigid, categorical" approach to the SEC's structure is controversial,[17] *Jarkesy*'s application of *Free Enterprise Fund* was no surprise. To the contrary, scholars have seen this development coming for more than a decade,[18] and Judge Neomi Rao on the D.C. Circuit—one of the nation's leading scholars on the powers of the President under Article II of the U.S. Constitution—had already reached the same conclusion.[19] Furthermore, in his dissent in

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reviewed by the Supreme Court this Term. But they do not apply to the entirety of agency adjudication.

[14] *Id.* at 465.

[15] Jarkesy v. SEC, 51 F.4th 644, 647 (5th Cir. 2022) (Haynes, J., dissenting from denial of rehearing en banc).

[16] Benjamin M. Daniels & Trevor L. Bradley, *Fifth Circuit Decision Threatens to Upend SEC's Use of Administrative Proceedings,* NAT'L L. REV. (June 7, 2022).

[17] *Jarkesy*, 34 F.4d at 478 (Davis, J., dissenting); *see also id.* at 466–79; *Jarkesy*, 51 F.4th at 645–47 (Haynes, J., dissenting from denial of rehearing en banc); Jason Willick, *What Might Conservative Legal Minds Go After Next?*, WASH. POST. (May 24, 2022) (arguing that *Jarkesy* is part of a broader effort to put "unaccountable administrative agencies in the crosshairs"). *See generally* Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599 (2018) (explaining constitutional attacks).

[18] *See, e.g.*, Jerome Nelson, *Administrative Law Judges' Removal "Only for Cause": Is That Administrative Procedure Act Protection Now Unconstitutional?,* 63 ADMIN. L. REV. 401, 402 (2011) (identifying risk that *Free Enterprise Fund*'s logic dooms constitutionality of ALJs); *see also* Linda D. Jellum, "*You're Fired!" Why the ALJ Multi-Track Dual Removal Provisions Violate the Constitution and Possible Fixes*, 26 GEO. MASON L. REV. 705, 741 (2019) (concluding, reluctantly, that the logic of the Supreme Court's cases makes it "inevitable" that "ALJ multi -track removal provisions violate the Constitution"); Jackson C. Blais, *Mischief Managed? The Unconstitutionality of SEC ALJs Under the Appointments Clause*, 93 NOTRE DAME L. REV. 2115, 2116 (2018) (anticipating *Jarkesy*).

[19] *See, e.g.*, Fleming v. Dep't of Agric., 987 F.3d 1093, 1115 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part) (concluding that ALJ dual for-cause removal provisions conflict with *Free Enterprise Fund*); *see also* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v.

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Free Enterprise Fund itself, Justice Stephen Breyer warned about this potential implication for agency adjudication,[20] and subsequent Supreme Court decisions have only heightened the risk.

In recent years, for example, the Court has held that ALJs are "Officers of the United States"—rather than mere employees—and so must be appointed pursuant to the Appointments Clause rather than through a process run by career officials.[21] (Notably, that decision also prompted Justice Breyer to again fret about the future of agency adjudication.[22]) Building on *Free Enterprise Fund*, the Court also suggested in 2021 that that agency heads must be able to exercise decisional control over agency adjudications,[23] and since 2020 the Court has twice suggested that Article II's vesting of "[t]he executive Power" in the President may include an unfettered presidential power to remove *any* officer of the United States within the Executive Branch who exercises any "administrative authority."[24]

Merely because the Fifth Circuit's *Jarkesy* decision was predicted, however, does not diminish its importance. Rather, it vividly illustrates a truth about the modern administrative state: Agency adjudication—at least as understood since the enactment of the

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PCAOB, 79 FORDHAM L. REV. 2541 (2011) (arguing that *Free Enterprise Fund*'s logic extends to *all* removal restrictions).

[20] *See Free Enter. Fund*, 561 U.S. at 543 (Breyer, J., dissenting) ("Does every losing party before an ALJ now have grounds to appeal on the basis that the decision entered against him is unconstitutional?").

[21] Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018) (citing U.S. CONST. art. II, § 2, cl. 2).

[22] *Id.* at 2060 (Breyer, J., concurring in part) (warning that the decision "risk[s] transforming administrative law judges from independent adjudicators into *dependent* decisionmakers, serving at the pleasure of the Commission").

[23] *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1976 (2021); *see also id.* at 1984 (explaining that "'higher-level agency reconsideration' by the agency head is [a] standard way to maintain political accountability and effective oversight" (quoting Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 157 (2019))).

[24] *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020); *see also* Collins v. Yellen, 141 S. Ct. 1761, 1784 (2021). In both *Collins* and *Seila Law*, the Court's holding was limited to single-headed agencies, but, as others have noted, the Court's language and reasoning may extend more broadly. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 85 (explaining that the "maximalist reading" of *Seila Law* may "throw[] the independence of most of the current independent agencies . . . into grave doubt"); Aditya Bamzai & Aaron L. Nielson, *Article II and the Federal Reserve*, CORNELL L. REV. (forthcoming 2024) (explaining the broad doctrinal implications of the Court's reasoning for administrative law generally).

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Administrative Procedure Act (APA) in 1946—is in danger.[25] Taken to their logical conclusion, the Supreme Court's recent cases require the President play a significant role (either directly or through an agency head under the President's control) in the selection of *all* important players in the Executive Branch, including agency adjudicators.[26] Perhaps even more significantly, these decisions suggest that the President must be able to remove every significant Executive Branch official, again, including perhaps adjudicators.[27] Yet such political control of what is supposed to be a neutral, individualized process may undermine a central tenet of fair adjudication: decisional independence.[28] If an adjudicator can be fired for not sharing the politics or even predilections of the White House, parties may reasonably fear that the adjudicator is not ruling based on law and a matter's individual facts but instead out our fear of being fired. Indeed, such political control of adjudication, at least with respect to certain rights and interests, may *itself* violate due process.[29]

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[25] *See, e.g.*, Jennifer Nou, *Dismissing Decisional Independence Suits*, 86 U. CHI. L. REV. 1187, 1187 (2019) ("Administrative adjudication is poised for avulsive change.").

[26] *See Seila Law*, 140 S. Ct. at 2198 n.2 (explaining that "under our constitutional structure," agency adjudication is an "exercise[] of . . . the 'executive Power'" (quoting City of Arlington v. FCC, 569 U.S. 290, 305 n.4 (2013))).

[27] *See Collins*, 141 S. Ct. at 1787 (holding unconstitutional a removal provision even assuming it allowed the President to remove the officer for policy disagreements because the Constitution requires "at will" employment).

[28] *See, e.g.*, Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 45 (2020) ("Although other recent threats to the rule of law may deservedly garner the headlines, we should not lose sight of the critical role that impartial agency adjudication plays."); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1075 (2011) ("The bottom line is that senior agency officials can 'manage' adjudication only to the extent that that supervision does not relate to the resolution of particular cases.").

[29] *See* Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1698 (2020) [hereinafter Barnett, *Regulating Impartiality*] (citing Schweiker v. McClure, 456 U.S. 188, 195 (1982)). That said, it is possible that agency adjudicators should only be able to resolve public (rather than private) rights, with public right being defined as those rights to which due process protections do not attach, perhaps including benefits. *See* Kent H. Barnett, *Due Process for Article III—Rethinking* Murray's Lessee, 26 GEO. MASON L. REV. 677 (2019); *cf.* SEC v. Jarkesy, 34 F.4th 446 (5th Cir. 2022) (also concluding that ALJs cannot resolve certain private rights). Here, we do not address the precise constitutional point where political inference in adjudication violates due process.

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Hence the dilemma: the Supreme Court's reading of Article II mandates that the President be able to fully control the Executive Branch—otherwise, "the buck would stop somewhere else"[30]—but such control could make fair adjudication impossible. How can political control and decisional independence in adjudication co-exist?[31]

Recognizing that the unitary executive theory of Article II is potentially on a collision course with decisional independence, scholars and other reformers have proposed several ways to save agency adjudication.[32] Three main approaches have emerged: creating a new "central panel" agency to house most or all agency adjudicators;[33] expanding the Article I courts to include more regulatory areas;[34] or placing more or perhaps even all agency adjudication in Article III courts.[35] Each of these reforms is motivated by a desire to solve the dilemma between presidential control and decisional independence. Unfortunately, we are not confident that any of them will work, at least as a general manner. They either will not solve the constitutional problem, will create massive unintended consequences, or, often, both.

So, can agency adjudication be saved? Yes, but part of the saving must be avoiding these reform proposals, especially during this era of uncertainty as to the scope of the problem and the impact of these sweeping proposals themselves. Instead, saving agency adjudication

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[30] *Seila Law*, 140 S. Ct. at 2191 (quoting *Free Enterprise*, 561 U.S. at 514).

[31] *See, e.g.*, Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. REV. 2679, 2703 (2019) ("As *Oil States* and *Lucia* illustrated, Justice Gorsuch and others are deeply concerned about the constitutional tensions between the importance of political accountability in the administrative state and the dangers of politics in agency adjudication."); *accord* Cox & Kaufman, *supra* note 10, at 1771.

[32] Other scholars have argued that the Supreme Court should not extend the holdings of its recent removal cases (*Collins*, *Seila Law*, and *Free Enterprise Fund*) into the adjudication context. *See, e.g.*, __. As we explain below, however, that sort of doctrinal move would be easier said than done; the Court's logical syllogism (Article II requires that the President be able to remove all executive officers; officer X is an executive officer; therefore, the President can remove officer X) does not distinguish between types of executive officers. *See, e.g.*, Barnett, *Regulating Impartiality*, *supra* note 29, at 1717 ("[A]n adjudicator-based exception would be inconsistent with the Court's formalist doctrine . . . . If a functional exception exists for adjudicators under Article II, that exception at the very least conflicts with the Court's separation-of-powers formalism and more problematically undermines the normative force of formalism altogether.").

[33] *See infra* Part III.A.

[34] *See infra* Part III.B.

[35] *See infra* Part III.C.

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requires embracing a key insight: While the Constitution certainly poses threats to decisional independence, it also offers solutions that do not require fundamentally overhauling agency adjudication.

To begin, Congress should more aggressively use what two of us (Nielson and Walker) have dubbed its "anti-removal power," i.e., the power to increase the president's political costs of removal.[36] By *design*, the Constitution provides Congress with instruments like the Appointments Clause that allow Congress to create a measure of independence for Executive Branch officials. In the context of agency adjudication, Congress could make some adjudicators Senate confirmed.[37] It can also require agency heads to give reasons for removing adjudicators, including in targeted congressional hearings. This would raise the political costs of removal. Although this anti-removal power does not strip the White House of its formal power to remove agency officials, it often has that real-world effect—especially for less-salient positions for which political norms against removal already exist, such as agency adjudicators.[38]

The Presidency itself also has a role to play. As Kent Barnett has explained, the President's Article II power to control the Executive Branch includes the power *not* to control it. This means the Executive Branch can unilaterally regulate itself to prevent political interference with adjudication, both in terms of appointment and removal.[39] In other words, just because the President *can* tell an agency adjudicator how to resolve a matter (and remove that official if she refuses to do so), it does not follow that the President *must* use that authority. Even though the White House could theoretically break such a promise, the mere act of formalizing such a norm would increase the political costs of inference.[40]

That extra political cost often should be enough to preserve decisional independence, especially when combined with Congress's

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[36] Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1 (2023).

[37] *See* Aaron L. Nielson & Christopher J. Walker, *The Early Years of Congress's Anti-Removal Power*, AM. J. LEGAL HISTORY (forthcoming) (citing, *inter alia*, Federalist Papers 76 & 77 (Hamilton)) (marshalling evidence that framers intended Congress to discourage presidential removal); Annals of Congress, vol I (Joseph Gales ed, Gales & Seaton 1834) 517 (Madison)).

[38] *See infra* Part IV.A.

[39] *See* Barnett, *Regulating Impartiality*, *supra* note 29.

[40] *See infra* Part IV.B; *see also* Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 90 (2018) (explaining how notice-and-comment procedures create stickiness).

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anti-removal power. This combined approach therefore should safeguard the decisional independence of agency adjudicators without prompting significant constitutional concerns and unintended consequences, thus saving agency adjudication from both Article II concerns and misguided reforms.

The Article proceeds as follows: Part I provides an overview of the standard or default model for agency adjudication established in the APA, which includes hearing-level adjudications by impartial, decisionally independent agency adjudicators, followed by the availability of de novo agency head review and deferential judicial review in an Article III court. Part II details the dual reasons for this perceived crisis of decisional independence: the expanding statutory and regulatory exceptions to APA-governed formal adjudication and the Roberts Court's embrace of the unitary executive theory in its separation-of-powers precedents. Part III introduces and critiques the three main reform proposals to date: a centralized Article II administrative judiciary; the creation of more specialized Article I legislative courts; and the shift of agency adjudication to Article III federal courts. Part IV concludes by introducing our two-fold reform proposal: Congress's use of its anti-removal power and the President's use of internal administrative law to create impartiality regulations for the hiring and firing of agency adjudicators. These two reforms, we argue, should address the growing crisis in ways that avoid the costs of the other reform proposals while still producing similar benefits.

I. THE STANDARD MODEL FOR AGENCY ADJUDICATION

The standard model for agency adjudication, which is delineated by the Administrative Procedure Act (APA), strikes a careful balance between decisional independence of adjudicators and political control over agency adjudication.[41] More specifically, the APA distinguishes "formal" adjudication from all other types of "informal" adjudication,[42]

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[41] *See* 5 U.S.C. §§ 551–59, 701–06. This standard model is subject to congressional override in the agency's governing statute. *See, e.g.*, Dickinson v. Zurko, 527 U.S. 150, 154–55 (1999) (holding that to depart from the APA default rules, the agency's governing statute must suggest "more than a possibility of a [different] standard, and indeed more than even a bare preponderance of evidence"; and stating that the exception "must be clear"). *See generally* Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 243–45 (2014) (discussing the standards for departing from the APA's default rules).

[42] *See generally* Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377 (2021).

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the former of which was envisioned as the standard model for hearing-based adjudication. Paradigmatic APA-governed formal adjudication requires an evidentiary hearing held before an ALJ in which parties are entitled to oral arguments, rebuttal, and cross-examination of witnesses. ALJs presiding over this formal adjudicatory hearing are functionally equivalent to a trial judge in a bench trial. The ALJ is the principal factfinder and initial decisionmaker in an agency adjudication, and the APA generally empowers ALJs to "regulate the course of the hearing."[43] The ALJ decision is then subject to de novo agency head review.

Although the standard model for agency adjudication has been detailed before, our focus here is on the balance between two key structural features: a hearing before an impartial agency adjudicator and a final decision by a politically accountable agency head. By impartial agency adjudicator we mean an adjudicator who faithfully applies the law to facts and makes unbiased factfinding. Importantly, the second key feature—the potential for review and final decision by the agency head—serves as a mechanism by which political control is infused into agency adjudication. However, as this Part highlights, the standard model enables a specific method for political control of agency adjudication which is both transparent and circumscribed—and which ensures that the administrative record is compiled and initial findings and decision are made by an impartial agency adjudicator.

A. Hearing-Level Adjudicator Decisional Independence

The first key structural feature of the standard model of agency adjudication is that the hearing-level adjudicator has decisional independence. This decisional independence enables the adjudicator to create an administrative record and make findings free from political interference.

The APA has several requirements that reflect due process concerns ensuring a meaningful opportunity to be heard before an unbiased adjudicator.[44] For instance, the APA prohibits the adjudicator from engaging in ex parte communications about the case

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[43] 5 U.S.C. § 556(c)(5).

[44] *Id.* § 556(b); *see also id.* § 3105 ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title."). The APA provides that parties may move to exclude administrative law judges for "personal bias or other disqualification of a presiding or participating employee." *Id.* § 556(b).

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"unless on notice and opportunity for all parties to participate."[45] Nor can the adjudicator "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency."[46] The APA also requires the ALJ's decision to be based exclusively on the record created at the hearing, supported by "reliable, probative, and substantial evidence,"[47] and include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."[48]

To further ensure decisional independence, Congress sharply limited agency control over selection, retention, and removal of ALJs. The APA limits the agency's ability to remove or demote an ALJ to only "for good cause," which is determined by the Merit Systems Protection Board (MSPB).[49] Until recently, ALJs were selected through a competitive appointments process that was overseen by the Office of Personal Management (OPM). OPM ranked ALJ candidates on several factors, including examination scores,[50] and then created a list of the three highest scoring candidates from which the agency can

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[45] *Id.* § 554(d)(1).

[46] *Id.* § 554(d)(2). Indeed, the APA has detailed prohibitions on ex parte communications "relevant to the merits of the proceeding," requirements to make any such communications part of the public record of the proceeding, and authority for the agency to require the offending party "to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation." *Id.* § 557(d).

[47] *Id.* § 557(c)(3)(A).

[48] *Id.* If a party believes the agency's decision is based on a material fact outside of the record, the party must have an opportunity to make a timely request for reconsideration *Id.* § 556(e).

[49] 5 U.S.C. § 7521(a).

[50] These factors include experience, *id.*, veteran status, Veterans' Preference Act, 5 U.S.C. § 3309; 5 C.F.R. § 302.201, and the results of an OPM-administered exam, VANESSA K. BURROWS, CONG. RESEARCH SERV., ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 2 (2010). For a discussion on the controversial practice of veteran status and its impact on the final list of ALJs, see Jeffrey S. Lubbers, *Federal Administrative Law Judges: A focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 115–16 (1981). The Administrative Conference of the United States has repeatedly recommended that Congress modify this preference in an effort to increase the number of qualified ALJ candidates. ADMIN. CONF. U.S., RECOMMENDATION 92–7: THE FEDERAL ADMINISTRATIVE JUDICIARY 3 (1992), *available at* https://www.acus.gov/sites/default/files/documents/92-7.pdf.

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select its ALJ.[51] Decisional independence of ALJs was arguably diminished in 2018 when President Trump issued an executive order exempting all ALJs from the OPM competitive selection process and civil service statutes more generally, the latter of which prohibited employment decisions to be based on partisanship.[52] OPM immediately authorized heads of executive departments to make ALJ appointments without OPM approval, thus concentrating ALJ hiring process fully within the agency.

ALJs, however, continue to be exempt from the Civil Service Reform Act's performance appraisal requirements, which apply to most federal employees.[53] As a result, ALJs' pay is not tied to performance reviews but instead set by statute and OPM regulation.[54] ALJs are not eligible for bonuses.[55] Finally, agencies' influence on ALJ outcomes is also minimized by assigning cases to ALJs by rotation or random assignment. These protections enhance ALJ decisional independence by excising the agency from ALJ salary determinations and limiting agencies' ability to indirectly influence adjudicatory outcomes.

Why does the standard model of agency adjudication insist on decisional independence of ALJs? Decisional independence of ALJs is important for the same reason we prize judicial independence in the federal Article III judiciary. Perhaps the most fundamental principle of judging is that the adjudicator be free from outside influence in decisionmaking. Judges cannot resolve issues impartially if members of the legislature lobby them for a particular result or if donors threaten to withhold support, contingent on a particular outcome of a

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[51] VANESSA K. BURROWS, CONG. RSCH. SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 2–3 (2010). To gain more control over the appointments process, agencies can hire ALJs who already work in another agency, Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1344 (1992), or wait until several vacancies exist so that they obtain a larger list of candidates from OPM, *id.* at 1361 n.82. Agencies also may borrow an ALJ from another agency with that agency's consent. *Id.*

[52] 83 Fed. Reg. 32,755 (July 18, 2018).

[53] ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 92–7: THE FEDERAL ADMINISTRATIVE JUDICIARY 2 (1992).

[54] *Id. see also* Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. RES. L. REV. 1083, 1108 (2015) (citing 5 U.S.C. § 4301). ALJs' pay is set out in significant detail in 5 U.S.C. § 5372, with three levels of basic pay. Notably, Congress moved from a two-tiered pay grade for ALJs—which was supposed to account for the difficulty of the kinds of cases that ALJs heard and raised their pay. *See* Verkuil, *supra* note 51, at 1352.

[55] *See* 5 C.F.R. § 930.210(b) (OPM regulation).

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case. As a result, at the federal level, the Article III guarantees of lifetime tenure and protection against salary diminution stand as fortifications of decisional independence. The same stands for ALJs. Members of Congress or political appointees in the agency should not be able to meddle in individual cases, and financial incentives should not prejudice the proceedings.

Decisional independence also enables the hearing-level adjudicator to create an administrative record—or the paper trail that documents the ALJ's decisionmaking process and the basis for the ALJ's decision—that is free from outside influence. The administrative record itself has several benefits, which are substantially enhanced when it is compiled by an impartial adjudicator. First, the record helps to provide legitimacy to agency adjudication. The administrative record serves as the basis of the ALJ's decision and outlines the legal reasoning for the outcome reached. Without such a record, it is impossible to know that decisions are fairly achieved. If parties to the adjudication do not believe decisions are fairly reached, they are less likely to accept the outcome.[56]

Second, the administrative record provides the documentation needed for higher-level review, both within the agency and by federal courts. When reviewing an agency's decision, courts will determine whether the agency's action is reasonable and consistent with the applicable legal requirements.[57] Importantly, whether a court or agency head seeks to overturn the hearing-level adjudicator's decision, the higher-level reviewer must explain why the initial decision that outlines the adjudicator's legal reasoning is incorrect.

B. Agency-Head Final Decisionmaking Authority

The second key structural feature of the standard model of agency adjudication is that the agency head has final decisionmaking authority. This feature is the way in which political control is infused into agency adjudication. The Supreme Court has interpreted the APA to provide that the ALJ's initial decision is not entitled to deferential administrative review.[58] Plenary review stems from a critical difference between agencies and federal courts. As Harold Krent and

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[56] The same holds for federal courts wherein the Supreme Court has been heavily criticized for its "shadow docket," in which the Court rules on cases that do not receive full briefing by issuing succinct orders, generally issued without legal justification. *See* William Baude, Foreword, *The Supreme Court's Shadow Docket*, 9 NYU J.L. & LIB. 1 (2015); STEVE VLADECK, THE SHADOW DOCKET (2023).

[57] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[58] FCC v. Allentown Broad. Corp., 349 U.S. 358, 364–65 (1955).

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Lindsay DuVall note, "[l]egislatures have directed the agency, not the ALJ, to issue a decision reflecting the agency's position."[59] In fact, *the* critical difference between an ALJ adjudication and a civil bench trial is that the agency head has de novo review authority, while an appellate court defers to the trial court's factual findings.[60] Indeed, federal courts scholars have long distinguished Article III federal courts and Article I legislative courts from agency adjudicatory tribunals on the theory that the agency head has final policymaking authority.[61]

As a result, an agency has complete freedom, as though it had heard the initial evidence itself, when reviewing the decision of the ALJ. Nevertheless, the agency is typically required to explain why it has rejected an ALJ's findings, and courts examine the evidence more critically when an agency's reversal of an ALJ ruling turns on the credibility of the witnesses who testified at the hearing.[62] Thus, the standard model envisions the agency head exercising political control over agency adjudication but requires this power to be implemented through a transparent mechanism. This point cannot be overstated. The agency head has wide latitude to reverse the ALJ's initial decision, including for policy considerations, but must explain her reasons for the reversal in a written decision. The agency head's decision becomes

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[59] Harold J. Krent & Lindsay DuVall, *Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 29 (2005).

[60] *See generally* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011); *see also* Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106, 111 (2017) ("The appellate review model in the civil litigation context is based on the record from the prior proceeding, and the reviewing court does not engage in independent fact-finding. Likewise, the standard of review reflects the comparative expertise of the various institutions, with more or less deferential review depending on whether the issue is more factual or legal, respectively.").

[61] *See, e.g.*, RICHARD H. FALLON, JR., ET AL., HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 379–80 (7th ed. 2015) (noting the policy-making function in agency adjudication); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 923–24 (1988) (same).

[62] Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951). Most frequently, the agency head may reverse the ALJ's initial decision for policy reasons. However, when the agency reverses for factual disputes, the Court has stated that "evidence supporting a conclusion may be less substantial when an impartial, experienced [ALJ] who has observed the witnesses and lived with the case has drawn conclusion different from the [agency's]." *Id.*

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part of the administrative record that is subject to judicial review by a federal court and scrutiny by Congress, the President, and the public more generally. As a result, a reviewing court has the benefit not only of the trial-level decision, which is based on an impartial application of law to facts, but also the agency head's reasoned decision, which may be imbued with express policy-based or political preferences.

Importantly, this second structural feature—agency-head final decisionmaking authority—provides numerous benefits that improve agency performance.[63] Perhaps most saliently to this discussion, it ensures that agency heads control the regulatory structure they supervise. That is, it provides for political control and accountability over agency adjudication. Agency heads—who can comprise a single director, secretary, or administrator; or a commission, board, or other multi-member body—oversee the agency's activities and set the agency's policy preferences. It is widely accepted that agency heads have a comparative advantage in policy expertise relative to agency adjudicators.[64] Generally, agency leadership has greater access to experts and staff that provide input and partake in the deliberative process that leads to better informed policy decisions than adjudicatory officers.[65] In contrast to agency heads, adjudicatory officers often have significant caseloads that prevent them from having the time necessary to think deeply about policy matters.[66] Moreover, because adjudication is a primary policymaking vehicle for federal agencies, granting agency-head review over adjudication helps to ensure accountability, consistency, and efficiency through agency-head control over policy development.[67]

In addition, agency heads possess direct review authority of adjudications to help ensure consistency in adjudicative outcomes. Jerry Mashaw, in his seminal book *Bureaucratic Justice*, expounded a theory of agency adjudication in which agency-head control sought to increase consistency and accuracy in adjudicative outcomes.[68] From a

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[63] Ronald M. Levin, *Administrative Judges and Agency Policy Development: The Koch Way*, 22 WM. & MARY BILL RTS. J. 407, 412 (2013).

[64] PAUL R. VERKUIL ET AL., RECOMMENDATION 92-7: THE FEDERAL ADMINISTRATIVE JUDICIARY (Admin. Conf. of U.S., 1992).

[65] *Id.*

[66] *Id.*

[67] *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386 (2004).

[68] JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY BENEFITS CLAIMS 25–26 (1983); Robert A. Kagan, *Inside Administrative Law*, 84 COLUM. L. REV. 816, 820 (1984) (detailing how Mashaw's "bureaucratic

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normative perspective, consistency in adjudicatory outcomes is important to fairness arguments underlying equal enforcement, as well as encouraging confidence and hence ex ante compliance with agency policy.[69] Yet despite their goals, inconsistent adjudicatory outcomes is a reality of the modern day administrative state. As a result, agency heads try to limit the discretion of their staff through the promulgation of guidelines, regulations, and manuals that agency officials must follow.[70] Nevertheless, agency adjudicators often retain substantial discretion in their decisionmaking for a number of reasons, including the inability of an agency head to delineate every circumstance which the official who must make a decision will face. Thus, agency-head review of adjudicatory outcomes helps ensure that agency policy preferences are consistently applied and that similarly situated parties receive similar results across decision makers.

Finally, agency-head review "helps the agency head gain greater awareness of how a regulatory system is functioning."[71] Such awareness assists the agency head when considering whether adjustments to the regulatory scheme are necessary via standard policymaking forms—such as rulemaking, adjudication, or guidance documents—or less formal mechanism—such as quality assurance programs or inputs to performance evaluations. Prior work by one of us (Wasserman) and coauthor Michael Frakes demonstrates how agency heads influence agency culture. In turn, agency culture has tremendous impact on the shaping how agency employees' approach and develop their practice style.[72] Frakes and Wasserman find that the Director of the U.S. Patent & Trademark Office (PTO) utilized initial training and quality assurance mechanisms, among other means, to help shape the granting culture of the PTO.[73] They find

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rationality" is a model of agency adjudication that facilitates "[g]reater control and consistency" by placing the "overriding value" on "accurate, efficient and consistent implementation of centrally-formulated policies"); *see also* Hoffer & Walker, *supra* note 41, at 276–89 (exploring the importance of consistency, efficiency, and equity in agency adjudication).

[69] *See, e.g.*, Hoffer & Walker, *supra* note 41, at 278.

[70] JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE IN A DEMOCRATIC REPUBLIC 21 (1999); Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 280 (2009).

[71] Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 289 (1996).

[72] Michael D. Frakes & Melissa F. Wasserman, *Patent Office Cohorts*, 65 DUKE L.J. 1601, 1605 (2016).

[73] *Id.* at 1614–15.

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strong evidence that the culture of the PTO (either pro-patent or anti-patent) the year the patent examiner was hired had a lasting effect on her granting patterns over the course of her career.[74]

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In sum, the standard model of agency adjudication strikes a careful balance between decisional independence of hearing-level adjudicators and political control of the agency's final adjudication decision. More specifically, APA-governed formal adjudication provides a series of protections that guarantee decisional independence of ALJs but at the same time enables the agency head to have almost unfettered final decisionmaking authority. Importantly, the APA strikes this balance between political control and decisional independence by requiring the agency head to provide written detailed reasons for why it is overturning the initial adjudicator and subjecting this decision to federal court review.

This traditional APA-governed formal adjudication is utilized by a number of so-called independent federal agencies, such as the Federal Trade Commission,[75] the Federal Communications Commission,[76] the International Trade Commission,[77] and the Securities and Exchange Commission.[78] It is also commonplace at a number of executive branch agencies, including at the Departments of Agriculture, Health and Human Services, Interior, and Labor.[79] It is the default approach under the APA for formal adjudication, subject to exceptions in the agency's governing statute.

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[74] *Id.* at 1605.

[75] 15 U.S.C. § 45.

[76] 47 U.S.C. § 151.

[77] 19 U.S.C. § 1330.

[78] 15 U.S.C. § 78d.

[79] OFFICE PERS. MGMT, ADMINISTRATIVE LAW JUDGES, https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency. OPM provides an agency-by-agency breakdown of ALJs on its website.

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II. AGENCY ADJUDICATION'S CURRENT CRISIS.

In light of the central role of agency adjudication in the federal administrative state and our current age of "anti-administrativism,"[80] it should perhaps come as no surprise that the constitutionality of this federal administrative judiciary has been called into question in recent years. These constitutional attacks challenge the careful balance between decisional independence of hearing-level adjudicators and final agency head decision-making. Indeed, there is a growing concern in administrative law circles, and especially among ALJs and other agency adjudicators, that the decisional independence of agency adjudicators is increasingly being threatened as a result of enabling greater political control over agency adjudication.

There are at least two reasons for this concern. The first involves congressional choices to depart from the APA model for formal adjudication. This choice has resulted in the vast majority of agency adjudication being overseen by hearing-level adjudicators that have far less decisional independence than ALJs, in terms of hiring, supervision, and firing. The second involves the Supreme Court's recent precedents on the Appointments Clause and separation of powers. These precedents, which have strengthened presidential control over agency adjudication, have also diminished the decisional independence of all agency adjudicators. We address each in turn.

A. The New World of Agency Adjudication

Despite APA-governed formal adjudication being the standard model that every administrative law student learns, the vast majority of agency adjudications and federal regulatory actions do not involve APA-governed formal adjudications before an ALJ.[81] Agencies instead, increasingly regulate using adjudicatory means that still require evidentiary hearings but do not embrace all of the features set forth in the APA for formal adjudication. To borrow from Daniel Farber and

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[80] *See, e.g.*, Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (generally lamenting rise of anti-administrativism); Aaron L. Nielson, Response*, Confessions of an "Anti-Administrativist"*, 131 HARV. L. REV. F. 1 (2017) (offering defense of some challenges to administrative state).

[81] Some experts estimate that as much as 90 percent of all agency adjudication occurs outside of APA formal adjudication proceedings. AM. BAR ASS'N, A GUIDE TO FEDERAL AGENCY ADJUDICATION 176 (Jeffrey B. Litwak ed., 2d ed. 2012) (citing Paul R. Verkuil, *A Study of Informal Adjudication Procedure*, 43 U. CHI. L. REV. 739, 741 (1976)). Part I.A draws substantially from Walker & Wasserman, *supra* note 23, at 153–57, 162–73.

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Anne O'Connell, the predominance of formal-like agency adjudication outside of the APA is yet another departure from the "lost world of administrative law"—further revealing "an increasing mismatch between the suppositions of modern administrative law and the realities of modern regulation."[82]

In this new world of agency adjudication, agency-administered evidentiary hearings that fall outside of the scope of "formal" APA-governed adjudication led the Administrative Conference of the United States and the American Bar Association to discourage the use of the traditional, binary distinction between "formal" and "informal" for APA agency adjudication.[83] Instead, they identify three categories of adjudication—Type A, Type B, and Type C—which highlight the distinction between "informal" agency adjudications that have agency-administered evidentiary hearings and those that do not.

Type A is the APA-governed "formal" adjudication discussed in Part I. Type B adjudication generally tracks adjudications conducted by the non-ALJ adjudicators where a statute or regulation requires a hearing that is not governed by the APA's extensive adjudication provisions.[84] Type C adjudication is a residual category for less formal

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[82] Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014).

[83] *See* Adoption of Recommendations, 81 Fed. Reg. 94,312, 94,314–15 (Dec. 23, 2016) (distinguishing Type A, B, and C adjudications); *accord* AMERICAN BAR ASS'N, RESOLUTION 114 (Feb. 2005) [hereinafter ABA RESOLUTION 114], https://www.americanbar.org/content/dam/aba/administrative/administrative_law_judiciary/resolution_114.authcheckdam.pdf. *See generally* Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003 (2004) (presenting and discussing further ABA Resolution 114).

[84] *See* MICHAEL ASIMOW, ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 2 (Final Report to Admin. Conf. U.S., 2016). As Asimow explains, distinguishing Type B adjudications from both Type A and Type C adjudications is not an exact science. *See id.* at 7–13. For many Type B adjudications, the relevant statute may not indicate whether the APA's formal adjudication provisions should apply. Asimow identifies four ways to distinguish Type B from Type A: (1) whether the relevant statute uses the APA's magic words "on the record" after an agency hearing, 5 U.S.C. § 554(a); (2) whether the relevant statute does not use the magic words but otherwise assumes record exclusivity and requires an evidentiary hearing; (3) whether courts apply *Chevron* deference to agency statutory interpretations developed in the adjudication; and (4) whether courts determine congressional intent to have the APA apply due to the adjudication of serious public policy issues. *See* ASIMOW, *supra*, at 7–9. Like Asimow, we do not take a definitive position here on the best criteria for distinguishing Type A from Type B.

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adjudications that do not require an evidentiary hearing. While scholars have long studied agency adjudication, the distinction between informal adjudications that require an agency-administered hearing and those that do not is of recent vintage.

Type B adjudication now predominates the federal judiciary. Consider, for instance, the immigration court system within the Department of Justice's Executive Office for Immigration Review. As of October 2022, there are more than 600 immigration judges hearing cases at the Department, including more than 100 hired in fiscal year 2022 alone. To put that number in perspective, during the first two years of the Biden Administration, the Senate confirmed 97 Article III judges. In recent years, these immigration judges have decided between 100,000 and 300,000 cases per year. In fiscal year 2022, for instance, the Department of Justice received more than 700,000 new cases in the immigration court system, and the immigration judges completed more than 300,000 cases. The stakes in immigration adjudication are high, including whether to allow noncitizens to remain in the United States to avoid persecution in their countries of origin.[85]

Increased reliance on Type B adjudication by both Congress and federal agencies has contributed to the concerns about diminished decisional independence of agency adjudicators. There are a host of ways in which agency heads have more latitude to influence the outcomes of Type B adjudication than APA-governed formal adjudication. As noted above, informal agency adjudications are adjudicated by non-ALJ agency personnel that have diverse titles, such as administrative judges (AJs). AJs do not enjoy the same decisional independence of ALJs. The APA, for example, prohibits ex parte communications and requires separation of powers protections for informal agency adjudication.[86]

In addition, agencies also have a greater ability to influence AJ proceedings indirectly. Most AJs are subject to agency performance appraisals. AJs' salaries can be affected by these reviews. No statue bars agencies from giving bonuses to AJs. As a result, a number of AJs receive bonuses for hitting certain performance targets, such as productivity quotas or goals. Recent research highlights how influential performance appraisals are in shaping the incentives of

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[85] Elsewhere, two of us explore in greater detail another Type B adjudication scheme: the Patent Trial and Appeal Board at the U.S. Patent and Trademark Office. *See* Walker & Wasserman, *supra* note 23, at 157–73.

[86] While some agencies have incorporated these protections into informal adjudication via regulations or tradition, not all agencies have done so.

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agency employees.[87] The Trump Administration came under fire when it enacted productivity quotas for immigration judges, which opponents argued were authorized to increase the rate of removal orders.[88] Bonuses paid to administrative patent judges upon workload completion have been challenged, albeit unsuccessfully, as violating due process.[89]

Agencies have utilized other methods to influence AJ outcomes. AJs, unlike ALJs, are not necessarily assigned cases by rotation or randomization. For example, the U.S. Patent & Trademark Office used to panel stack its adjudicatory board to arrive at the agencies' preferred adjudicatory outcomes.[90] When a three-board member panel arrived at a decision that the agency disagreed with, the aggrieved party would ask for a rehearing and the Director would enlarge the panel to include five or sometimes seven members to ensure the outcome she preferred.[91] This controversial practice would appear to be inconsistent with the APA if the administrative patent judges were in fact ALJs, who are afforded more protections.[92]

Finally, agencies have more latitude to remove AJs and historically to hire AJs. Unlike ALJs' "good cause" standard of removal, AJs are not subject to any particular protection from removal. As a result, an AJ may fear being fired if, for example, she does not apply the law to facts in the way the agency prefers or if she makes factual findings that the agency disagrees with. And AJs, unlike ALJs, have never been subject to a selection process that involved an outside agency like OPM.[93] While many agencies have criteria for selecting AJs and civil service statutes prevent the hiring of AJs based on partisanship, there

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87 *See* Michael D. Frakes & Melissa F. Wasserman, *Deadlines Versus Continuous Incentives: Evidence from the Patent & Trademark Office* (on file with authors).

88 Jill Family, *We Have Nothing to Fear but "Sovereignty Fear" Itself*, YALE J. ON REGUL.: NOTICE & COMMENT (Aug. 5, 2021), https://www.yalejreg.com/nc/we-have-nothing-to-fear-but-sovereignty-fear-itself/.

89 Mobility Workx, LLC. v. United Patents, LLC, 15 F.4th 1146 (Fed. Cir. 2021).

90 Walker & Wasserman, *supra* note 23, at 178–88 (describing the practice of panel stacking at the Patent and Trademark Office).

91 *Id.*

92 *See* 5 U.S.C. § 3105 ("Administrative law judges shall be assigned to cases in rotation so far as practicable. . . . ").

93 Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1347 (1992) ("The selection and appointments procedures for administrative judges are controlled by the agencies themselves.").

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is no statutory requirement that AJs have any particular qualifications.[94] Nevertheless, partisan hiring of AJs has occurred. Perhaps most famously, a 2008 Special Report by the Office of the Inspector General and the Office of Professional Responsibility found that the Bush Administration had violated Department of Justice policy and federal civil service statutes when it hired immigration judges based on political affiliation.[95] Half of the thirty-seven immigration judges hired during the Bush Administration had no experience in immigration law.[96]

In this new world of agency adjudication, the standard model of agency head review persists for both Type A and Type B adjudication, but the first central feature of the standard model has eroded. As explained above, with Type B adjudication, the degree of decisional independence of hearing-level adjudicators is in much greater doubt than in Type A, APA-governed formal adjudication. And in this new world, Type B adjudication has risen to overtake Type A adjudication in both the number of agency adjudicators and case volumes.

B. The Roberts Court and Separation of Powers

The second reason, however, is more reaching and limits what even Congress can do. Since the appointment of Chief Justice John Roberts and Justice Samuel Alito, the Supreme Court has embraced a more unitary executive view of separation of powers and the Appointments Clause. This trend, moreover, has sped up with the appointments of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—and sometimes Justice Elena Kagan. The resurgence of the unitary executive theory, moreover, now crosses political lines. Whereas the theory used to have more purchase in Republican administrations, President Joe Biden has in some ways become remover-in-chief, even

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[94] Civil Service Act of 1883, ch. 27, 22 Stat. 403 (1883).

[95] An immigration judge (IJ) is "an attorney whom the Attorney General appoints as an administrative judge within the Executive Officer for Immigration Review." 8 U.S.C. § 1101(b)(4). OPM has categorized career attorney positions as Schedule A. 5 C.F.R. § 213.3102. IJs are career Schedule A appointees, such that the civil service laws there apply. *See* 5 U.S.C. §§ 2301, 2302. U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), https://oig.justice.gov/sites/default/files/archive/special/s0807/chapter6.htm.

[96] Susan Benesch, *Due Process and Decisionmaking in U.S. Immigration Adjudication*, 59 ADMIN. L. REV. 557, 566 (2007).

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going so far as to remove the head of the Social Security Administration despite a statutory tenure protection.[97]

The Supreme Court's strengthening of presidential control over agency adjudication has come at the expense of decisional independence of agency adjudicators. The Court's rulings, which have arguably pushed the federal administrative judiciary to this crisis point, have involved two interrelated issues: the hiring and the removal of agency adjudicators. The Court's decisions associated with agency adjudicator hiring have resulted in increasing agency head control over agency adjudicators' hiring. Critics contend that such localized power enables agency heads to hire adjudicators based on political affiliation rather than merit, undermining decisional independence of agency adjudicators. The Court's precedents associated with removal have increased the latitude of the President to remove an agency head and increased the latitude of an agency head to remove agency adjudicators. By rolling back removal protections, agency adjudicators may be more subject to outside pressures to reach a specific outcome. As a result, both sets of cases increase political decisionmaking in federal agency adjudication at the expense of the impartiality of agency adjudicators .

This constitutional sea change began (at least in recent years) with *Free Enterprise Fund*, which concerned the constitutionality of various features of the Public Company Accounting Oversight Board—a regulatory body housed within the SEC. The SEC appoints the Board's five members but, importantly, could not remove them at will, but only for "good cause" and pursuant to various procedures.[98] The parties stipulated, moreover, that the President could not remove SEC Commissioners at will.[99] The D.C. Circuit held—based on the Supreme Court's well-known *Humphrey's Executor* and *Morrison* decisions—that this arrangement did not violate the separation of powers, even though there were two layers of removal protection between the President and the Board members.[100] The Supreme

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[97] *See, e.g.*, Aaron L. Nielson, *Three Views of the Administrative State: Lessons from* Collins v. Yellen, 2021 CATO SUP. CT. REV. 141, 162; Ronald Krotoszynski, *The Conservative Idea That Would Let Biden Seize Control of Washington*, POLITICO (Dec. 10, 2020).

[98] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

[99] *Id.*

[100] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 679 (D.C. Cir. 2008), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010) (citing Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Morrison v. Olson, 487 U.S. 654 (1988)); *cf. id.* at 685–86 (Kavanaugh, J., dissenting) (disagreeing).

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Court, however, disagreed, holding in an opinion by Chief Justice Roberts that even if some statutory removal restrictions are constitutional, two levels was one too many. After all, Roberts reasoned, "[a] second level of tenure protection changes the nature of the President's review," even though "[t]he Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."[101]

Commentators quickly observed that the Court's reasoning would seem to apply beyond a two-level context.[102] If the Constitution requires presidential control (the premise of the argument), why would the number of levels between the President and the agency official matter? But even a prohibition on two levels of removal protection alarmed Justice Breyer, who—in dissent—worried about what it would portend for agency adjudication.[103] As he explained, many agencies with leadership protected by statutory removal restrictions also use adjudicators with their own removal restrictions. In response, the majority observed that its opinion did not address adjudicators:

> [O]ur holding also does not address that subset of independent agency employees who serve as administrative law judges. Whether administrative law judges are necessarily "Officers of the United States" is disputed. And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions or possess purely recommendatory powers. The Government below refused to identify either "civil service tenure-protected employees in independent agencies" or administrative law judges as "precedent for the PCAOB."[104]

Eight years later, in *Lucia v. SEC*, the Court resolved whether ALJs are "Officers of the United States" who must be appointed

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[101] *Free Enterprise Fund*, 561 U.S. at 485.

[102] *See, e.g.*, Rao, *supra* note 19.

[103] As Justice Breyer noted in dissent, no statute expressly provides SEC Commissioners with any tenure protection and the Supreme Court has never held that some statute implicitly provides such protection. Following *Collins*, the argument against such an implied tenure protection has become stronger because the SEC unquestionably exercises regulatory authority. *See Collins*, 141 S. Ct. 1761, 1783 n.18 (explaining that "[w]hen a statute does not limit the President's power to remove an agency head, we generally presume that the officer serves at the President's pleasure," especially if an entity "is not an adjudicatory body").

[104] *Free Enter. Fund*, 295 U.S. at 499.

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pursuant to the Appointments Clause.[105] With Justice Kagan writing, the Court held that ALJs are indeed officers because they hold "a 'continuing' office established by law" and "exercise significant authority pursuant to the laws of the United States."[106] Under the Appointments Clause, such individuals must be appointed by at least the agency head (if the not the President), rather than through a merit-based civil-service selection process.[107] Justice Breyer (joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor) wrote separately to warn of the potential implications for agency adjudication of holding that ALJs are officers[108] and specifically urged the Court to protect ALJ independence.[109] By contrast, in his concurring opinion, Justice Thomas underscored the importance of "clear lines of accountability" that "encourag[e] good appointments and giv[e] the public someone to blame for bad ones."[110] In the wake of *Lucia*, President Trump issued Executive Order 13,843, an order that "exempt[ed] ALJs from the competitive civil service hiring process" and instead placed their appointment in the hands of agency heads.[111]

In 2018, the Supreme Court also decided *Oil States Energy Services v. Greene's Energy Group*, and rejected constitutional challenges to certain agency adjudications at the U.S. Patent and Trademark Office

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[105] 138 S. Ct. 2044 (2018).

[106] *Id.* at 2053.

[107] *See id.*; see *also* U.S. Const. Art. II, § 2 cl. 2 (providing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States . . . 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").

[108] *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in part and dissenting in part) ("*If* the *Free Enterprise Fund* Court's holding applies equally to the administrative law judges—and I stress the 'if'—then to hold that the administrative law judges are 'Officers of the United States' is, *perhaps*, to hold that their removal protections are unconstitutional. This would risk transforming administrative law judges from independent adjudicators into *dependent* decisionmakers, serving at the pleasure of the Commission.").

[109] *Id.* ("I have stressed the words 'if' and 'perhaps' in the previous paragraph because *Free Enterprise Fund*'s holding may not invalidate the removal protections applicable to the Commission's administrative law judges even if the judges are inferior 'officers of the United States' for purposes of the Appointments Clause.").

[110] *Id.* at 2056 (Thomas, J., concurring).

[111] Levy & Glicksman, *supra* note 28, at 62; *see also id.* at 59–68 (discussing order).

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(PTO).[112] *Oil States* addressed whether agency adjudications unconstitutionally strip parties of property rights in issued patents.[113] The Court concluded that patent rights are public, rather than private rights, and so can be adjudicated in an agency. Notably, Justice Gorsuch, in his *Oil States* dissent, expressed concern about too much political pressure affecting the decisional independence of agency adjudicators (at least in the context of private rights): "Powerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies."[114]

Then came *Seila Law*, which confirmed that a majority of the Court is not content simply with *Free Enterprise Fund*. *Seila Law* concerned the structure of the Consumer Financial Protection Bureau (CFPB), a powerful regulating agency headed by a single individual whom the president could only remove for "inefficacy, neglect, or malfeasance in office."[115] The CFPB's defenders argued that the rule from *Humphrey's Executor* (which allowed such protection for a multi-member body of principal officers) combined with the rule from *Morrison* (which allowed such protection for some individual inferior officers) should extend to the CFPB Director.[116]

Writing for a five-justice majority, however, Chief Justice Roberts disagreed, explaining that "*Humphrey's Executor* [merely] permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power," and that precedent also only protects "inferior officers with limited duties and no policymaking or administrative authority."[117] Notably absent from this analysis was any first principles defense of statutory restrictions on removal. Indeed, the Court described the rule from *Humphrey's Executor* so narrowly that it does not appear to even

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[112] Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365 (2018).

[113] *Id.* at 1375.

[114] *Id.* at 1381 (Gorsuch, J., dissenting).

[115] *See* 140 S. Ct. 2183, 2192–93 (2020).

[116] *Id.* at 2192.

[117] *Id.* at 2199.

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apply to the FTC today.[118] Alarmed, Justice Kagan dissented, using unusually pointed language.[119]

After *Seila Law*, two more cases came in rapid succession. In *Collins v. Yellen*, the Court—by a vote of 7 to 2 (Justice Kagan joined the Court's judgment because of *stare decisis*, but she did not join the majority opinion)—extended *Seila Law*'s holding to the Federal Housing Finance Agency, which was also headed by a single individual.[120] Writing for the majority, Justice Alito concluded that it does not matter that the FHFA Director by statute wields less executive power than the CFPB Director, nor that the removal restriction at issue was less demanding (requiring just some "cause").[121] The Court also declined to decide whether its analysis extends to multi-member agencies for which the chair has independent statutory authority (and so could be conceptualized as a single-headed agency within her own sphere of delegated authority) or members of the Civil Service (who surely wield executive power, just less of it).[122] Justice Sotomayor dissented, lamenting that "[t]he Court has proved

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[118] *See id.* at 2198 n.2 ("The Court's conclusion [in *Humphrey's Executor*] that the FTC did not exercise executive power has not withstood the test of time."); Daniel Crane, *Debunking* Humphrey's Executor, 83 GEO. WASH. L. REV. 1836 (2015) (arguing that the FTC does not match *Humphrey's Executor's* narrow description).

[119] *See Seila Law*, 140 S. Ct. at 2233 (Kagan, J., dissenting) ("[T]he Court's precedents before today have accepted the role of independent agencies in our governmental system. To be sure, the line of our decisions has not run altogether straight. But we have repeatedly upheld provisions that prevent the President from firing regulatory officials except for such matters as neglect or malfeasance . . . . Nowhere do [the Court's removal] precedents suggest what the majority announces today: that the President has an 'unrestricted removal power' subject to two bounded exceptions."); *id.* at 2240 ("[T]he majority's 'exceptions' (like its general rule) are made up.").

[120] 141 S. Ct. 1761 (2021).

[121] *See id*. at 1785 ("[T]he nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head. The President's removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies."); *id.* at 1786–87 ("We acknowledge that the Recovery Act's 'for cause' restriction appears to give the President more removal authority than other removal provisions reviewed by this Court. . . . But as we explained last Term [in *Seila Law*], the Constitution prohibits even 'modest restrictions' on the President' power to remove the head of an agency with a single top officer.")

[122] *See id*. at 1787 n.21 (declining to address other removal restrictions).

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far too eager in recent years to insert itself into questions of agency structure best left to Congress."[123]

In *United States v. Arthrex*, the Court addressed agency adjudication directly, holding that administrative patent judges cannot have both final decisionmaking authority and statutory removal protections.[124] As part of the America Invents Act, Congress empowered these administrative patent judges to resolve certain patent questions without plenary review by a principal officer. The constitutional wrinkle is that the Patent Act does not give the head of the agency final decisionmaking for their decisions. The Federal Circuit reasoned that this was unconstitutional, and that the correct remedy was to sever these adjudicators of their tenure protection such that the agency head could remove administrative patent judges at will.[125] This remedy, as a policy matter, would take the fears Justice Gorsuch expressed in his *Oil States* dissent to a far more frightening level.

The Supreme Court agreed with the Federal Circuit that the structure of these PTO adjudications violates the separate of powers, holding that "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us."[126] But the Court opted for a different remedy. Instead of making administrative patent judges removable at will by the agency head, the Court struck down the Patent Act's prohibition on agency-head review of administrative patent judges' decisions.[127] In other words, by giving the agency head the final say, the Court opted to preserve the decisional independence of the hearing-level agency adjudicators in exchange for more political accountability over the agency adjudication system. In so doing, the Court emphasized that agency-head final decisionmaking authority "is the standard way to maintain political accountability and effective oversight for adjudication that takes place outside the confines of" the APA's agency-head review provision.[128] Thus, even if agency adjudicators have tenure protection, the principal-officer agency head must be able to make final decisions for the agency.

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[123] *Id.* at 1809.

[124] *See* 141 S. Ct. 1761 (2021).

[125] *Id.* at 1338 (labeling this the "narrowest remedy").

[126] *Arthrex*, 141 S. Ct. at 1985.

[127] *Id.* at 1986–87.

[128] *Id.* at 1984 (citing Walker & Wasserman, *supra* note 23, at 157).

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Last year, the Fifth Circuit in *Jarkesy* held—precisely as Justice Breyer feared that some court eventually would—that the SEC's structure offends *Free Enterprise Fund* because the agency's ALJs are two steps removed from the President.[129] Notably, the D.C. Circuit dodged this issue. In *Fleming v. Department of Agriculture*, a panel held that the petitioners had waived the constitutional challenge by not first raising it before the agency.[130] Judge Neomi Rao dissented from this part of the panel's opinion, arguing that administrative exhaustion is not required in this context.[131] On the merits, she explained: "Congress insulated ALJs with two layers of for-cause removal protection: an agency may remove an ALJ 'only for good cause established and determined by the [Merit Protection Services Board (MSPB)],' and members of the MSPB 'may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.'"[132] Accordingly, Judge Rao concluded that this dual-for-cause removal limitation violates the separation of powers under the Supreme Court's *Free Enterprise Fund* decision.[133] The appropriate remedy, she argued, would be for the agency head to "be responsible for determining whether there is good cause to remove an ALJ."[134]

Finally, the Court's recent decisions facilitate challenges to agency adjudicators. In *Carr v. Saul*, for example, the Court held that, at least where there is no statute or regulation that requires administrative exhaustion, litigants do not need to administratively exhaust constitutional challenges to how ALJs are appointed.[135] And in *Axon v. FTC*, the Court held that removal-power challengers to the FTC's structure need not first proceed through the administrative process

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[129] SEC v. Jarkesy, 34 F.4th 446, 463 (5th Cir. 2022), *cert granted*, No. 22–859, 2023 WL 4278448 (U.S. June 30, 2023); *see* nn.12–17 *supra* (discussing *Jarkesy*).

[130] 987 F.3d 1093, 1097 (D.C. Cir. 2021).

[131] *Id.* at 1106 (Rao, J., concurring in part and dissenting in part).

[132] *Id.* at 1116 (quoting 5 U.S.C. §§ 7521(a), 1202(d)).

[133] *Id.* at 1115 (citing *Free Enterprise Fund*, 561 U.S. at 492). *Cf.* Kevin M. Stack, *Agency Independence After* PCAOB, 32 CARDOZO L. REV. 2391, 2392 (2011) ("But the dual layer of removal protection was not what decided the case. If it were, the PCAOB decision would have swept aside the constitutional foundation for good-cause protections for the many adjudicators operating in independent agencies who also have two layers of good-cause protection, a conclusion the *PCAOB* Court resists.").

[134] *Fleming*, 987 F.3d at 1124 (Rao, J., concurring in part and dissenting in part).

[135] 141 S. Ct. 1352, 1360 (2021).

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but can immediately seek judicial review.[136] In *Axon*, the Court did not grant certiorari to decide whether to overrule *Humphrey's Executor* itself, but the trend lines are clear: restrictions on removal are in retreat.

Unsurprisingly, the Court's embrace of the unitary executive theory is controversial[137]—as are its broader efforts to revisit other aspects of the administrative state.[138] Whether the Constitution provides the President with an unfettered removal power has long been the source of constitutional debate; indeed, the First Congress split on the subject.[139] Especially following cases like *Free Enterprise Fund*, which have made the issue of more than mere academic interest, this debate has prompted an avalanche of literature.[140] Who

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[136] 143 S. Ct. 890 (2023).

[137] *Compare* Aditya Bamzai & Saikrishna Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023) (broadly defending presidential removal authority), *with* David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 781 (2022) (criticizing this "broad[] embrace[] [of] the 'unitary executive' theory").

[138] *See, e.g.*, Cox & Kaufman, *supra* note 10, at 1771 ("Over the last decade, the Supreme Court has advanced a new vision of the administrative state."); Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 82 (2022) (arguing that the Court is aggressively weakening the federal bureaucracy); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279 (2021) ("For the first time in modern history, a working majority on the Supreme Court may be poised to give the nondelegation doctrine real teeth."); Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931 (2021) (explaining decline of use of *Chevron* in the Supreme Court); *see also* Justin Walker, *The Kavanaugh Court and the* Schechter*-to-*Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923 (2020) (defending many of these changes).

[139] *See e.g.*, Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1034 (2006) (outlining the debate and arguing that the decision supports presidential removal); *see also* Jed Handelsman Shugerman, *The Indecisions of 1789: Inconsistent Originalism*, 171 U. PA. L. REV (forthcoming 2023) (challenging whether Decision of 1789 supports removal); John Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2031 (2011) (similar).

[140] The ever-growing literature is too expansive to catalog here. Suffice it to say, many important works have been published in recent years touching on the subject. *See, e.g.*, MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION (2020); Jed Shugerman, *'Vesting': Text, Context, and Separation-of-Powers Problems*, 74 STAN. L. REV. 1479 (2022); Daniel D. Birk, *Interrogating the Historical Basis for A Unitary Executive*, 73 STAN. L. REV. 175 (2021); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269 (2020); Christine Kexel Chabot, *Is the*

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has the better of the argument is a question that no doubt will continue to prompt academic discussion. Some scholars, moreover, urge a special constitutional carve-out for adjudication from the unitary-executive theory.[141] For purposes here, however, it is enough to observe that a majority of the Justices now endorses unitary-executive principles, and those principles—if followed to their logical conclusion—may pose challenges for agency adjudication. Indeed, this coming Term, in *SEC v. Jarkesy*, the Court will decide whether the Constitution requires the agency head to have the authority fire an ALJ for cause, as opposed to Congress's current approach of insulating ALJs with two layers of removal protection.[142] In fact, because *Jarkesy* implicates three layers of removal protection—for the ALJ, the SEC,

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Federal Reserve Constitutional? An Originalist Argument for Independent Agencies, 96 NOTRE DAME L. REV. 1 (2020); Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352 (2020); Ilan Wurman, *The Removal Power: A Critical Guide*, 2020 CATO SUP. CT. REV. 157 (2019-2020); Andrew Kent, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019); Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 1299 (2019); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1858 (2016); David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487 (2015); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1 (2013); *see also* Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 28 (2021) (discussing term-of-year provisions); Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9 (2018) (discussing political differences between appointed officials); Patrick M. Corrigan & Richard L. Revesz, *The Genesis of Independent Agencies*, 92 N.Y.U. L. REV. 637 (2017) (discussing conditions of creation of independent agencies); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013) (discussing political norms).

[141] *See, e.g.*, Harold J. Krent, *Limits on the Unitary Executive: The Special Case of the Adjudicative Function*, 46 VT. L. REV. 86 (2021); Richard Pierce, *Should the Court Change the Scope of the Removal Authority?*, 26 GEO MAS. L. REV. 657, 672–75 (2019).

[142] *See, e.g.*, *Supreme Court Review May Prove the Death Knell to SEC Administrative Courts,* TROUTMAN PEPPER (Jul. 5, 2023), https://www.troutman.com/insights/supreme-court-review-may-prove-the-death-knell-to-sec-administrative-courts.html ("In light of the high Court's current view of the administrative state, there is a strong possibility that the SEC might lose *Jarkesy*. . . . If the Fifth Circuit ruling stands, it could essentially put an end to administrative proceedings nationwide, shocking administrative agencies and flooding the federal court system with cases once reserved for administrative agencies' in-house review.").

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and the MSPB—the United States has urged that the appropriate remedy (if the Court finds a constitutional violation) is for the SEC to be able to remove ALJs at will. [143]

III. REFORM PROPOSALS AND THEIR LIMITATIONS

What can be done? If the Supreme Court continues its current path (and there is little reason to believe it will swerve), the Justices may soon conclude that agency adjudication—at least as it is currently structured—is unconstitutional because the President does not have sufficient control over it. Indeed, we expect the Court to reach that conclusion this coming Term in *Jarkesy*, striking down the two levels of statutory removal protections from the President with respect to ALJs. Based on the Court's evolving embrace of unitary executive theory, the Court may well conclude that *any* restrictions on presidential removal of Executive Branch officers who exercise *any* "policymaking or administrative authority" are unconstitutional, which appears to be the logical conclusion of the Court's reasoning in *Seila Law* and *Collins*.[144] Yet giving greater control to the White House would undermine at least the appearance of decisional independence and perhaps sometimes the reality of it. Does this mean that agency adjudication is doomed?

Alarmed that such a question is even reasonable to ask, reformers have begun searching for a path to save agency adjudication. Several solutions have been proposed, three of which have received the most attention: a new agency (or "central panel") to house administrative adjudication; greater use of Article I courts; and the transfer of most or all agency adjudication to Article III courts.

In this Part, we briefly outline these three proposals and discuss some of the costs and benefits of each. Our goal here is not to provide a comprehensive analysis; that would likely require a full law review article for each proposal. Instead, we aim to highlight how each proposal has significant limitations. For the reasons explained in this Part, these proposals either will not solve the constitutional problem, will have unintended consequences, or often both.

A. Article II Centralized Administrative Judiciary

The solution that has prompted the most real-world activity appears to be the creation of a new centralized adjudication agency

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[143] Pet'r Br. 66, SEC v. Jarkesy, No. 22–859 (S.Ct., filed Aug. 28, 2023).

[144] Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2199–2200 (2021); *see also* Bamzai & Nielson, *supra* note 24 (explaining breadth of Court's reasoning).

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within the Executive Branch. This proposal—often called a "central panel"—involves moving all, most, or at least some agency adjudicators from their current agencies and placing them in a new agency.[145] Although the precise details of the central panel vary, the basic idea is a new agency headed by directors nominated by the President and by confirmed the Senate. The agency's leaders would be protected by a "good cause" removal protection, and would then appoint other agency adjudicators who could be removed at will by the central panel directors. Alternatively, the heads of the agency could be removed at will, but the individual agency adjudicators would enjoy "good cause" removal protection. Adjudicative decisions then would be subject to de novo appeals to the agency head(s)—either the directors of the central panel or the head(s) of the substantive agency from which the adjudicators were transferred. This proposal has been championed by the National Conference of Administrative Law Judges, an entity comprised of thousands of agency adjudicators.[146] Last fall, the American Bar Association's House of Delegates adopted a resolution urging Congress to create a federal central benefits panel.[147]

Richard Levy and Robert Glicksman, two of the main scholarly proponents of this proposal, have nicely summarized how this central panel proposal could function:

> A properly designed central panel can preserve the advantages of the APA's approach to administrative adjudication, including agency control over policy and preservation of specialized adjudicatory expertise, while increasing protections for decisional impartiality and independence. As in most states, agencies would retain control over policy formulation through promulgation of binding legislative rules, precedential adjudications, and less formal (and therefore nonbinding) guidance documents. In addition, agencies would retain final decisional authority through de novo review of central panel decisions and the power to preside over a case as an original matter in lieu of referring it for resolution by the central panel. The concept

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[145] *See, e.g.*, Levy & Glicksman, *supra* note 28, at 44–45 (arguing that Congress should enact a federal central panel agency.

[146] *See* Ronald M. Levin, *Doubts About a Federal Central Panel*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 17, 2022), https://www.yalejreg.com/nc/symposium-decisional-independence-04/ (discussing ABA Resolution 201, which NCALJ introduced and then withdrew from consideration at the ABA House of Delegates' August 2022 session).

[147] Am. Bar Ass'n, House of Delegates Resolution 200 (Aug. 2022) [hereinafter ABA Resolution 200], https://www.yalejreg.com/wp-content/uploads/ABA-Resolution-Federal-Benefits-Tribunal-200-Aug.-2022.pdf.

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> of a central panel does not require that all of its judges would have the same status or decide all types of cases. Thus, the central panel can preserve specialized expertise through the creation of subject matter-specific divisions, such as a specialized division of Social Security judges. At the same time, and equally important, by removing administrative adjudicators from the direct oversight of the agency whose cases they adjudicate, the central panel model severs the direct lines of control that facilitate improper agency pressure, thereby promoting impartial adjudication.[148]

The central panel proposal would be transformative for the federal administrative judiciary—and, in our view, not in a good way. Our sets of concerns are at least threefold.[149] First, the proposal would cause dramatic disruption to the current adjudication systems, such that the cure would be worse than the disease. Second, the proposal would introduce a whole host of practical problems that would undercut its ability to cure the perceived threats to decisional independence. And third, it is far from clear that this solution would actually solve the Article II problem, especially if the reasoning from *Seila Law* and *Collins* is extended to its logical conclusion. We address each in turn.

1. This Is a Dramatic Proposal, Yet the Benefits Are Far from Certain.

Glicksman and Levy (and others) have made the formal case that there could be a potential threat to decisional independence of agency adjudicators based on the two developments detailed in Part II. But no one has empirically explored in any rigorous manner whether and to what degree there is a systemic, real-world threat to decisional independence—whether agency adjudicators make decisions based on political influence and out of fear of being fired or otherwise politically disciplined, instead of based on law and facts. In particular, do ALJs and other agency adjudicators judge partially today, based out of concerns of being fired or otherwise punished by political leadership? Would the move from good-cause removal by the MSPB to good-cause removal by the agency head—or, at multi-member commissions, at-will removal by the commissions—increase the likelihood of ALJs and

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148 Richard E. Levy & Robert L. Glicksman, *Toward a Federal Central Panel for Administrative Adjudication*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 14, 2022), https://www.yalejreg.com/nc/symposium-decisional-independence-01/.

149 The following draws heavily from the ABA Section of Administrative Law and Regulatory Practice's unpublished Statement of Opposition to Resolution 201, which one of us (Walker) as Section Chair and Ron Levin as Section Delegate to the ABA House of Delegates drafted in June 2021. Professor Levin has kindly agreed for our joint work to be incorporated herein.

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other agency adjudicators not impartially deciding cases? If so, to what degree? Before moving potentially more than 12,000 agency adjudicators from their current agencies into one mega central panel agency, we should better understand the scope and magnitude of the problem that the reform proposal seeks to address.

2. This Proposal Will Create Practical Problems.

Congress, agencies, and the public have spent decades trying to improve agency-specific adjudication systems—to increase inter-decisional consistency, to improve the quality of adjudicator decisionmaking, to speed up the adjudication process, to manage crushing backlogs, and to help individuals who often appear without legal counsel to effectively navigate those systems. To provide just one example, as Matt Wiener and one of us (Walker) chronicle in a recent study for the Administrative Conference, agencies have carefully developed appellate review systems to help address these systemic challenges in their high-volume adjudication systems.[150] Central panel proponents should do the hard work of examining the intended and unintended consequences of bold reform proposals, such as relocating thousands of agency adjudicators to a new federal agency. We fear such empirical work would reveal that the central panel proposal would produce insubstantial benefits that would come nowhere near justifying staggering costs to the system. And the millions of individuals who try to navigate these adjudication systems each year would bear the brunt of those costs.

For example, in August 2022, the ABA passed a resolution urging "Congress to enact legislation establishing a tribunal, staffed by ALJs to decide cases airing under federal benefits programs that is independent of the federal agencies that manage these programs."[151] This new federal central benefits panel would involve the transfer of all disability cases adjudicated by the Social Security Administration (SSA). Relocation of SSA adjudications from their current home to a mega central adjudicative agency would affect more than 1,900 SSA administrative law judges (ALJs)—more than 90% of ALJs nationwide—and, more importantly, more than half a million individuals (and their legal counsel) who go through the SSA adjudication system each year. The risks of inefficiencies, procedural deficiencies, and inter-decisional inconsistencies would be enormous. While the effect such a massive upheaval on the agency adjudicators

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[150] CHRISTOPHER J. WALKER & MATTHEW LEE WIENER, AGENCY APPELLATE SYSTEMS (Final Report to Admin. Conf. U.S., Dec. 14, 2020).

[151] ABA Resolution 200, *supra* note 6, at 1.

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would be profound, we are even more concerned about the potentially catastrophic impact it would have on the individuals and their legal counsel who would struggle to navigate this new agency. Many of these individual beneficiaries and claimants—including many members of marginalized communities—cannot afford to retain counsel, and the disruptive effect on them would be especially severe.

The SSA example is just the beginning of the complications that a federal central panel vision implicates. At least the ABA's proposal limits the central panel proposal to benefits adjudications. The more ambitious federal central panel proposal is intended to encourage Congress to consolidate SSA adjudicators (and adjudications) into the same mega-agency with administrative patent judges, immigration judges, and SEC ALJs—just to name a few. Yet Congress has already created unique adjudicative systems for regularized decisionmaking in a number of these regulatory fields, such as the Patent and Trademark Appeals Board and the Board of Veterans' Appeals. These systems would be seriously undermined if adjudicators in these fields were moved into a federal central panel. The proposal does not come to grips with the disruptive implications of displacing these systems.

Ironically, scholars, agency officials, and researchers at the Administrative Conference and elsewhere have spent decades studying and recommending improvements to specific agency adjudication systems. These recommendations do address decisional independence, but they also address efficiency and procedural improvements to increase the likelihood that each individual subject to adjudication at the agency level has a prompt and fair process and accurate outcome. The amount of careful research and study that have gone into improving SSA adjudication, for instance, is staggering.[152] And yet the central panel proponents encourage Congress to consider instituting a federal central panel system that has been subjected to no comparable study.[153] The burden of empirical proof should be on

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[152] *See, e.g.*, Gerald K. Ray & Jeffrey S. Lubbers, *A Government Success Story: How Data Analysis by the Social Security Appeals Council (with a Push from the Administrative Conference of the United States) Is Transforming Social Security Disability Adjudication*, 83 GEO. WASH. L. REV. 1575, 1585–88, 1601–1606 (2015) (detailing the history of ACUS recommendations for SSA adjudication).

[153] Although the range of cases that the federal central panel would handle remains unspecified, one can reasonably assume that its caseload would be much larger than that of any state central panel, on which the proposal is based. Thus, the track record of the state panels does not necessarily foretell equally good results in a panel with nationwide scope, overseeing federal programs that in many cases raise remarkably complex substantive issues. The effectiveness of the state central panel model, moreover, should be subject to more rigorous empirical

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the moving party. Here, we are doubtful the central panel proponents would come close to demonstrating that the benefits justify the costs.

Compounding our concerns about the costs and benefits and the lack of empirical evidence for reform, the central panel proposal raises serious doubts about its intrinsic value and workability. One concern is that, even though the traditional APA model gives rise to certain risks that agency heads may sometimes interfere with adjudicators' decisional independence for political or arbitrary reasons, it is also possible that oversight by central panel directors could prove to be political or arbitrary for other reasons. It is scarcely difficult to imagine a president appointing a political associate or ideologically motivated person to fill this slot. Moreover, even if the director were to turn out to be well qualified and well motivated, the central panel would be a very large entity (far larger than any existing state central panel), and the line between "supervision" and "undue pressure" would likely be indistinct. One can only speculate about the pressures that the director or directors would be in a position to exert in the name of supervision, and about whether there would be adequate institutional safeguards to prevent misuses of the director's supervisory authority.

Moreover, it is unclear whether a federal central panel would be able to maintain the advantages of specialization that accrue under the current APA structural model. Under the latter model, ALJs who regularly work within one agency develop an understanding of the issues it faces, many of which can be extremely specialized and technical. They also become familiar with the agency's written and unwritten policies and priorities. Indeed, agencies can benefit from the informed ground-level critiques that ALJs can provide as a result of their past experience in working with the agency's caseload.

In contrast, the great majority of state central panels are staffed by generalist ALJs who may be assigned to a variety of cases over time. If the federal panel were to follow that model, opinions would often be written by ALJs who would be unfamiliar with the relevant subject matter and agency practices. One likely consequence would be many more appeals to agency heads and more time spent reworking ALJs' conclusions when the cases are appealed. This development would tend to delay the agencies' final dispositions regarding those disputes, in an environment in which case backlogs are already extreme and the wheels of justice are already turning far too slowly. To be sure, this

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assessment than has been done to date. *Cf.* Malcolm C. Rich & 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 1, 51–52 (2019) (reporting survey results from twenty-three state central panel directors).

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concern could potentially be addressed by subdividing the central panel by specialty. But that argument does not answer the question of how such judges would be supervised. The director, lacking the agency's substantive expertise and program responsibilities, might make decisions on an arbitrary basis; and political accountability for such improvident decisions might be hard to maintain, because they would likely have less visibility than a typical agency head has.

Other oversight issues would raise similar concerns. For instance, many adjudication systems faced crushing backlogs, such that the real concern for individuals in the system is not a biased adjudicator, but the lack of a timely decision. Justice delayed, they say, is justice denied. Agency-head management is essential to addressing the timely adjudication of matters. Indeed, federal courts have repeatedly held that reasonable productivity goals are permissible and do not infringe on the decisional independence of the agency adjudicator.[154] An agency head that undertakes to prescribe reasonable productivity goals can be guided by program needs, but a central panel director with no responsibility for implementing the substantive statute would lack that baseline. For all of their imperfections, the institutional relationships between the leadership of federal agencies and the ALJs who respectively hear cases in those agencies are structured by longstanding statutes, rules, policies, and norms of agency practice in order to advance administrative law's rule-of-law values of predictability, consistency, fairness, and efficiency. The central panel proposal would risk undermining much of these benefits of the standard federal model—especially in high-volume adjudication systems.[155]

3. In Addition to its Other Weaknesses, This Proposal May Not Satisfy Article II.

Finally, and perhaps most importantly, it is not at all clear how the central panel proposal would address the perceived threats to agency adjudicator decisional independence. To be sure, the central panel would avoid *Free Enterprise Fund*'s bar on dual-level removal restrictions—if ALJs are removable at will with the central panel directors removable for cause (or vice versa). But that would bring us

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[154] *See, e.g.*, Ass'n of Admin. Law Judges v. Colvin, 777 F.3d 402, 404–05 (7th Cir. 2015); Sannier v. MSPB, 931 F.3d 856, 858 (Fed. Cir. 1991); Nash v. Bowen, 869 F.2d 675, 680–81 (2d Cir. 1989); *cf.* Abrams v. SSA, 703 F.3d 538 (Fed. Cir. 2012) (upholding discipline of judge for failing to comply with instructions related to productivity).

[155] *See* Walker & Wasserman, *supra* note 23, at 175–78 (discussing objectives).

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full circle: Assuming the central panel directors could be removable only for cause despite *Seila Law* and *Collins* under a *Humphrey's Executor* theory—which may not be the case—the President would still exercise enormous political control over the agency and especially the ALJs who would enjoy no removal protection from the agency head. In other words, we may not be in a different place than the status quo. The same is true, after *Jarkesy*, if the agency heads are removable at will but the ALJs enjoy good-cause removal protections.

Furthermore, for all the reasons explained above, it is not at all clear that the Court's decisions will stop at the relatively limited holdings in *Seila Law* and *Collins*. The Court's logic seems to extend beyond just single-headed agencies, and may even capture anyone who exercises "administrative authority."[156] If so, then the central panel idea may an exercise in futility, for at the end of the day, the President will still have the constitutional power to remove agency adjudicators notwithstanding Congress's dramatic statutory reforms.

B. Article I Courts

Sounding a similar theme, other reformers argue that Congress should expand the nation's system of "Article I courts"—tribunals like the Court of Federal Claims or the U.S. Tax Court that are staffed by presidentially appointed, Senate-confirmed judges who do not enjoy the tenure and salary protections that Article III judges receive—to include more regulatory matters, thus moving adjudication out of enforcement agencies. Last year, for instance, House Democrats introduced legislation to transfer immigration adjudication from the Justice Department to a new Article I immigration court system.[157] Under this proposed solution, presidential interference in agency adjudication would supposedly be limited without expanding the Article III system.

Unfortunately, this solution suffers from serious flaws. It would be remarkably disruptive, would create significant accountability problems, and, again, likely would not solve the constitutional problem. We again consider both points in turn.

1. This Solution Would Be Remarkably Disruptive.

As with the federal central panel proposal, this proposed reform would be remarkably disruptive for regulated individuals while

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[156] *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020); *see also* Collins v. Yellen, 141 S. Ct. 1761, 1784 (2021).

[157] Real Courts, Rule of Law Act of 2022, H.R. 6577, 117th Cong. (introduced Feb. 3, 2022).

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threatening other administrative law doctrines. Hundreds if not thousands of agency adjudicators would be moved to a new system, where hundreds of thousands if not millions of individuals would be forced to navigate that new system without the benefits of decades of improvements that have been adopted in the current adjudication systems. For all the reasons explained above, there is good reason to fear significant unintended consequences.

2. The Solution Would Also Create Accountability Problems.

Unlike the central panel proposal, Article I courts would lack any agency-head review and supervision. That could result in a rise in inter-decisional inconsistencies, less tools to encourage efficiency and deal with case backlogs, and less efficient and effective systemic effects and awareness when it comes to the full regulatory apparatus—from policymaking and enforcement to adjudication and case management. Indeed, for good or ill, the Article I model would eviscerate the accountability rationale for judicial deference to interpretations of law announced in agency adjudication[158] and an agency's power to make policy by adjudication.[159]

To be sure, the benefits of some narrow subject-matter transfers of agency adjudications to Article I courts may well justify the costs. We do not foreclose that possibility. The Tax Court, after all, has shown promise. An Article I court has the advantage over an Article III alternative by allowing Congress to still minimize the costs on the adjudicated by, for instance, tailoring the substance and procedures to allow individuals to appear without legal counsel and with more limited discovery obligations. But even then, much more empirical

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[158] *See* United States v. Mead Corp., 533 U.S. 218 (2001) (presumptively affording *Chevron* deference to agency interpretations announced in some adjudications) (applying Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)). *Chevron* deference is grounded in part in principles of political accountability, which principles may already be weaker for adjudication. *See, e.g.*, Hickman & Nielson, *supra* note 138, at 953, 967–68 (describing political rational for deference and explaining that accountability is already weaker in the adjudication context); *accord* Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021).

[159] *See, e.g.*, SEC v. Chenery Corp. (Chenery II), 332 U.S. 194 (1947) (allowing agencies to announce and apply new policies in adjudication). To be sure, there are strong reasons to be wary of such policymaking, especially retroactively, *see, e.g.*, Hickman & Nielson, *supra* note 138, at 972, but it is a longstanding feature of the legal system and is not always (especially) controversial, especially where the agency has provided fair notice of its interpretation.

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work needs to be done to understand the benefits and the intended and unintended costs.

3. This Solution Is Also Constitutionally Vulnerable.

Finally, the reality is that Article I adjudication is itself vulnerable to constitutional challenge, at least to the extent that the President does not have plenary control over it. Although labeled "Article I," these judges plainly exercise Article II power.[160] Indeed, as explained by Judge Sri Srinivasan in a 2014 separation-of-powers case about the constitutional status of the Tax Court, "Tax Court judges do not exercise the 'judicial power of the United States,' pursuant to Article III," and also are not part of "the Legislative Branch"; therefore, "[i]t follows that the Tax Court exercises its authority as part of the Executive Branch."[161] Judge Srinivasan further concluded that although "Congress may afford the officers of those entities a measure of independence from other executive actors, . . . they remain Executive-Branch officers subject to presidential removal." [162]

So if the Supreme Court ultimately holds that the President has unilateral authority to remove essentially any executive officer who exercises "administrative authority," as *Seila Law* suggests is on the table, it is hard to see why plenary removal would not extend to Article I courts. To the extent that this fairly straightforward constitutional analysis proves accurate, moving adjudication out of "enforcement" agencies like the SEC and placing it in pure "adjudicative" bodies like Article I courts to prevent constitutional objections to restrictions on presidential removal may rely on a false distinction that there is constitutional line between those categories. And unlike in the central panel model, the Article I judges have no principal officer overseeing them who has final decisionmaking authority or plenary removal authority of the Article I judges—one of which the Supreme Court seemed to require in *Arthrex*.

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[160] *See, e.g.*, Kuretski v. CIR, 755 F.3d 929, 943 (D.C. Cir. 2014) ("The Tax Court's status as an 'Article I legislative court' does not mean that its judges exercise 'legislative power' under Article I. The Tax Court is in the business of interpreting and applying the internal revenue laws, not in the business of making those laws. And the Tax Court's Article I origins do not distinguish it from the mine run of Executive Branch agencies whose officers may be removed by the President. After all, every Executive Branch entity, from the Postal Service to the Patent Office, is established pursuant to Article I. The Tax Court no more exercises Article I powers than do those agencies." (citations omitted)).

[161] *Id.*

[162] *Id.* at 944.

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To be sure, *Seila Law*'s reference to "administrative authority" does not itself end the analysis. *Seila Law* only used that phrase to demark the limits of prior precedent upholding restrictions on presidential removal; the Court did not take the further step of saying that any removal restrictions that fall outside of prior precedent are necessarily unconstitutional.[163] Instead, the Court reasoned that where precedent does not control, the next step is to consider whether the removal restriction at issue "has a foothold in history or tradition" and comports with "constitutional structure."[164] Perhaps removal restrictions in the context of Article I courts survive that test even as other removal restrictions do not.

Perhaps—but perhaps not. True, in *Myers v United States*, a key pillar in *Free Enterprise Fund* and *Seila Law*, Chief Justice Taft reviewed the nation's history or removal restrictions and argued that adjudicators (including, presumably, Article I judges) may not be subject to the same constitutional objections as other executive officials with removal restrictions.[165] Specifically, he explained that "there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control." [166] Defenders of an expanded Article I court may lean on that language. Yet Taft was not done: In order to "discharge his own constitutional duty of seeing that the laws be faithfully executed," "even in such a case" the President may still "consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised."[167] Yet if the adjudicator knows beforehand that the President can fire her for not acting (in the President's view) "intelligently or wisely," the adjudicator rationally may attempt to predict what the President wants rather than exercise independent judgment—thus indirectly limiting decisional independence. In other words, *Myers' dicta* about adjudication does not appear to meaningfully safeguard decisional independence.

Of course, it is possible that a court would conclude that *Myers* erred in this respect and that a more robust removal restriction

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[163] *See, e.g.*, Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020).

[164] *Id.*

[165] Myers v. United States, 272 U.S. 52, 129 (1926).

[166] *Id.*

[167] *Id.*

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preventing even *ex post* removal is also appropriate in light of the nation's history and constitutional structure.[168] It is not our point here to definitively resolve the question—a question that merits a deeper historical analysis. Instead, we merely observe that moving adjudication out of "agencies" into "Article I courts" may not solve even solve the constitutional problem to the extent that Article I courts are, notwithstanding any labels, agencies for purposes for Article II.

C. Article III Courts

Perhaps boldest of all, some reformers argue that some, most, or all agency adjudication should be moved into Article III courts, thus eliminating agency adjudication as a category.[169] In this scenario, every matter currently handled by an agency adjudicator would be decided by an Article III judge, thus requiring a massive expansion of the Article III system and a radical reimagining of what many agencies do.

Placing everything in Article III courts also is no panacea. Doing so would create the same risks of unintended consequences and accountability concerns as the other proposals, and—though it would head off some constitutional concerns—may also be subject to constitutional attack.

1. In Many Contexts, this Proposal Makes Little Policy Sense.

To begin, moving all adjudication into the judicial branch often would be a downright horrible policy, especially for high-volume adjudication systems. There are good reasons why benefits programs, which prompt most agency adjudications, are administered by agencies rather than courts. We have already detailed many of those rule-of-law values associated with the standard APA model of agency-head review and supervision—such as inter-decisional consistency,

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[168] *Cf.* Barnett, *Regulating Impartiality*, *supra* note 29, at 1719 ("I cannot say with any certainty whether the Supreme Court will provide ALJs and other agency adjudicators a carve-out . . . . It may well be that the Court would find a functional exception to its formalist jurisprudence that considers adjudicators' functions within the executive branch and the competing due process values").

[169] *See, e.g.*, Michael B. Rappaport, *Classical Liberal Administrative Law in a Progressive World*, *in* THE CAMBRIDGE HANDBOOK OF CLASSICAL LIBERAL THOUGHT 107 (M. Todd Henderson ed., 2018)); *see also* Memorandum from Steven G. Calabresi & Shams Hirji on Proposed Judgeship Bill to Senate & House of Representatives 21 (Nov. 7, 2017), *available at* https://thinkprogress.org/wp-content/uploads/2017/11/calabresi-court-packing-memo.pdf (arguing for 158 ALJs who impose civil monetary penalties to be replaced with Article III judges).

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efficiency, and access to justice. Likewise, as with Article I courts, moving adjudication outside of the Executive Branch may create serious doctrinal tension for questions of deference and adjudicative policymaking.

There is, of course, also the question of political feasibility and congressional capacity. There are more than 12,000 agency adjudicators. One cannot possibly imagine the Senate having the political will or capacity to confirm thousands of new Article III judges to handle these adjudications. (This is a similar concern with expanding the Article I judiciary.) Not to mention the massive disruption such transition would cause to the existing high-volume adjudication systems. The intended and unintended costs of transferring these adjudications would be much greater than the federal central panel proposal or even the Article I courts initiative.

2. This Proposal May Prompt New Constitutional Concerns.

There are also constitutional concerns with this solution, at least for some categories of agency adjudication. To be sure, this proposal may avoid Article II concerns in many contexts; Article III judges are not subject to presidential removal. But in so doing, it may raise new ones.

Most notably, not all action that falls within the broad category of "agency adjudication"—again, the application of law to particular facts—necessarily satisfies the "case or controversy" requirement of Article III. To be sure, when an agency or Article I court resolves a concrete dispute between opposing parties—such as a breach of contract claim—it is easy to see how that dispute could be placed in Article III courts. Indeed, at least some such claims arguably *must* be placed in Article III courts; Justice William Brennan, for example, argued that it may be "the very definition of tyranny" to allow Congress to place common-law suits outside of the Article III courts, a theme that may undergird more recent precedent.[170] This is an issue

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[170] CFTC v. Schor, 478 U.S. 833, 859–60 (1986) (Brennan, J., dissenting) (quoting THE FEDERALIST NO. 46, at 334 (James Madison) (H. Dawson ed., 1876)); *see also* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1960 (2015) (Roberts, C.J., dissenting) ("The Court today declines to resist encroachment by the Legislature. Instead it holds that a single federal judge, for reasons adequate to him, may assign away our hard-won constitutional birthright so long as two private parties agree. I hope I will be wrong about the consequences of this decision for the independence of the Judicial Branch"); Jarkesy v. SEC. 4 F.4th 446 (5th Cir. 2022) (holding that some adjudication must be heard in Article III courts because of jury-trial right).

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that the Supreme Court may soon confront in *Jarkesy*. We see no constitutional obstacle to placing in Article III courts most (if not all) disputes between private parties that currently are heard in other federal tribunals.

The constitutional difficulty arises in adjudications that do not clearly present an adversarial relationship. *Hayburn's* Case, decided in 1792, suggests that Congress lacks constitutional power to place a pension program in the federal courts precisely because it was non-judicial in character.[171] The implications of that analysis for, say, the SSA are notable. As the Supreme Court has explained:

> The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although "[m]any agency systems of adjudication are based to a significant extent on the judicial model of decisionmaking," the SSA is "[p]erhaps the best example of an agency" that is not. Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits, and the Council's review is similarly broad. The Commissioner has no representative before the ALJ to oppose the claim for benefits, and we have found no indication that he opposes claimants before the Council. [172]

Of course, it may be possible to refashion agency adjudication to put many matters in Article III courts—indeed, many social security cases are heard in federal court even today. If, for example, the SSA were to make initial, non-adversarial determinations, followed by litigation in an Article III court whenever SSA rejects the person's view, it is hard to see the constitutional problem at that point because adverseness would exist.[173] But that initial SSA assessment is itself a form of adjudication. Perhaps that problem can also be addressed by changing the statute. We do not evaluate a scheme that no one has fleshed out. Instead, our point, more modestly, is that moving benefits programs from the Article II agencies into Article III courts will no doubt prompt plausible constitutional objections—in addition to the obvious practical problems of efficient and cost-effective adjudication of claims discussed above.

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[171] 2 U.S. (2 Dall.) 409 (1792); *see also* RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65 (9th ed. 2022) (explaining *Hayburn's Case*).

[172] Sims v. Apfel, 530 U.S. 103, 110-11 (2000) (citations omitted).

[173] *See, e.g.*, *id.* at 112 (distinguishing between procedures before the SSA from procedures challenging SSA decisions in federal court).

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There may also be other constitutional objections. Some matters—such as those touching on national defense—may implicate core Article II authority. It is not hard to imagine, for example, constitutional objections if Congress were to place matters of military justice for incidents on the battlefield itself in Article III courts.[174] Proponents of moving administrative adjudication into Article III courts may respond that subjects like the military should be treated differently. But some lines are not easily drawn.

To be fair, we are aware of no one who has argued that all agency adjudications should be transferred to Article III courts for the initial evidentiary hearing. Instead, recent reform proposals by Steven Calabresi and Michael Rappaport have zeroed in on a smaller subset of agency adjudication: those that affect private rights and quasi-private rights and/or impose civil monetary penalties. Professor Calabresi, for instance, suggested replacing just 158 ALJs—the ones he determined have the power to impose civil penalties—with Article III judges.[175] If truly limited to the adjudications dealing with private rights and/or potentially imposing civil penalties, such removal may well make sense (and would of course be constitutional). But the answer becomes less clear if the proposal is to move all higher-volume agency adjudications to Article III courts.[176] More to the point, moving 150 or so ALJ positions to the Article III judiciary does absolutely nothing to address the larger concerns about decisional independence with the 12,000 or so other agency adjudicators in the federal administrative judiciary.

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[174] *See, e.g.*, Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 937, 952 (2015) ("[T]he President's Article II authority as Commander-in-Chief and the text of the Fifth Amendment—which expressly exempts from the Grand Jury Indictment Clause 'cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger'—[have been cited as] key ingredients to the constitutionality of adjudication by non-Article III federal military courts:"). To be sure, merely because some adjudication can be done outside of Article III courts does not necessarily mean that it must be so. The President's Article II authority, however, may require some matters to be heard by those in the Executive Branch. We do not purport to answer this question but merely note that eliminating agency adjudication may raise constitutional concerns in certain categories of disputes.

[175] Calabresi & Hirji, *supra* note 169, at 21.

[176] Elsewhere, one of us argues that the better solution at the SEC would be to give the regulated party the right to remove certain adjudications to federal court. *See* Christopher J. Walker & David Zaring, *Remedying the Separation-of-Powers Problem in* Jarkesy (on file with authors).

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IV. A PATH FORWARD

For all the reasons explained above, it is doubtful that the leading proposals to save agency adjudication will do so. Indeed, until we more fully understand the scope of the problem and the impact of each sweeping reform proposal, these proposed solutions have the potential to cause substantial and widespread problems for the millions of individuals subject to agency adjudication each year, while not even necessarily solving the motivating constitutional flaws. Perhaps this Article's most important takeaway is that agency adjudication must be saved from these reform proposals.

But that does not mean there is no path forward. Here we advance two narrowly tailored proposals that Congress and the Executive Branch, respectively, could implement. These proposals avoid sweeping reforms and accompanying costs to the adjudication system, yet likely address the threats to decisional independence. Each reform could be pursued on its own, but the combination would be, in our view, even more effective.

A. Article I Solution: Congress's Anti-Removal Power

Congress has an important role to play—but this role is *not* to enact dual-layer restrictions on removal. The APA purports to safeguard decisional independence by statute, but that sort of statutory safeguard only works in a world where the unitary executive theory has no teeth. In 1946, Congress could be forgiven for concluding that the Constitution allows statutory restrictions on removal, but the rule from *Humphrey's Executor*—and similar adjudication cases like *Wiener*—is now in retreat. Thus, any attempt to save agency adjudication through dual-layer statutory removal restrictions is likely to fail. Reformers should accept that the Supreme Court now views restrictions on the President's Article II removal authority with considerable skepticism if not outright hostility.

The Constitution, however, provides Congress with powerful tools to discourage removal without formally preventing it. These tools, moreover, have a longstanding pedigree and the Supreme Court's most recent cases support, rather than cast doubt, on their use.

In *Congress's Anti-Removal Power*, two of us (Nielson and Walker) document how the Constitution empowers Congress to dissuade presidents from removing Executive Branch officials by making removal politically costly.[177] Alexander Hamilton identified the Appointments Clause as such a tool. As he explained, not only does

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[177] *See generally* Nielson & Walker, *supra* note 36.

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Senate confirmation for principal officers prevent presidents from selecting fools or weaklings who would be little more than "the obsequious instruments of [the President's] pleasure,"[178] but it also inherently creates greater "stability in the administration." After all, "[w]here a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt."[179] In other words, because the President cannot simply install someone he prefers more, the White House must pause before removing an incumbent and decide whether the benefits of removal—discounted by the possibility that the Senate will not confirm the replacement or at least will not do so instantaneously—exceed the costs of removal, including political costs. James Madison made a similar point. Although he vigorously defended the President's plenary power to remove Executive Branch officers, Madison also explained that Congress could check that power through other means, including by threatening impeachment and political embarrassment.[180]

In addition to the Appointments Clause, Congress has other tools to increase costs of presidential removal. In *Congress's Anti-Removal Power*, we categorize these tools as follows[181]:

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[178] FEDERALIST NO. 76, p. 457 (C. Rossiter ed. 1961).

[179] FEDERALIST NO. 77, p. 463 (C. Rossiter ed. 1961).

[180] *See* I ANNALS OF CONG. 517 (Joseph Gales ed., 1834) (quoting June 17, 1789 remarks of James Madison, in which he argued that a rational president would hesitate to "displace from office a man whose merits require that he should be continued in it," because "he wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust"); *id.* at 518 (arguing that the prospect of political reprisal for removal "will excite serious reflections beforehand in the mind of any man who may fill the presidential chair").

[181] Nielson & Walker, *supra* note 36, at 68.

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Congress's Toolkit for Strengthening Its Anti-Removal Power

	Tool	Description
Soft Tools	Impose Removal Reason-Giving Requirement	This requires the president to report a reason (any reason or a specific good-cause reason) to Congress for the firing.
	Enact Statutory Signals of Agency Independence	These include labeling the agency as "independent," setting a term of years for the office, and enacting legislative findings that reinforce independence.
	Require Congressional Hearings on Removal	A hearing with the fired official and other witnesses could be required whenever removed or for failure to comply with reason-giving requirements.
Hard Tools	Heighten Senate Cloture Vote Threshold on Replacement Nominee	Senate cloture vote could be increased above a simple majority for removal, or more narrowly when the president does not provide adequate reasons.
	Slow Down Senate Confirmation Process on Replacement Nominee	Procedures for hearing, debate, and consideration of subsequent nominee could be drawn out if removal was not for good reasons.
	Impeach the President (or Threaten Impeachment)	Congress could signal in enacted legislative findings that presidential impeachment is on the table for improper removal, with impeachment being the ultimate hard tool.
Anti-Evasion Tools	Prevent Recess Appointments	The Senate can ensure it is never in a recess long enough to allow the president to make a recess appointment replacement.
	Reform the Vacancies Act for Use of Acting Officials	Congress could reform the Federal Vacancies Reform Act to increase removal costs by limiting the president's options for acting or temporary leaders.
	Limit Subdelegations and Acting Officials Authority	Congress can narrow the authority of an agency under an acting leader or otherwise prohibit the subdelegation of agency authority within the agency.

These include higher cloture voting requirements for confirmation votes (which, by increasing the likelihood that the Senate will not confirm a replacement, force the White House to more steeply discount the benefits of removal), reason-giving requirements (which signal to the White House that if the reason for removal is not a good one, the Senate will not confirm a replacement), pre-committing to holding a hearing should removal occur (which increase the political costs of removal), and anti-evasion tools to prevent recess appointments or acting officials (which also require the White House to discount the benefits of removal more than usual). Both in principle and in practice, it appears that Congress's use of these tools discourages some presidential removal, especially for offices that are not high priorities to the White House.[182]

If Congress wants to create some decisional independence for agency adjudicators, it should begin to creatively use its anti-removal power. As a preliminary matter, Congress could send statutory signals

[182] *See id.* at 51.

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in favor of decisional independence by enacting legislative findings on the importance of decisional independence, the expert-based qualifications for hiring, and the appropriate (and inappropriate) reasons for firing.[183] These enacted findings would not be statutory commands, but instead expectations—signaling to the President, the agency, and the public that Congress cares about decisional independence, both in terms of hiring and firing, and will use its political tools to protect it. Formally, such signals may not be important. The President can ignore them and remove an official. In the real world, however, history teaches that such efforts create norms against and increase the political cost of presidential interference.[184] This effect should not be dismissed. The Chair of the Federal Reserve, for example, has no express statutory removal protection.[185] Nonetheless, political norms have developed that discourage interference.[186] Congress could take steps to develop similar norms in the agency adjudication context. Given that even pro-unitary executive jurists like Chief Judge Taft openly expressed discomfort with presidential interference with adjudication,[187] it should not be especially hard to further solidify such norms.

Moreover, for some agency adjudicators—perhaps appellate-level adjudicators like those at the Board of Immigration Appeals—Congress could, per the Appointments Clause, require them to be presidentially appointed on advice and consent of the Senate.[188] Rebecca Eisensberg and Nina Mendelson have suggested that as a potential option to address patent adjudication after *Arthrex*—i.e., by creating a panel of Senate-confirmed final decisionmakers.[189] This

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[183] *See generally* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669 (2019) (explaining the role of legislative findings).

[184] *See* Nielson & Walker, *supra* note 36, at 52.

[185] *See generally* Bamzai & Nielson, *supra* note 24.

[186] *See id.* Elsewhere, one of us (Nielson) explains additional tools unique to the Federal Reserve that Congress may use to help safeguard the Federal Reserve's monetary (but not regulatory) independence. *See id.*

[187] Myers v. United States, 272 U.S. 52, 129 (1926)).

[188] *See* Nielson & Walker, *supra* note 36, at 54–55 (demonstrating dynamic role that Senate confirmation plays in removal).

[189] Rebecca Eisenberg & Nina Mendelson, *Limiting Agency Head Review in the Design of Administrative Adjudication*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 21, 2022), https://www.yalejreg.com/nc/symposium-decisional-independence-06/. *See generally* Rebecca S. Eisenberg & Nina Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1 (2023).

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would affect political insulation in terms of hiring and firing. To be sure, it would be infeasible to require thousands of agency adjudicators to be Senate confirmed, which is one problem with creating more Article I courts or replacing agency adjudication with Article III administrative courts. But one could imagine Congress exploring this anti-removal tool with respect to a subset of appellate adjudicators to create an additional measure of decisional independence. One important feature of the Appointments Clause is that it gives Congress certain discretion over the appointment process for inferior officers,[190] thus allowing Congress to tailor appointment to particular situations. The mere possibility, moreover, that an unhappy Congress may require Senate confirmation may dynamically reinforce norms against political inference in the adjudicative process, especially if Congress pre-commits to an onerous legislative process.

Short of designating agency adjudicator appointments for Senate confirmation, Congress could use its anti-removal "soft tools" to raise the stakes for agency heads in deciding whether to fire an agency adjudicator. For instance, it could require the agency head to notify Congress of any termination and to provide the reason for the firing.[191] In this way, Congress could require the agency head to provide reasons—indeed, good reasons, at least *de facto*, given the political costs of offering a bad reason[192]—for firing an agency adjudicator. This is not a new tool. For generations, Congress has required the President to provide the reasons for the firing of the Comptroller of the Currency and inspector generals.[193] By design, this requirement raises the cost of removal by forcing the agency head to reveal the reasons for the firing publicly and to Congress, to be judged in the court of public opinion and by the agency's congressional overseer. As the

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[190] *See* U.S. CONST. art. II, § 2 cl. 2 ("*Congress* may . . . vest the Appointment of such inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments" (emphasis added)).

[191] *See* Nielson & Walker, *supra* note 36, at 36–37 (describing effects of reason-giving requirement); *see also* 12 U.S.C. § 2 ("The Comptroller of the Currency shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold his office for a term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate.").

[192] *See* Nielson & Walker, *supra* note 36, at 37 ("When President Obama removed one—and only one—inspector general, his administration felt obliged to defend itself repeatedly and in some detail to Congress.").

[193] *See* Bamzai, *supra* note 111, at 1378 (describing history of Comptroller provisions); Nielson & Walker, *supra* note 36, at 35-36 (same, and inspectors general).

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congressional record demonstrates, the political reality is that presidents generally will not remove officials so protected absent a "good reason[]."[194]

Congress could also strengthen the reason-giving requirement by pre-committing by statute to hold an oversight hearing if the agency head fires an agency adjudicator, or perhaps only if the agency head fails to provide the statutorily required (good) reason.[195] At that hearing, the fired adjudicator and agency head would testify, as well as any other witnesses the committee wanted to call, such as the head of the adjudicator's union. This hearing would raise the removal costs even more, as agencies are quite receptive to congressional oversight.[196] To be sure, the end result would not eliminate an agency head's formal power to fire or discipline an agency adjudicator. But in the real world, it would often make such a firing too politically costly for the agency head, especially if the firing is not based on merit.

Returning to the core "soft tools" proposal, however, the reason-giving and congressional hearing approach has the added benefit of keeping Congress appraised and focused on the issue of decisional independence in agency adjudication. If the threat against decisional independence were grave or widespread, the congressional hearings and oversight would help uncover and assess it. This proposal would also avoid the massive costs of the bolder reform proposals. It would keep the agency adjudication systems in place, but with a political rather than legalistic safeguard against political interference. In other

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[194] *See* Bamzai, *supra* note 111, at 1379 (quoting Cong. Globe, 38th Cong., 1st Sess. 2122 (1864)); Nielson & Walker, *supra* note 36, at 34 (recounting debate).

[195] *See* Nielson & Walker, *supra* note 36, at 53–54 ("Congress could enact a trigger (either by statute or rule) that requires a congressional hearing whenever the head of an independent agency (or other agency official Congress so designates) is fired. This provision could be triggered by any such firing, or perhaps only when the President fails to provide a statutorily required reason. At this hearing, the fired official would testify along with other witnesses the relevant committee chose to call. To be sure, a congressional hearing is by no means a perfect substitute for an adjudication in an Article III court, but it subjects the removal decision to a trial in the court of public opinion.").

[196] *Cf.* CHRISTOPHER J. WALKER, FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING 17 (Final Rep. to Admin. Conf. U.S. 2015) (reporting that one agency official observed that, in explaining why federal agencies assist Congress in legislative drafting, "his agency feels particularly pressed to complete all technical drafting assistance requests before a senior agency official is scheduled to appear at a congressional hearing"); *see also id.* (quoting another agency official who said that "oversight is always in the back of our minds" when the agency is providing technical drafting assistance).

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words, not only would it be on firmer constitutional grounds, but pursuing reform through Congress's anti-removal power would be a less disruptive option than those discussed in Part III, which is critical in an area with so much empirical uncertainty as to the scope of the problem and the impacts of the broader reform proposals. Furthermore, Congress's ability to modulate its use of its anti-removal power—stronger protections for certain positions, weaker for others—should help mitigate the risk of unintended consequences.

B. Article II Solution: Impartiality Regulations

There is also a role for the Executive Branch itself. All too often administrative law scholarship focuses on the checks imposed by Congress and courts[197]—perhaps driven by the temptation to focus on what is easiest to see.[198] But internal administrative law—that is, "the internal directives, guidance, and organizational forms through which agencies structure the discretion of their employees and presidents control the workings of the executive branch" [199]—can also impose

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[197] *See, e.g.*, Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1225, 1227 (2020) ("Administrative practice is an iceberg. Federal courts see only the tip peaking above the water—the judicial challenges to regulatory actions that make it to the courthouse. Administrative law scholars have dedicated much time to analyzing that small peak of judicial review of agency action and related judicial deference doctrines. Yet, below the water's surface exists a mass of regulatory activity that escapes the judiciary's purview." (citing Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industrie*s, 36 YALE J. ON REGUL. 165, 170 (2019))).

[198] *See* Paul R. Verkuil, *The Self-Legitimating Bureaucracy*, 93 YALE L.J. 780, 780 (1984) (reviewing MASHAW, *supra* note 68) ("It is as if, when asked the question what (or where) is administrative justice, we look for that particular lost coin under the proverbial streetlight of judicial process, not because the coin is there, but because that is where the light is.").

[199] *See* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1239 (2017); *see also* Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in* Vermont Yankee's *White Space*, 32 J. LAND USE & ENV'T. L. 523, 523–24 (2017) (explaining how administrative law allows agencies to employ procedures above the APA's judicially reviewable baseline); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (urging structuring of Executive Branch to check itself). *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2285–90 (2001) (explaining how executive orders can be used to direct how agencies function).

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discipline on agencies.[200] In countless contexts, internal administrative law contributes to a more effective and fair regulatory process including for agency adjudication.[201]

This important insight can and should play a key role in saving agency adjudication. Notwithstanding the Court's embrace of unitary executive principles, the Executive Branch can use internal administrative law to take a step to ensure decisional independence for agency adjudicators, both in terms of hiring and firing. In other words, the President's broad authority over the Executive Branch includes the ability to *not* exercise control. Indeed, unitary executive principles support such uses of internal administrative law. One of the central explanations the Court has given for robust presidential control over the Executive Branch is the President's ability to protect liberty and, importantly, the political incentive that the President has to do so. As *Seila Law* explains:

> The . . . constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President's oversight, "the chain of dependence [is] preserved," so that "the lowest officers, the middle grade, and the highest" all "depend, as they ought, on the President, and the President on the community."[202]

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[200] *See, e.g.*, Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV.1620, 1638 (2018) ("It is a mistake for administrative law to fixate on judicial review as the core safeguard for our constitutional republic.").

[201] *See* Walker & Turnbull, *supra* note 197, at 1242–45 (collecting potential internal administrative law reforms for use in adjudication); *see also* David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1 (2020) (proposing reforms for adjudications where discrete individuals may not, inter alia, have adequate incentives to seek judicial review).

[202] Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020) (quoting 1 Annals of Cong. 499 (J. Madison)). To be sure, the Court also observed that "[t]he President cannot delegate ultimate responsibility *or the active obligation to supervise* that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch." *Id.* (emphasis added) (citation omitted). An "active obligation to supervise," however, surely can be satisfied by ensuring others within the Executive Branch are not interfering with agency adjudication; indeed, the President's ability to coordinate the whole of Executive Branch is important. One purpose of supervision, moreover, is to ensure that the system is

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That logic supports presidential efforts to encourage confidence in the decisional independence of adjudicators, including by unilaterally foreswearing exercise of Article II authority to interfere with the impartial hiring and firing of individual adjudications. After all, merely because the President has a power does not mean that it must be used in every case. The President, for example, has a robust pardon power; it does not follow that the President should use that power in every case. To the contrary there can be political costs associated with using the pardon power too casually, plus the facts of individual cases may well not merit such relief. The same is true for appointments; even where the President has unilateral appointment authority (such as during a recess), it does not follow that the President should always use that authority in every case. The President is Commander in Chief of the armed forces, yet often wisely lets battlefield commanders make operational calls; instead, responsible use of power sometimes means standing aside while others act. The same sort of analysis could apply to the removal power; the President could unilaterally impose restrictions on political interference with adjudication, not because Congress has required it, but because it is intrinsically the wise thing to do or at least because the President does not want to incur political costs.

Kent Barnett is the leading proponent of using internal administrative law to limit political interference in the hiring, supervision, and firing of agency adjudicators. In *Regulating Impartiality in Agency Adjudication*, Professor Barnett argues that to safeguard adjudicator decisional independence in a world of unrestricted presidential removal, "the White House and agencies should use executive orders and regulations to mimic and improve administrative adjudicators' existing statutory protections from at-will removal."[203] Indeed, he urges not just internal restrictions on removal of adjudicators, but also formal entrenchment of the "tiered" removal structure that *Free Enterprise Fund* calls into doubt.[204] He suggests similar impartiality regulations to preserve apolitical, meritocratic hiring of agency adjudicators. In his view, such a targeted

working well; for adjudication, that may require actively not interfering at the hearing level. Of course, if the adjudicator is doing a poor job, active supervision may also require stepping in. Independence should exist within a range. Even defenders of agency independence recognize that removal is justified under some circumstances. *See, e.g.*, *id.* at 2239–40 (Kagan, J., dissenting).

[203] Barnett, *Regulating Impartiality*, *supra* note 29, at 1700.

[204] *See id.*

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use of internal administrative law not only has the capacity to stave off due process concerns, but also accords with historical practice.[205]

As Professor Barnett acknowledges, however, one significant limitation of relying on internal administrative law is that it is less sticky than statutory law.[206] What one administration does through regulatory tools, after all, can be undone by another administration using those same tools.[207] Professor Barnett argues, however, that impartiality regulations can be made more permanent if they are promulgated through the APA's notice-and-comment rulemaking process.[208] He is correct that rules are generally stickier than less formal regulatory tools,[209] but there are at least two problems with his proposal. First, the notice-and-comment process is not especially difficult for *all* rules.[210] Second, and more fundamentally, it is doubtful

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[205] *See id.* at 1720–21 ("In fact, the executive branch has a long-standing, yet perhaps overlooked, history of providing civil service protections to improve the professionalism of executive officials through internal administrative law"). The fact that presidents themselves have applied internal administrative law in this way may be relevant in identifying and reinforcing presidential norms. *See, e.g.*, Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2202 (2018) (explaining how "past practices" can affect "structural norms").

[206] *See* Barnett, *Regulating Impartiality*, *supra* note 29, at 1724 (explaining that "compared to statutory administrative law, internal administrative law's significant disadvantage is that it has less permanence").

[207] *See, e.g.*, Aaron L. Nielson, *Sticky Regulations and ~~Net Neutrality~~ Restoring Internet Freedom*, 71 HASTINGS L.J. 1207, 1223 (2020) ("But policy made through the administrative process can be unmade through the administrative process, and to the extent that policies made through the administrative process lack bipartisan support, we should expect incoming administrations to undo what their predecessors have done.").

[208] *See* Barnett, *Regulating Impartiality*, *supra* note 29, at 1724 ("[I]nternal administrative law's significant disadvantage is that it has less permanence and permits easier repeal. Yet agencies can create more regulatory permanence by using notice-and-comment procedures for the promulgation, amendment, or repeal of internal rules. Unless repealed, the regulations would likely have the force of law"); *see also* Elizabeth Magill, Foreword, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 874 (2009) (explaining value of commitment mechanisms to make internal administrative law credible).

[209] *See* Nielson, *supra* note 40, at 90 ("Because regulated parties know that an agency must survive a procedural gauntlet to change a regulatory scheme, they can have more confidence in that scheme's stability.").

[210] *See, e.g.*, Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1498 (2012) (explaining that agencies can easily navigate notice-and-comment procedures except "in the context of the much smaller number of rulemakings that raise controversial issues where the stakes are high").

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that a regulation—especially one promulgated by a prior President—could prevent the President from freely removing an agency official. The Supreme Court has concluded that Article II itself provides the President with the removal power, and a regulation—even one supported by statutory law—cannot override a constitutional power. Again, consider the pardon power: Does anyone think a regulation requiring a certain procedure before a President could issue a pardon would nullify a pardon issued outside of that procedure? Accordingly, no matter what a regulation says, an agency adjudicator is always at risk of being removed by the White House—thus casting a cloud over decisional independence.

Nonetheless, we agree with Professor Barnett that agencies should promulgate impartiality regulations and that the President should issue impartiality executive orders, even if regulations and executive orders are not formally binding on the President. Such measures do not offend Article II and provide at least some decisional independence, based on inertia if nothing else—the more steps that an administration must do to remove someone, the less likely it is that the administration will do so, at least at the margins.

But we also urge the President to take credible steps to increase the political costs of interfering with adjudicatory decisions. One way to do that is to publicly and prominently proclaim that political interference in individual adjudications is scandalous and to pledge not to do it. The goal should be to make it politically uncomfortable to walk away from the proclamation during the President's own administration and to inculcate norms that would provide political fodder to the opponents of future presidential administrations should those future administrations ever deviate from them. Although the President could still retreat from a "good government" pledge, the more politically costly such retreat becomes, the less likely it is that a president will engage in it. Presidents often find value in "tying themselves to the mast"; this is another possible place where such an effort make sense.

Similarly, the President can empower ombudsmen and other officials to cry foul to prevent undue interference with agency adjudication. Congress may be able to use its anti-removal power to create "offices that protect the public from administrative overreach, such as agency ombuds, privacy offices, and other 'offices of goodness.'"[211] But whether Congress acts, the President can use

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[211] Nielson & Walker, *supra* note 36, at 97 n.347 (citing Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 65 (2014)).

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executive orders or other forms of presidential direction to entrust certain individuals with responsibility to guard against political meddling. If a whistleblower sounds an alarm, the political salience will likely skyrocket—which prospect should reduce the likelihood of meddling to begin with, especially because adjudicatory independence (within reasonable limits) is a commonsense issue that commands widespread support.[212] Of course, the President may decide to remove the whistleblower too, but that would only add to the political costs. It surely is not a coincidence that presidents historically have been quite reluctant to remove inspectors general.[213]

Finally, one important advantage of using political norms to safeguard impartiality is that they may be better able to adjust to unforeseen circumstances. There may be sound reasons that are hard to identify ex ante for the President to intervene in an agency adjudication; a law barring such actions may be overinclusive. A political check, however, grounded in social norms is more flexible. Given the public's inherently asymmetric preferences in favor of fair adjudication ("unbiased" adjudication undoubtedly polls better than the alternative), the risk that the White House will unduly interfere with adjudication decisions is unlikely so long as the President's decision is public; thus, the President would need a pretty good explanation before willing to take the political heat.[214]

To be sure, we do not claim that it is impossible to imagine situations where the President disregards political norms against interference with individual adjudications, or that political checks will never fail. Our point, more modestly, is that in the real world, political norms and checks should almost always be enough to protect agency-adjudicator decisional independence, and that whatever downsides this option poses pale in comparison with the downsides of other

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[212] *See, e.g.*, Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 290 (2013) (arguing that "like apple pie, baseball, and the flag," rules designed "to reach the right result after an adversarial contest on a level litigation field [is] a worthy raison d'être for a procedural system").

[213] *See* Nielson & Walker, *supra* note 36, at 7 ("Although presidents occasionally remove inspectors general despite having to provide reasons, it is remarkable how often presidents do *not* remove inspectors general, even after a presidential transition.").

[214] There may be circumstances where political costs prevent beneficial presidential action; not every good decision is popular, especially situations where the reason the action beneficial is difficult to explain. Internal administrative law may not solve that problem, but it is difficult to see how internal administrative law would make that problem worse than the status quo.

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proposed solutions. Furthermore, when impartiality regulations are coupled with Congress's targeted use of its anti-removal power, it becomes even less likely that political inference will be a serious problem. There are no silver bullets, but these approaches should almost be enough to safeguard decisional independence in agency adjudication while avoiding the significant costs and legal uncertainty of competing proposals.

CONCLUSION

Modern developments in administrative law have weakened the footing of decisional independence in agency adjudication. Indeed, the Supreme Court may soon conclude that laws preventing the President from exercising plenary control of all Executive Branch officers, including adjudicators, violate Article II. At the very least, we expect the Court to hold in *Jarkesy* that the agency head must be able to remove adjudicators for cause. The Court is aware of the downsides of political interference with agency adjudications, but the structure of its constitutional analysis about the appointment and removal of Executive Branch officers is such that it is far from obvious how to carve out adjudication. Given the centrality of agency adjudication to federal operations, this significant constitutional development should be squarely addressed.

Unfortunately, some cures are worse than the disease. We agree that a measure of decisional independence is at risk, but the leading reforms are not the answer. Massively overhauling the world of agency adjudication will trigger unintended consequences that will harm the millions of individuals who depend on agency adjudication, while not fully solving the deeper constitutional and policy problems. Instead, saving agency adjudication will require both political branches to act: Congress should begin systematically using its anti-removal power, and the Executive Branch should self-impose internal regulations to preserve decisional independence of agency adjudicators. Such targeted reforms should allow the nation to retain the important benefits of agency adjudication without running afoul of the Court's commitment to robust presidential control of the Executive Branch.

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