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Abstract

Over the last several decades, administrative law has recognized an expanding role for the President in controlling agency decisionmaking. Agency adjudication—and especially formal hearings conducted under the Administrative Procedure Act (APA)—have been viewed as properly insulated from this development. To protect due process, the APA established a regime for ensuring that competent, impartial Administrative Law Judges (ALJs) preside over formal hearings. The regime includes two apparent levels of for-cause removal protection for ALJs combined with robust agency head control over the policymaking aspects of formal adjudication. Today, the regime is in peril because it appears to be inconsistent with the Supreme Court's unitary executive theory of administration.

This Article defends the constitutionality of the APA's ALJ regime under the Supreme Court's recent separation of powers cases. It argues that the APA's robust preservation of agency head control satisfies Article II, while its for-cause protections for ALJs ensure due process and faithful execution of the law through adjudicatory hearings. The statute is, in short, well designed to ensure properly presidential adjudication.

The Article further argues, however, that there is a deeper conceptual challenge lurking here. The APA and the administrative state were founded upon a New Deal-era conception of administrative power as quasi-legislative and quasi-judicial and fundamentally not executive. Modern administrative law has rejected this conception, embracing instead the view that administrative power necessarily entails the exercise of executive power. The current threat to the APA offers an opportunity to improve upon this conception by recognizing that administration is about both discretion and duty. Political control has its place. But the President must also be able to

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rely on subordinate officers that Congress has equipped with the legal and institutional support necessary to fairly and faithfully execute the law.

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Introduction

The Administrative Procedure Act's (APA) most central reform—its regime for ensuring competent, impartial presiding officers in adjudicatory hearings—is on a collision course with the Supreme Court's recent separation of powers jurisprudence. In peril is the APA's structure for empowering and protecting Administrative Law Judges (ALJs), who preside over administrative hearings and issue initial decisions that may become final in the absence of agency head review.[1] The primary threat to the regime is *Free Enterprise Fund v. PCAOB*,[2] a 2010 case in which the Supreme Court held that "multilevel protection from removal is contrary to Article II's vesting of the executive power in the President."[3] Seemingly like the structure at issue in *Free Enterprise Fund*, the APA's ALJ structure entails "multilevel protection from removal."[4] ALJs can be removed from office only for cause, which is determined by the Merit Systems Protection Board (MSPB),[5] the members of which likewise can be removed only for cause.[6] The situation is further complicated when ALJs are employed by independent agencies such as the Securities and Exchange Commission (SEC), which are headed by

[1] *See* 5 U.S.C. §§ 556(b) & (c), 557(b).
[2] 561 U.S. 477 (2010).
[3] 561 U.S. at 484.
[4] 561 U.S. at 484.
[5] *See* 5 U.S.C. § 7521.
[6] *See* 5 U.S.C. § 1202(d).

multi-member bodies whose members enjoy for-cause removal protection.[7] The principle of *Free Enterprise Fund* would pose no threat to the APA if ALJs were mere employees, but the Supreme Court foreclosed this possibility in 2018, when it held in *Lucia v. SEC* that ALJs are "Officers of the United States."[8] In *Jarkesy v. SEC*, the United States Court of Appeals for the Fifth Circuit held that the multilevel removal protection provided by the APA's ALJ structure is unconstitutional under *Free Enterprise Fund*.[9] The Supreme Court granted certiorari in the case and heard oral argument on November 29, 2023.[10] The APA's day of reckoning is here.

Lurking beneath the surface of this controversy is a more fundamental conflict: in recent decades, the Supreme Court has developed a conception of administrative action fundamentally at odds with that which prevailed in the New Deal era and animated the APA. As I have argued in prior work, the APA is based on a conception of administrative action as exclusively quasi-legislative and quasi-judicial, and fundamentally *not* executive.[11] Although ordinarily associated with the Supreme Court's 1937 decision in *Humphrey's Executor v. United States*, which involved the constitutionality of for-cause removal protection for commissioners of the Federal Trade Commission (FTC), this understanding of administrative power was not confined to independent regulatory commissions. To the contrary, this understanding applied to all statutory grants of quasi-legislative (rulemaking) or quasi-judicial (adjudication) power, whether made to an independent agency or a traditional executive department.[12] Indeed, the Attorney General's Committee on Administrative Procedure—which conducted the extensive

[7] In *Free Enterprise Fund*, the parties and the majority assumed that SEC commissioners can be removed only for cause, although the SEC's organic statute contains no for-cause provision. *See Free Enterprise Fund*, 561 U.S. at 487; *see also id.* at 545 (Breyer, J., dissenting). SEC commissioners are, however, appointed for a term of years, *see* 15 U.S.C. § 78d(a), which perhaps should be interpreted as a protection against removal by the President for the duration of the term. *See* Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 5 (2021).

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

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

[10] *See SEC v. Jarkesy*, 2023 WL 4278448 (2023); *see also* Petition for Certiorari at I, SEC v. Jarkesy (No. 22-859) (presenting several questions, including "[w]hether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection").

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

[12] *See, e.g.*, Morgan v. United States, 298 U.S. 468, 481-82 (1936) (applying the New Deal conception of "administrative" action to ratemaking conducted by the Department of Agriculture); Ariz. Grocery Co. v. Atchison, 284 U.S. 370, 389 (1931) (same but involving the Interstate Commerce Commission).

research that provided the APA's "intellectual foundation"[13]—employed this conception to scope its study.[14] Only agencies that were "administrative" in the New Deal sense were included. This choice left an indelible mark on the APA, which regulates binding agency action according to the mutually exclusive categories of adjudication and rulemaking.[15]

When the APA was enacted in 1946, most administrative action was adjudication, and the statute's primary aim was to address the constitutional challenges presented by this quasi-judicial form of agency action.[16] At the time, adjudication was understood as a staged or "phased" process.[17] (Modern administrative law has forgotten this, although adjudication today retains its staged structure.[18]) The initial stage of adjudication involves myriad informal, non-hearing techniques such as investigations, inspections, examinations, conferences, negotiations, and settlements.[19] In the relatively rare instances in which these techniques are insufficient to resolve a matter with the affected private party's consent,[20] a judicial-type hearing might be

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

[14] *See* FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 2-4 (1941) [hereinafter FINAL REPORT]. The Final Report is based on 27 monographs examining the procedures and practices of "administrative" agencies. *See id.* at 3-4. Purely "executive" agencies—such as the Government Printing Office, the Bureau of Standards, the Civil Service Commission, the Bureau of the Budget, and the General Accounting Office—were left out of the study.

[15] *See* 5 U.S.C. §§ 551(4)-(7). "This particular line may be the APA's most important innovation." Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 942 (2021). It was inspired by—but "not on all fours with"—the pre-APA definitions of quasi-judicial and quasi-legislative action. Emily S. Bremer, *Blame (or Thank) the Administrative Procedure Act for* Florida East Coast Railway, 97 CHI.-KENT L. REV. 79, 96 (2022) [hereinafter *Blame (or Thank)*].

[16] The legislature was also influenced by concerns—made concrete by the World Wars and related political developments in Europe—about how to ensure effective administration without facilitating authoritarianism. *See e.g.*, Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 GEO. MASON L. REV. 573 (2021); Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1 (2022).

[17] *See* FINAL REPORT, *supra* note 14, at 5.

[18] *See Rediscovered Stages*, *supra* note 11, at 433.

[19] *See Rediscovered Stages*, *supra* note 11, at 402-03.

[20] *See* FINAL REPORT, *supra* note 14, at 35-38, 41-42.

required to resolve the dispute. Congress often prefers that the needed hearing be conducted by the agency—rather than by a court on judicial review—and so includes a hearing requirement in the agency's governing statute. This approach ensures the agency's primary jurisdiction, but it presents significant constitutional challenges, threatening due process as a matter of both separation of powers and individual rights.[21] The need to address these challenges was the driving force behind the APA.

In the three-quarters of a century since the APA's adoption, rulemaking has become central to administration, working an inevitable change on the dominant conception of "administrative" power. Beginning in the 1960s and 70s, rulemaking began to displace adjudication as the preferred method of agency policymaking, and Congress created a host of new agencies with broad statutory mandates to protect public health and safety through rules.[22] This shift in turn heralded the rise of "presidential administration"[23] by giving presidents a "grip" on agency policymaking that was elusive when agencies primarily made policy incrementally, through *ad hoc* adjudication.[24] In response to these developments, the Supreme Court's administrative law docket increasingly focused on policymaking undertaken pursuant to statutes that grant broad discretion and contemplate a central role for rulemaking.[25] As the Court has decided these modern disputes, a profoundly different—

[21] For an originalist discussion of the relationship between due process and separation of powers, *see* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012). The sovereign power and individual rights aspects of due process are also observable, for example, in personal jurisdiction doctrine. *See, e.g.*, THOMAS D. ROWE, JR., SUZANNA SHERRY, & JAY TIDMARSH, CIVIL PROCEDURE 452 (5th ed. 2020) ("The Court has wavered about whether personal-jurisdiction doctrine rests on individual liberty or state sovereignty (or both).").

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

[23] *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); *cf.* Michael A. Livermore, *Political Parties and Presidential Oversight*, 67 ALA. L. REV. 45, 53-61 (2015) (describing how executive restructuring, presidential control in administrative law, and evolution in the operation of American political parties have all contributed to increase the President's influence in federal administration).

[24] *See* Emily S. Bremer, *Power Corrupts*, 41 YALE J. REG. ___ (forthcoming 2024), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4375200 [hereinafter *Power Corrupts*].

[25] The *Chevron* doctrine—according to which courts defer to reasonable agency interpretations of the statutes by which Congress has delegated power to them—was both cause and consequence of this change in focus. *See* Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).

fundamentally executive—conception of administrative action has emerged.[26] At the same time, support has grown for a more unitary theory of executive power that seeks to legitimate agency action through the President's democratic accountability.[27] The result is a unitary executive conception of administration that fits most naturally with type of agency action that spawned it: policymaking through the development and enforcement of general rules adopted pursuant to broad statutory delegations.

The Supreme Court now confronts the challenge of adapting its unitary executive conception of administration to formal adjudicatory hearings, a genuinely quasi-judicial form of agency action that implicates very different issues and values than those at stake in the rulemaking context. To date, adjudication generally has been viewed as an area of administration that is properly insulated from presidential control.[28] In her seminal article identifying the phenomenon of "presidential administration," then-Professor Kagan recognized that adjudication "is fundamentally different" from other forms of agency policymaking such as rulemaking.[29] In adjudication,

[26] *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 305, n.4 (2013) (explaining that administrative actions "take 'legislative' and 'judicial' forms, but they are exercises of—indeed under our constitutional structure they *must be* exercises of—the 'executive Power.'").

[27] "Presidential Administration intersects with (while being distinct from) . . . the unitary executive theory," which itself has both stronger and weaker formulations. Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1122 n.331 (2020). The important point for purposes of this Article is that there has been a strong trend in administrative law, which has manifested doctrinally in the Court's recent separation of powers cases, to embrace presidential control of administration and to look skeptically on legal impediments to such control. Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313, 315, 325-29 (2010); *Cf.* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 Yale L.J. 2, 8 (2009) (arguing "that what count as 'valid' reasons under arbitrary and capricious review should be expanded to include certain political influences from the President, other executive officials, and members of Congress, so long as the political influences are openly and transparently disclosed in the agency's rulemaking record").

[28] Kagan, *supra* note 23, at 2306 ("The only mode of administrative action from which Clinton shrank was adjudication. At no time in his tenure did he attempt publicly to exercise the powers that a department head possesses over an agency's on-the-record determinations."); *see also* Wiener v. United States, 357 U.S. 349, 356 (1958) (holding that the adjudicative functions of the War Claims Commission "precluded the President from influencing the Commission in passing on a particular claim" and from removing a member of the Commission "for no reason other than that he preferred to have on that Commission men of his own choosing"); Myers v. United States, 272 U.S. 52, 135 (1926) ("Then 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.").

[29] Kagan, *supra note* 23, at 2362; *see also* Chachko, *supra* note 27, at 1122 ("Kagan herself did not argue for presidential administration of administrative adjudication.").

"presidential participation in administration, of whatever form, would contravene procedural norms and inject an inappropriate influence into the resolution of controversies."[30] Although presidential administration has made some inroads into the adjudication context, these developments have been limited.[31] The Supreme Court nonetheless has seemed poised to extend its strong vision of the President's executive power into the adjudicative space, an outcome that some commentators view as logical and appropriate.[32] After all, the Constitution vests the executive power in the President, and "[a]gency adjudication, just as much as agency rulemaking, is an exercise of the 'executive power' under Article II."[33]

This Article argues that the APA is constitutional under the Supreme Court's new approach because it provides the procedural and institutional structures necessary to ensure faithful execution of the law through administrative adjudication. At the level of legal doctrine, the important point is that the APA's carefully constructed regime masterfully integrates procedural requirements, employment structures, and agency head control in a way that, taken together, promotes political accountability consistent with the demands of due process. Viewed in its totality, it emerges that the APA's regime erects only one—not two—effective levels of for-cause removal protection between the President and the ALJs.[34] The statute's robust preservation of agency head control ensures proper presidential control over and responsibility for the policymaking aspects of formal adjudication.[35]

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[30] Kagan, *supra note* 23, at 2363; *see also* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211 (2013) ("Proponents of expansive presidential power to direct subordinates' exercise of delegated discretion stop short of arguing for presidential directive power over adjudication, even where strictly executive agencies . . . are concerned.").

[31] *See, e.g.*, Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. REG. 549, 594-95 (2018) (noting but "tak[ing] no position on" the Obama Administration's push for "more muscular use of adjudication and regulatory enforcement actions across agencies to further policy goals").

[32] *See, e.g.*, Vermeule, *supra* note 30, at 1212 ("If one believes that Presidents hold directive power over the delegated discretion of executive agencies, it is unclear why that power would not extend straightforwardly to adjudicative functions of agencies as well as rulemaking functions.")

[33] Vermeule, *supra* note 30, at 1212.

[34] Although *Free Enterprise Fund* suggests that such a holistic, functional analysis is inappropriate, *see* 561 U.S. at 500, the Court's more recent decision in *Arthrex* embraces it, *see* 141 S. Ct. at 1980-86.

[35] If there is an Article II problem to be found here, it is not in the APA's regime, but in the for-cause protection afforded to the principal officers who collectively form the head of agencies such as the SEC. The Court has so far been able to avoid squarely considering this question, but it should do so (in an appropriate case) instead of sacrificing the APA just to kick that can further down the road. *See infra* at Part II.C.

Meanwhile, the for-cause removal protections and related employment structures enable the President to ensure impartial adjudication in hearings before the agencies and the MSPB, respectively. At the level of administrative theory, the analysis reveals that executive power in the adjudicatory context is more about discharging duties than exercising discretion. The President must be able to depend on inferior executive officers to fairly adjudicate (as required by due process) and faithfully execute the law (as required by Article II) through an incredible volume of formal adjudicatory hearings. Neither the President nor the Heads of Departments can review all of these adjudicatory decisions—they must be able to rely on delegation to inferior officers. The APA's regime ensures that ALJs are sufficiently competent and impartial to meet this need,[36] while agency heads have proper control over the adjudicatory programs for which they are responsible. From this perspective, it emerges that the restrictive aspects of the APA's regime *empower* the President to ensure faithful execution in the unique, quasi-judicial context of formal administrative hearings.[37] This insight in turn reveals a path toward reconciling the constitutional tensions between political accountability and impartiality protections in agency adjudication.[38]

This Article proceeds in three parts. Part I grounds this Article's analysis in administrative history and reality. It explains the problems Congress sought to remedy by enacting the APA's ALJ regime, examines that regime in detail, and explains the forces that threaten its continued viability. Part II argues that the APA's hearing provisions are consistent with the Supreme Court's recent separation of powers cases. The recent decision in *Arthrex* is critical, for it establishes that the APA's robust preservation of agency head control is sufficient to satisfy Article II. This in turn clarifies that if there is a constitutional infirmity in adjudication before independent

[36] For example, ALJs must be lawyers, while non-ALJ adjudicators (often referred to as "administrative judges (AJs)" are not always subject to that requirement and often are not lawyers. *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1660 (2016). This may contribute to variable competence across adjudication programs and may also convey the impression that some kinds of agency adjudication are more important than others. *Cf.* Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287, 1291 (2022) (studying the use of lay judges in state courts and arguing that "allowing a system of nonlawyer judges perpetuates long-standing inequalities in how litigants experience courts").

[37] *Cf.* Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1096 (2022) ("[P]roperly understood, most administrative adjudication is fully consistent with separation of powers formalism because it involves the execution of law by officials within the executive branch.").

[38] *See, e.g.*, Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 OHIO ST. L.J. 2679, 2680 (2019).

agencies such as the SEC, it is to be found in for-cause protection for the agency's principal officers. If the Supreme Court wants to address that issue, it should do so separately and directly. Part III goes deeper, arguing that the Supreme Court's reconceptualization of administrative action over the last several decades presents deeper threats to administrative adjudication than has previously been recognized. It explores the challenges of embracing an executive theory of administrative adjudication, particularly in a time of presidential primacy. It argues that salvation can be found by embracing the substantial non-discretionary aspects of formal adjudication and recognizing that proper restrictions on executive action are sometimes necessary to facilitate faithful execution of the law.

I. The Imperiled Position of the Administrative Law Judge

A principal goal of the APA was to ensure due process of law in administrative adjudication while maintaining individual agencies as the locus of adjudicatory decisionmaking. Central to this project was reforming the widespread, constitutionally problematic practice of commingling prosecutorial and adjudicative functions.[39] The needed reform was accomplished by the APA's formal hearing provisions, which established minimum procedural requirements for quasi-judicial hearings. At the heart of this regime was the Office of the Hearing Examiner, which we refer to today as the ALJ. This Part begins by explaining the mischief that Congress sought to remediate by enacting the APA.[40] It then explains the structure and operation of the APA's hearing provisions and concludes by explaining how recent Supreme Court decisions have imperiled this core compromise of the APA.

A. The Pre-APA Need for Reform

A principal reason for the APA's 1946 enactment was to reform administrative adjudication, which at the time was the dominant form of agency policymaking.[41] On the one hand, there was a desire to keep adjudication, including (most controversially) the conduct of quasi-judicial hearings, within individual administrative agencies. At the same time, there were problems with the way that hearings were conducted during the pre-

[39] *See* Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 J. POL'Y HIS. 379, 398-400 (2008) (discussing the Attorney General Committee's proposals to provide a "fair hearing" within the administrative process via provisions designed to effectuate an internal separation of functions).

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

[41] *See, e.g.*, Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1138, 1143 (2014) (discussing how the prevalence of adjudication at the time of the APA's enactment shaped the statute).

APA period. The APA's "intellectual foundation"—i.e., the voluminous research of the Attorney General's Committee on Administrative Procedure into actual procedures used by pre-APA administrative agencies—documented these problems.[42]

To understand the problems the APA was designed to remedy, however, one must first understand the placement and purpose of an administrative hearing in adjudication. As I have explained in prior work, the APA was based on the understanding that adjudication is a staged process.[43] In the initial stage of adjudication, the agency uses informal techniques to uncover the relevant facts and determine their legal significance. These informal techniques vary widely—accepting and processing applications and complaints, conferences, inspections, examinations, negotiations, and settlement—and are usually sufficient to resolve the matter with the consent or acquiescence of the affected private party. This is because the informal stage of the process typically reveals undisputed facts with indisputable legal significance.[44] In the rare case in which a dispute remains at the conclusion of the informal stage, the matter is elevated to the hearing stage of the process.[45] At this point, what is needed is a way to resolve an otherwise intractable, fact-bound dispute between the agency and an affected private party. The agency could simply issue a final order, in which case the hearing could be conducted by an Article III court conducting de novo judicial review of the agency's action.[46] But Congress often prefers that the initial hearing and decision be made by the agency, so that its expertise can be brought to bear on the legal, factual, and policy issues that are raised in such disputes.[47]

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[42] *Present at the Creation*, *supra* note 13, at 513-14.

[43] *Rediscovered Stages*, *supra* note 11. Adjudication retains this structure today, although modern administrative law forgot about it as attention shifted overwhelmingly to rulemaking as the predominant form of agency policymaking. *See id.*; *see also Power Corrupts*, *supra* note 24.

[44] *Rediscovered Stages*, *supra* note 11, at 403; *see* FINAL REPORT, *supra* note 14, at 5.

[45] *Rediscovered Stages*, *supra* note 11, at 403.

[46] Thus, the APA's hearing provisions do not apply when the "matter [is] subject to a subsequent trial of the law and the facts de novo in a court," 5 U.S.C. § 554(a)(1), or in "cases in which an agency is acting as an agent for a court," *id.* § 554(a)(5). Nor do they apply to matters that Congress has mandated to be decided entirely using non-hearing, informal techniques, i.e., in "proceedings in which decisions rest solely on inspections, tests, or elections," *id.* § 554(a)(3).

[47] *See Rediscovered Stages*, *supra* note 11, at 431. Sometimes Congress has manifested the contrary preference by authorizing an agency to administer a statute through non-hearing, informal adjudication while allocating initial responsibility for resolving disputes to an Article III court. *See, e.g.*, *id.* at 431 n.358 (citing MONOGRAPH 3 (FCC), at 50-51, 53 n.38). Other approaches are possible, too. For example, Congress has repeatedly authorized the FCC to allocate radio spectrum licenses via auction rather than through adversarial hearings. *See generally* CONG. RSCH. SERV., R47578, *The Federal Communications Commission's Spectrum Auction Authority: History and Options for Reinstatement* 1-2 (May 24, 2023),

Congress effectuates this institutional preference by including a hearing requirement in the agency's statute.[48]

The adjudicatory hearing is thus held toward the end of the administrative process for the purpose of resolving fact-bound, otherwise intractable disputes between the agency and the private parties it governs.[49] It is designed to produce reliable evidence that can be used to make the factual findings necessary to support the agency's final resolution of the dispute.[50]

An obvious challenge is that the presiding officer in an adjudicatory hearing is employed by one of the parties to the dispute: the agency. This challenge is present even in agencies that use an inquisitorial model rather than an adversarial model for adjudicatory hearings. A prominent example is found in Social Security hearings, which are inquisitorial in the sense that claimants appear alone before the SSA's ALJs and do not "bear the responsibility to develop issues for adjudicators' consideration."[51] Indeed, no advocate appears in the hearings to represent the agency's opposing interest or position. Instead, the ALJs are responsible for ensuring all issues are adequately developed and addressed. Moreover, SSA has long taken the position that the agency's obligation, even in hearings, is to protect the

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available at https://crsreports.congress.gov/product/pdf/R/R47578 (discussing the history of the FCC's auction authority and options for reinstating it after its most recent expiration on March 9, 2023).

[48] *See, e.g.*, 15 U.S.C. § 2064(f) (providing that the Consumer Product Safety Commission may issue an order to remediate a substantial product hazard "only after an opportunity for a hearing in accordance with section 554 of title 5"); 15 U.S.C. § 2615(a)(2) (providing that civil penalties for violation of the Toxic Substances Control Act "shall be assessed by the Administrator [of the Environmental Protection Agency] by an order made on the record after opportunity . . . for a hearing in accordance with section 554 of title 5"); 42 U.S.C. § 1383(c)(1)(A) ("The Commissioner of Social Security shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits…").

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

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

[51] Carr v. Saul, 141 S. Ct. 1352, 1358 (2021).

interests of SSA beneficiaries. It emerges upon a moment's reflection, however, that protecting SSA beneficiaries requires *both* granting benefits to qualified claimants *and* denying benefits to ineligible claimants.[52] And one need not question SSA's beneficent motives to recognize that a claimant appearing in a hearing is unavoidably in an adversarial position vis-à-vis the ALJ's employing agency. This becomes apparent when SSA hearings are viewed in their broader administrative context. Most Social Security claims are processed informally, without resort to a hearing, because the claimants are granted the benefits they seek and to which they are entitled.[53] Reflecting the staged structure described above, SSA holds a hearing only when a claimant's application for benefits *has been denied*.[54] From the claimant's perspective, then, the hearing is an opportunity to prove that the agency got it wrong.[55] And the person to whom the claimant must prove this is an ALJ who works for that same agency.[56]

Even in regimes in which an agency is responsible for adjudicating disputes between two private parties, the administrative context may give rise to structural threats to impartiality. Recall that Congress has vested adjudicatory authority in an agency rather than a court *for a reason*.[57]

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

[53] *See Power Corrupts*, *supra* note 24.

[54] *See* 42 U.S.C. §§ 405(b), 1383(c)(1)(A).

[55] This description simplifies matters considerably by glossing over the role of state agencies in processing and deciding initial claims for benefits. *See, e.g.*, Jonah B. Gelbach & David Marcus, *A Study of Social Security Disability Litigation in the Federal Courts*, Final Report to the Administrative Conference of the United States 16-18 (July 28, 2016), *available at* https://www.acus.gov/report/report-study-social-security-litigation-federal-courts.

[56] If the ALJ affirms the initial denial of benefits, further administrative proceedings are available before other persons—members of SSA's Appeals Council—who are also employed by the agency. *See, e.g.*, Soc. Sec. Admin., Hearings, Appeals, and Litigation Law Manual (HALLEX) § I-3-0-1(B), https://www.ssa.gov/OP_Home/hallex/hallex-I.html ("Under a direct delegation of authority from the Commissioner of the Social Security Administration, the A[ppeals] C[ouncil] is the final level of administrative review for claims filed under titles II and XVI of the Social Security Act."); OFF. OF THE INSPECTOR GEN., A-12-13-13039, SOC. SEC. ADMIN., AUDIT REPORT: REQUEST FOR REVIEW WORKLOADS AT THE APPEALS COUNCIL (Mar. 2014), *available at* https://oig.ssa.gov/audit-reports/2014-03-10-audits-and-investigations-audit-reports-A-12-13-13039/ (examining the processes of the Appeals Council, SSA's internal appellate body). Only on judicial review is a disappointed claimant afforded the opportunity to present his or her arguments to a government official outside the agency (i.e., an Article III judge). *See* 42 U.S.C. §§ 405(g), 1383(c)(3); *see generally* Gelbach & Marcus, *supra* note 55 (examining federal court litigation over Social Security disability decisions).

[57] *See* Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 309-10 (2007). This structural

Typically, Congress has directed the agency to conduct adjudicatory hearings as just one of several ways to pursue the organic statute's policy goals. This approach leverages the agency's expertise, ensuring that disputes arising from the regulatory regime are resolved in a way that furthers the overarching statutory mandate. Even when the agency is not a party to the cases heard, it has an institutional interest in resolving the disputes in a way that advances Congress's policy objectives. For example, in the America Invents Act of 2011 (AIA), Congress created the Patent Trial and Appeal Board (PTAB) within the Patent and Trademark Office (PTO) and authorized it to adjudicate disputes between private parties over the validity of previously issued patents.[58] These new adjudicatory responsibilities are just one part of the PTO's broader and longstanding role in administering the United States patent system.[59] The AIA was enacted partly in response to concerns that the PTO was harming consumer welfare by issuing too many "bad" patents.[60] Before the statute was enacted, challenges to such patents proceeded through litigation in the federal courts, an approach that many viewed as too expensive and lengthy to do the job adequately.[61] The new PTAB adjudicatory procedures were thus designed to offer a cheaper, faster path to

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reality runs deep: producing different substantive outcomes from those available through Article III courts was the raison d'être for Congress's modern shift towards using administrative agencies for statutory implementation. *See, e.g.*, JAMES LANDIS, THE ADMINISTRATIVE PROCESS 46 (1938) ("The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes."); FINAL REPORT, *supra* note 14, at 11-18 (examining various reasons why Congress has resorted to using the administrative process).

[58] Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011). The statute created three such processes: post-grant review proceedings, *see id.* § 6 (codified at 35 U.S.C. §§ 311-319, 321-329), supplemental examination, *see id.* § 12 (codified at 35 U.S.C. § 257), and the transitional program for covered business method patents, *see id.* § 18 (codified at 35 U.S.C. § 321).

[59] One of the first agencies in the republic, the PTO administers statutes enacted by Congress under its constitutional power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to the respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

[60] Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 157 (2019); *see also* Benjamin & Rai, *supra* note 57, at 320-21 (discussing the pre-AIA belief about the costs of "bad patents" and explaining that "many commentators . . . have argued in favor of the cost-effectiveness of post-grant opposition proceedings—that is, trial type proceedings before an administrative patent judge where competitors of the patentee could" challenge the patent administratively). For a study examining whether these concerns are well-founded, *see* Michael D. Frakes & Melissa F. Wasserman, *Does the U.S. Patent Office Grant Too Many Bad Patents?: Evidence from a Quasi-Experiment*, 67 STAN. L. REV. 613, 621 (2015).

[61] *See* Emily S. Bremer, *The Exceptionalism Norm in Agency Adjudication*, 2019 WIS. L. REV. 1351 [hereinafter *Exceptionalism Norm*]; Benjamin & Rai, *supra* note 57, at 321-23.

achieve the substantive regulatory goal of eliminating bad patents.[62] If the PTAB discharges its statutory mandate as Congress intended, one would expect a relatively high rate of patent invalidation, which patent holders might reasonably perceive as evidence that the PTAB is a biased decisionmaker.[63] Here, as in other administrative schemes that entail the adjudication of disputes between private parties, the agency's statutory duties and substantive expertise may unavoidably translate into a kind of situationally understandable, well-meaning partiality.

What is at stake in designing procedures for adjudicatory hearings is a core requirement of due process: an impartial decisionmaker.[64] In pre-APA administrative hearings, the right to a neutral arbiter was especially threatened by the widespread practice of combining investigative, prosecutorial, and adjudicative functions in a single person.[65] A good

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[62] *See* Stuart Minor Benjamin & Arti K. Rai, *Administrative Power in the Era of Patent Stare Decisis*, 65 DUKE L.J. 1563, 1566-69 (2016).

[63] It is very easy to find arguments along these lines. *See, e.g.*, Steve Brachmann & Gene Quinn, *Are more than 90 percent of patents challenged at the PTAB defective?*, IP WATCHDOG, https://ipwatchdog.com/2017/06/14/90-percent-patents-challenged-ptab-defective/id=84343/ (June 14, 2017) (arguing that there is a high rate of patent invalidation before the PTAB but that "it's not necessarily that PTAB is hostile to patents but that the processes of that tribunal are geared towards high rates of invalidation, which doesn't square with results achieved in federal court"); Mark Stepanyuk, *So You Want to Invalidate a Patent? The PTAB May Be Your Friend!*, WASH. J.L. TECH. & ARTS BLOG, https://wjlta.com/2022/01/10/so-you-want-to-invalidate-a-patent-the-ptab-may-be-your-friend/ (Jan. 10, 2022) (arguing that PTAB is designed to be able to invalidate patents more frequently and easily than the federal courts). Although the data suggest that the PTAB does invalidate patents more frequently than the federal courts do, the effect has moderated over time, and explaining the disparity is a complex matter. *See* Greg Reilly, *The PTAB's Problem*, 27 TEX. INTELL. PROP. L.J. 31, 37-40 (2019); Saurabh Vishnubhakat, Arti K. Rai, & Jay P. Kesan, *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 BERK. TECH. L.J. 45 (2016).

[64] As the Supreme Court has explained, "due process requires a 'neutral and detached judge in the first instance.'" Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 617 (1993) (quoting Ward v. Monroeville, 409 U.S. 57, 61-62 (1972)). *See also, e.g.*, Charles L. Barzun, *Politics or Principle? Zechariah Chafee & the Social Interest in Free Speech*, 2007 BYU L. REV. 259, 309 (explaining Roscoe Pound's view that the right to due process of law includes the right to "non-arbitrary" and "impartial" decisionmaking); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 460-61 (2009) (explaining that one of the "core elements" of due process holds that "because the decisionmaker must remain impartial, he cannot serve as an advocate for the interests of either party") Margaret H. Lemos, *Foreword: State Enforcement in an Interstate World*, 2019 BYU L. REV. 1427, 1435 (2019) ("Due process demands that judges and other officials who perform adjudicative tasks be neutral and impartial—favoritism toward one or the other party is disqualifying, and outside influences are strictly curtailed.")

[65] *See* Kent H. Barnett, *Due Process for Article III—Rethinking* Murray's Lessee, 26 GEO. MASON L. REV. 677 (2019); *cf.* Frost, *supra* note 64, at 502 (discussing the possibility

example is found in immigration, where the same agency officials were responsible for investigating persons alleged to be illegally present in the United States and for adjudicating the agency's request to deport those persons. A modicum of separation was provided by mixing up the assignments, such as by having Immigration Agent A investigate Person X and adjudicate the deportation of Person Y, while Immigration Agent B would investigate Person Y and adjudicate the deportation of Person X.[66] But this approach was insufficient to ensure the adjudicators' impartiality.[67]

In other instances, more mundane practicalities made it impossible to effectuate a complete separation between the agency's prosecutors and the "hearing examiners" responsible for presiding over the agency's hearings. For example, in the Department of Labor's Division of Public Contracts, the hearing examiner and the attorney representing the agency in the hearing were "both drawn from the Division's Legal Section, having a total membership of 14, and . . . they [were] answerable to a common superior, the chief examiner."[68] When traveling together for hearings in the field, the agency followed policies designed to separate the two actors:

> Examiners have been firmly instructed that during the course of the hearing they must hold no conversations with Government counsel, unless a representative of the respondent is present. Moreover, a physical separation outside the hearing room is sought to be assured by requiring the examiner and the trial attorney to lodge in different hotels—and this requirement is not relaxed even when the hearing is held in places boasting only one reasonably comfortable hostelry.[69]

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that a judge may appear or become biased if permitted to act as an "advocate for one of the parties by investigating facts and researching legal arguments to assist only that party").

[66] The Attorney General's Committee on Administrative Procedure included the Immigration and Naturalization Service in its study, *see* FINAL REPORT, *supra* note 14, at 3, but did not prepare its own monograph examining the agency's procedures, *see id.* at 4 n.2. This was because "subsequent to th[e] Committee's appointment, an exhaustive analysis of the Service, then a part of the Department of Labor, was completed by three investigators, one of them a member of this Committee; the results of their study were made available to the Committee." *Id.* The study was commissioned as part of the effort, later completed, to relocate the INS to the DOJ. *See* REPORT OF THE U.S. DEP'T OF LABOR COMM. ON ADMIN. PROC., IMMIGRATION AND NATURALIZATION SERV. (May 17, 1940) [hereinafter DOL REPORT].

[67] *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 42-44 (1950) (quoting from DOL REPORT, *supra* note 66, at 81-82).

[68] *See* MONOGRAPH 1 (PUBLIC CONTRACTS), at 16.

[69] MONOGRAPH 1 (PUBLIC CONTRACTS), at 16.

But complete separation before and after the hearing was impossible. Sometimes the volume of work required an examiner and an attorney to "travel together in circuit, alternately hearing and trying cases in various sections of the country," and "[w]hile traveling, there is no question of their remaining apart."[70] Since they reported to the same superior, with whom they would frequently need to confer while on the road, "the two officers arrange[d] for reasons of economy to do their conferring with a single long-distance telephone connection."[71] When the pair would return to Washington, they sometimes "share[d] a single office and w[ould] almost assuredly, in so small a staff, be thrown together professionally and socially."[72]

Another problem in pre-APA adjudicatory hearings was that hearing examiners were widely believed to be incompetent. A particularly acute example was found at the FCC, where the "inadequate quality of the Examining Department's personnel" contributed to the Commission's 1938 decision to disband that department altogether.[73] The Attorney General's Committee explained that:

> Some [of the examiners] were not too competent or failed to appreciate their place in the administrative process. They refused to familiarize themselves with the subject matter of the hearings over which they presided; were frequently unable either to keep the proceedings in hand or to assist materially in the perfection of the record; and were unresponsive, in the preparation of their reports, to the Commission's policy determinations as enunciated it its decisions.[74]

Some of the examiners were "suspected of being guilty of improper conduct motivated by personal considerations," such as "favor[ing] particular attorneys" and even "permit[ing] these attorneys to prepare [the examiner's] reports."[75] There were also rumors that some of the examiners, "in their desire not to be 'reversed' by the Commission, were inclined to base their reports not so much on the facts in the record" as on extra-record, political

[70] MONOGRAPH 1 (PUBLIC CONTRACTS), at 16.
[71] MONOGRAPH 1 (PUBLIC CONTRACTS), at 16.
[72] MONOGRAPH 1 (PUBLIC CONTRACTS), at 16.
[73] MONOGRAPH 3 (FCC), at 28; *see also id.* at 26 (explaining that in 1938, the FCC "abolished its Examining Department"). The "common gossip" was that some commissioners wanted to fire some of the examiners but were unwilling to do so directly and therefore eliminated the entire department, reforming the agency's hearing procedures in the process. *Id.* at 27 n.3.
[74] MONOGRAPH 3 (FCC), at 28.
[75] MONOGRAPH 3 (FCC), at 28.

considerations that they believed were more likely to determine the Commission's ultimate decision.[76] "[T]hese examiners . . . would sometimes decide a case in favor of the party whose political connections they believed were superior to those of the other participants."[77] The lack of insulation from political pressure thus undermined both the competence and the impartiality of the hearing examiners. The FCC's "solution" to these problems was to disband its Examining Department and "shift to a process in which the attorney that had handled a matter from the start would preside over the hearing, the proposed findings of fact were supplied by the parties rather than by the presiding official, and the decisions were made by the Commission based on recommendations and memoranda supplied by the staff."[78]

A final problem in pre-APA adjudicatory hearings was the tension between the needs of fact-finding and the need for the agency head to retain policymaking control. This tension particularly was evident in independent regulatory commissions. The heads of these agencies—i.e., the multi-member regulatory commissions—needed the assistance of subordinates to conduct hearings but were extremely reluctant to delegate the authority necessary to do the job efficiently and properly. These agencies tended to micromanage the conduct of the hearings,[79] requiring presiding officers to get interlocutory approval for routine decisions and discouraging or prohibiting them from making factual findings, issuing initial or tentative decisions, or even recommending how cases ought to be decided.[80] The presiding officers in these agencies were often limited to summarizing the record, leaving as much of the decisionmaking to the agency head as possible. These practices were inefficient. They also contributed, both directly and structurally, to the reported incompetence of the presiding officers. By micromanaging the hearings, the agencies made the presiding officer's job less attractive to good candidates and discouraged those who took the job from taking responsibility for, and pride in, their work. Finally, this approach threatened the exclusive record principle by preventing the person who presided over the hearing from making or suggesting a decision, ensuring that the entire task of deciding was reserved for persons who were not present at the taking of evidence. At the same time, however, the Committee recognized that hearing procedures needed to be designed to ensure that examiners could

[76] MONOGRAPH 3 (FCC), at 28.

[77] MONOGRAPH 3 (FCC), at 28.

[78] Emily S. Bremer, *The Administrative Procedure Act: Failures, Successes, and Danger Ahead*, 98 NOTRE DAME L. REV. 1873, 1878 n.22 (2023) (citing MONOGRAPH 3 (FCC), at 22–23, 26–27, 31–32) [hereinafter *Failures*].

[79] *Failures*, *supra* note 78, at 1878.

[80] *See, e.g.*, MONOGRAPH 6 (FTC), at 16-19, 41-45; MONOGRAPH 26 (SEC), at 68-70, 83-85, 87-88.

retain individual responsibility for their reports while also conforming to the policy decisions properly made by agency leadership.[81]

B. The APA's ALJ Regime

Congress addressed these problems by enacting the APA's hearing provisions, which establish minimum procedural requirements for quasi-judicial hearings conducted by administrative agencies.[82] That is, the APA's requirements apply "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[83] The statute's "on the record" language, as well as several other provisions of the APA's hearing provisions, codified pre-APA case law under the Due Process Clause. Notable in this regard is the Supreme Court's 1936 decision in *Morgan v. United States*, which held that a final decision of the Secretary of Agriculture, made on review of a ratemaking hearing, violated due process because it was based on considerations outside the hearing record.[84] Ratemaking proceedings, such as the one at issue in *Morgan*, had a dual character: they were both quasi-legislative and quasi-judicial.[85] The agency was required first to determine whether the named party or parties had violated a legal duty to charge reasonable and non-discriminatory rates and, upon such a finding, the agency was authorized to establish a just and reasonable rate to be charged in the future. Simplified and stated in modern terms, ratemaking thus entailed an adjudication (quasi-judicial) as a pre-condition to a rulemaking (quasi-legislative).[86] The quasi-judicial aspect of the proceeding demanded that certain minimum procedural requirements be

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[81] *See, e.g.*, MONOGRAPH 4 (MARITIME COMM'N), at 18 (Because "[t]he decisions of most Maritime Commission cases rest on policy judgments with their roots in economic data, on legal interpretations, and on the choice of which sets of facts are movingly significant, rather than on the rejection of one or two conflicting versions of an occurrence," responsibility for "giving [the examiner's report] shape and content must be diffused and there must be opportunity not merely to influence the trial examiner's opinion but actually to supplant it when it is dissonant with official views or policies").

[82] *See* 5 U.S.C. § 554, 556, 557; *see also* Walker & Wasserman, *supra* note 60, at 148-53 (describing the APA's hearing regime).

[83] 5 U.S.C. § 554(a).

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

[85] *See Blame (or Thank)*, *supra* note 15, at 94-97.

[86] This simplification risks conveying the possibility of separating out these two components when in fact ratemaking's character is *dual* in the sense that the components are inextricably intertwined. In the APA, Congress forced ratemaking into the definition of rulemaking, thereby obscuring its dual character. *See* 5 U.S.C. §§ 551(4) & (5). I suspect this contributed to the loss over time of knowledge of the APA's due process foundation and, therefore, confusion about the reach of the APA's hearing provisions. *See Blame (or Thank)*, *supra* note 15, at 94-97.

observed in the hearing and also required that the agency's ultimate decision be based on the hearing record.[87] The APA's "on the record" language distinguishes between this kind of hearing, which is defined by the exclusive record principle,[88] and a quasi-legislative hearing, which is not subject to the same due process limitation and is unregulated by the APA.[89]

The APA's hearing regime is centrally focused on structuring the position and powers of the officers who preside over hearings.[90] Although the APA allows "the agency" or "one or more members of the body which comprises the agency" to preside over hearings, it encourages and regulates the use of ALJs to perform this function.[91] Over all, the APA's structure is designed to vindicate several related goals, each of which can be readily tied

[87] *Morgan*, 298 U.S. at 480-82.

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

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

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

[91] 5 U.S.C. § 556(b). The APA originally referred to ALJs as "examiners." *See* Administrative Procedure Act of 1946, § 7(b), Pub. L. No. 79-404 (1946), *available at* https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf,. This was changed first to "hearing examiner" when the APA was codified in 1966, *see* Pub. L. No. 89-554, and then to "administrative law judge," by the Civil Service Commission, a change that Congress ratified by statutory amendment in 1978, *see* Pub. L. No. 95-251. *See* Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 110 n.8 (1981). The APA also recognizes that Congress may deviate from the APA's defaults by enacting statutes that provide for specialized adjudicators, either in the form of boards or individual officers. *See* 5 U.S.C. § 556(b). A good example of each is found in the adjudication scheme at issue in *Arthrex*, which includes both the Patent Trial and Appeal Board (PTAB) and its administrative patent judges (APJs). *See* 141 S. Ct. at 1976.

to the pre-APA problems discussed in the previous section. The statute was designed to ensure (1) ALJ impartiality; (2) ALJ competence; and (3) agency head control over the policymaking aspects of adjudicatory hearings.[92]

ALJ Impartiality. Perhaps the most important aspect of the APA is its provisions designed to ensure ALJ impartiality. The statute explicitly imposes on ALJs a duty of impartiality, declaring that "[t]he functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner," and recognizing the possibility of ALJ disqualification in circumstances in which impartiality is not possible.[93] The statute also provides various structural protections of impartiality, seeking to achieve an internal separation of functions. ALJs "may not perform duties inconsistent with their duties and responsibilities as administrative law judges," which would include duties related to investigation and prosecution.[94] Nor may ALJs engage in ex parte communications, including with other employees of the same agency who are involved in investigation or prosecution.[95] Furthermore, "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review" of a formal hearing.[96] Finally, the APA provides that ALJs should "be assigned to cases in rotation so far as practicable,"[97] thus making it more difficult for the agency to control the conduct of the hearing indirectly through ALJ assignment decisions.[98]

ALJs are also protected from aspects of the employment relationship that might impair their impartiality as adjudicators. ALJ salaries are

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[92] Many but not all of the provisions designed to vindicate these goals apply to all presiding officers, including non-ALJ presiding officers. Because this Article is particularly concerned with defending the constitutionality of the ALJ regime, it focuses on ALJs.

[93] 5 U.S.C. § 556(b). "A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case." *Id.*

[94] 5 U.S.C. § 3105.

[95] *See* 5 U.S.C. § 554(d).

[96] 5 U.S.C. § 554(d). These ex parte restrictions do not apply "in determining applications for initial licenses," *id.* § 554(d)(A), "to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers," *id.* § 554(d)(B), or "to the agency or a member or members of the body comprising the agency," *id.* § 554(d)(C).

[97] 5 U.S.C. § 3105.

[98] This possibility may remind the reader of the "panel stacking" practices of the PTAB, which presented the appearance of impropriety even if they were lawful. *See Arthrex*, 141 S. Ct. at 1981; *see also* Walker & Wasserman, *supra* note 60, at 178-187 (analyzing the PTO Director's statutory authority for stacking panels and considering whether the practice violates due process).

established not by the employing agency, but by the Office of Personnel Management (OPM).[99] ALJs are not subject to performance evaluations[100] and "may not . . . 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."[101] An employing agency may take adverse employment action against an ALJ "only for good cause established and determined by the MSPB on the record after opportunity for hearing before the Board."[102] Such adverse employment actions include "removal," "suspension," "a reduction in grade" or "pay," and "a furlough of 30 days or less."[103] Exempted from this process are suspensions or removals by the head of an agency as "necessary in the interests of national security,"[104] reductions in force under OPM regulations,[105] and certain disciplinary actions taken by the Special Counsel.[106] The MSPB has three members, each of which is appointed to a seven-year term by the President with the advice and consent of the Senate.[107] MSPB members have for-cause removal protection: the statute provides that "[a]ny member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office."[108]

ALJ Competence. There are several ways in which the APA's regime seeks to ensure that ALJs are competent to perform their functions and "highly responsible" for the work they produce.[109] First, the APA ensures

[99] *See* 5 U.S.C. § 5372. ALJ positions are "super grade" positions, which is to say that the ALJ pay scale offers higher pay than what would ordinarily be provided by the GS scale. *Compare* OPM, Salary Table, Rates of Basic Pay for Administrative Law Judge (ALJ) Positions (Jan. 2023) (establishing annual base ALJ pay rates for 2023 ranging from $122,400 to $183,500), https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/ALJ.pdf, *with* OPM, Salary Table, General Schedule (GS) Base, Annual Rates by Grade and Step (Jan. 2023), https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2023/general-schedule (establishing annual base pay rates for 2023 ranging from $59,319 at GS-11 Step 1, where many government attorneys start, to $152,771 at GS-15 Step 10, which is the top of GS scale)

[100] *See* 5 U.S.C. § 4301(2)(D).

[101] 5 U.S.C. § 554(d).

[102] 5 U.S.C. § 7521. This task was initially vested in the Civil Service Commission (CSC). Ralph F. Fuchs, *The Hearing Examiner Fiasco Under the Administrative Procedure Act*, 63 HARV. L. REV. 738 (1950). It was transferred to the newly created MSPB by the Reorganization Plan No. 2 of 1978, which was codified by the Civil Service Reform Act of 1978 (CSRA). *See* Public Law No. 95-454, 92 Stat. 1111 (Oct. 13, 1978).

[103] 5 U.S.C. §§ 7521(b)(1)-(5).

[104] 5 U.S.C. § 7532(a); *see id.* § 7521(b)(A).

[105] *See* 4 U.S.C. §§ 3502, 7521(b)(B).

[106] *See* 5 U.S.C. §§ 1215, 7521(b)(C).

[107] *See* 5 U.S.C. §§ 1201, 1202(a).

[108] 5 U.S.C. § 1202(d).

[109] Fuchs, *Fiasco*, *supra* note 102, at 739 (explaining that the APA "embodies the conception of a corps of highly responsible hearing officers, originally put forward by the Attorney General's Committee").

that ALJs are able to exercise the powers necessary to conduct hearings, such as by "administer[ing] oaths and affirmations,"[110] "issu[ing] subp[o]enas authorized by law,"[111] ruling on the admission of evidence,[112] and streamlining the proceeding by facilitating the parties' settlement or resort to alternative dispute resolution.[113] These powers first must be conveyed to the agency by Congress in some other statute.[114] The APA's effect is to automatically subdelegate these powers to the agency's ALJs, thus ensuring the ALJs are able to perform their function.[115] To this end, although an agency may by rule "lay down policies and procedural rules which will govern the exercise of such powers by presiding officers,"[116] the agency "is without power to withhold such powers."[117] Second, the APA is designed to enable and encourage ALJs to take ownership and responsibility for the conduct of the hearing, the record it produces, and the initial decision based on that record. The statute requires that "[t]he employee who presides at the reception of evidence . . . shall make the recommended decision or initial decision . . . unless he becomes unavailable to the agency."[118] This limits agency head micromanagement, thereby providing the space and incentive for the ALJ to take responsibility for her function and work product. Third, the placement of the ALJs within the civil service structure, in addition to promoting their independence and impartiality, also promotes their competence.[119] A critical component of this structure was the ALJ examination and register, which was centrally managed, first by the CSC and later by the OPM. This aspect of the regime was dismantled by executive

[110] 5 U.S.C. § 556(c)(1).

[111] 5 U.S.C. § 556(c)(2).

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

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

[114] *See* 5 U.S.C. § 556(c).

[115] *See* TOM C. CLARK, DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 74 (1947).

[116] ATTORNEY GENERAL'S MANUAL, *supra* note 115, at 74.

[117] ATTORNEY GENERAL'S MANUAL, *supra* note 115, at 74. "This follows not only from the statutory language, 'shall have authority', but also from the general statutory purpose of enhancing the status and role of hearing officers." *Id.*

[118] 5 U.S.C. § 554(d).

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

order in 2018,[120] thus expanding each individual agency's latitude to recruit and select its own ALJs.[121]

Agency Head Control. Finally, the APA preserves agency head control over the various policymaking aspects of adjudication.[122] This control manifests both ex ante and ex post. Ex ante, the head of each adjudicating agency is responsible for appointing the ALJs it requires to conduct formal hearings.[123] The agency may also issue rules and guidance that ALJs must follow in performing their duties. This may include procedural regulations governing the conduct of the hearing,[124] as well as substantive rules and guidance establishing the law and policy that the ALJ must apply when making the initial decision. The statute also preserves the agency head's ability to personally preside over the hearing, in lieu of an ALJ.[125] If the agency does not preside over the hearing, it may choose, "either in specific cases or by general rule" to have the ALJ recommend a decision and certify "the entire record" to the agency head "for decision."[126] Alternatively, the agency may have the ALJ issue an initial decision that may become final in the absence of review by the agency head.[127] The APA firmly protects the agency head's authority to review ALJ decisions, providing that "[o]n appeal

[120] *See* Exec. Order 13843, *Excepting Administrative Law Judges from the Competitive Service*, 83 Fed. Reg. 32,755 (July 10, 2018); Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility,* 69 EMORY L.J. 1, 4 (2019).

[121] ACUS has offered some guidance to agencies about how to use this expanded authority well. *See* Admin. Conf. of the U.S., Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*, 84 Fed. Reg. 38,930 (Aug. 8, 2019).

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

[123] "Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title." 5 U.S.C. § 3105. As explained below, the APA's definition of "agency," *see* 5 U.S.C. § 551(1), read against the backdrop of Congress's longstanding statutory drafting conventions, clarifies the statute's command that the agency *head* appoint ALJs. *See infra* at Part II.C. If there was any doubt about this conclusion as a matter of statutory interpretation, the Supreme Court has held that the Appointments Clause also commands it. *See Lucia*, 138 S. Ct. at 2049, 2056. For a critical analysis of the proposition that agency head control is the "standard model," *see generally* Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1 (2023).

[124] *See* 5 U.S.C. § 556(c). As previously noted, the agency may regulate how ALJs exercise their powers, but may not withhold the powers listed in § 556(c). *See supra* at notes 110-117 and accompanying text.

[125] *See* 5 U.S.C. § 556(b)(1)-(2).

[126] 5 U.S.C. § 557(b); *see* 5 U.S.C. § 556(c)(10). The inclusion of the power to "make or recommend decisions in accordance with section 557" in § 556(c)'s list of automatically subdelegated powers suggests the agency may not prevent the ALJ from at least recommending a decision. *See supra* notes 110-117 and accompanying text.

[127] *See* 5 U.S.C. § 557(b); *see also* 5 U.S.C. § 556(c)(10).

from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."[128] This structure affords agencies broad discretion to design and implement a structure for intra-agency appeals from ALJ decisions, which may include an appeals body that stands between the ALJ and the agency head.[129] The only limitations on the agency head's review of the substance of an ALJ's decision are those that would constrain the agency if the agency presided over the hearing itself. That is, the agency head must comply with the various requirements imposed by due process, statutes, and the agency's own regulations. Notably, this includes the due process requirement (codified in the APA) that the agency's final decision be based exclusively on the hearing record.[130]

C. The APA in Constitutional Peril

Today, the APA's ALJ regime faces a variety of challenges, but its most imminent threat comes from the Supreme Court's recent decisions about the President's role in the separation of powers.[131] These decisions, issued over approximately the last decade, have cast doubt on the constitutionality of the APA's ALJ regime.

This existential threat is multi-layered. Most narrowly, it implicates the Court's precedents interpreting the Appointments Clause and the scope of the President's authority to remove executive officers at will. The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States," but it also permits Congress to "by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the

[128] 5 U.S.C. § 557(b).

[129] For an excellent study of how agencies have exercised this discretion, *see* CHRISTOPHER J. WALKER & MATTHEW WIENER, AGENCY APPELLATE SYSTEMS: FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (Dec. 14, 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3728393. The agency may even, by rule, decide that the agency head will not exercise its right under the APA to review decisions. This is rare in practice, although the SSA has taken this approach. *See* Eisenberg & Mendelson, *supra* note 123.

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

[131] In additional to the constitutional threat that is this Article's focus, the APA's ALJ regime is threatened by political, administrative, and practical problems. *See generally* Aaron L. Nielson, Christopher J. Walker, & Melissa F. Wasserman, *Saving Agency Adjudication*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4563879 (Sept. 6, 2023). In addition to these discrete challenges, the APA's hearing regime has suffered a long, slow unraveling by a combination of forces over the decades. In prior work, I have extensively documented these forces and their collective effect of establishing a paradoxical norm of exceptionalism in agency adjudication. *See generally Exceptionalism Norm*, *supra* note 61.

Courts of Law, or in the Heads of Departments."[132] Although the Constitution is silent as to the President's authority to remove executive officers, older Supreme Court precedents view removal as part of the executive power vested in the President by Article II,[133] while also upholding Congress's authority to limit the President's authority to remove officers vested with administrative authority rather than purely executive functions.[134] The Court has begun to reconsider these older precedents in ways that, at a deeper level, embrace a unitary theory of the President's executive power.[135] The result has been to narrow Congress's authority to structure the administrative state and—of particular importance in the ALJ context—to cast doubt on statutory structures that insulate agencies from Presidential control. The constitutionality of statutory restrictions on the President's power to remove officers at will has especially been brought into question.[136] At the level of theory, the Court increasingly has adopted a conception of administration as fundamentally a matter of executive power. As I have noted in prior work, this modern conception is in significant tension with the New Deal conception of administrative power that animated the APA.[137]

The most obvious threat to the APA's ALJ regime emerged in 2010 when the Supreme Court held in *Free Enterprise Fund v. PCAOB*[138] that two layers of for-cause removal protection violates the separation of powers.[139] The case involved the Public Company Accounting Oversight Board (PCAOB), a multi-member quasi-governmental agency created by the

[132] U.S. CONST. art. II, § 2.

[133] *See* Myers v. United States, 272 U.S. 52 (1926).

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

[135] *See generally* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

[136] This has also been the subject of renewed and vigorous scholarly debate. *See, e.g.*, Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023); Noah A. Rosenblum & Andrea Scoseria Katz, *Removal Rehashed*, 136 HARV. L. REV. F. 404 (2023); Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023); Jed H. Shugerman, *Freehold Offices vs. "Despotic Displacement": Why Article II "Executive Power Did Not Include Removal*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521119 (July 25, 2023).

[137] *See Rediscovered Stages*, *supra* note 11, at 436-437.

[138] 561 U.S. 477 (2010).

[139] *Free Enterprise Fund*, 561 U.S. at 484

Sarbanes-Oxley Act of 2002 in the wake of the Enron accounting scandal.[140] Modeled on the private, self-regulatory entities common in the securities industry, the PCAOB was organized as a private, nonprofit corporation and was vested with expansive authority over the accounting industry.[141] The SEC is authorized, "after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury," to appoint members of the PCAOB, who serve a term of five years.[142] The statute further provides that "[a] member of the Board may be removed by the Commission from office . . . for good cause shown before the expiration of the term of that member."[143] Good cause, which is defined fairly narrowly, must be established by the SEC "on the record, after notice and opportunity for hearing."[144] The SEC is itself a multi-member, independent regulatory commission composed of five members who are appointed by the President, with the advice and consent of the Senate, for a term of five years.[145] Although the SEC's organic statute (the Securities and Exchange Act of 1934) contains no provision addressing the removal of SEC commissioners, the parties before the Supreme Court in *Free Enterprise Fund* agreed that the commissioners enjoy for-cause removal protection.[146] Accepting this premise,[147] the Supreme Court held "that the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers."[148] The Court reasoned that these limitations resulted in "a Board that is not accountable to the President, and a President who is not responsible for the Board."[149]

The problem for the APA is that it contemplates *at least* two layers of for-cause protection for ALJs. As noted above, ALJs can be removed from

[140] *Free Enterprise Fund*, 561 U.S. at 484. For an excellent discussion of the many quasi-governmental entities that have been created by Congress, *see* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2014).

[141] *See Free Enterprise Fund*, 561 U.S. at 484-86 (describing the Board's powers); *see also* 15 U.S.C. § 7211(a) ("The Board shall be a body corporate, operate as a nonprofit corporation, and have succession until dissolved by an Act of Congress."). Although the statute declares that "[t]he Board shall not be an agency or establishment of the United States Government," and "[n]o member [of] . . . the Board shall be deemed to be an officer . . . of . . . the Federal Government," no party in *Free Enterprise* relied on that declaration to support its arguments before the Supreme Court. 15 U.S.C. § 7211(b).

[142] 15 U.S.C. § 7511(4)(A); *see id.* § 7511(5).

[143] 15 U.S.C. § 7211(e)(6).

[144] 15 U.S.C. § 7217(3).

[145] 15 U.S.C. § 78d(a).

[146] *See Free Enterprise Fund*, 561 U.S. at 487; *see also id.* at 545 (Breyer, J., dissenting) (objecting to the majority's decision to "assume without deciding" that the SEC commissioners enjoy for-cause removal protection).

[147] *Free Enterprise Fund*, 561 U.S. at 487.

[148] *Free Enterprise Fund*, 561 U.S. at 492.

[149] *Free Enterprise Fund*, 561 U.S. at 495.

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

The APA's ALJ structure would not be threatened by *Free Enterprise Fund* if ALJs were employees rather than officers—but the Supreme Court foreclosed this possibility in 2018, in the case of *Lucia v. SEC*.[150] Before 2018, the SEC had delegated its authority to appoint ALJs to certain members of its staff. If the ALJs were employees, this approach was lawful. But if the ALJs were inferior officers, then the Appointments Clause demands that they be appointed by the head of the agency. Resolving a circuit split,[151] the Supreme Court held in *Lucia* that ALJs are inferior officers and must therefore be appointed by the agency head. The Court further held that the SEC—and not its Chairman or some subset of commissioners—is the "head[] of Department[]" for Appointments Clause purposes. The SEC responded to the decision by retroactively approving the appointments of the agency's ALJs. Lucia was provided a hearing before a new ALJ.

The Supreme Court's most recent decision in this space, *United States v. Arthrex*,[152] complicates the analysis and, for reasons discussed in Part II, may offer new hope for saving the APA's ALJ regime. In *Arthrex*, the Supreme Court held that for-cause removal protection for Administrative Patent Judges (APJs) on the Patent Trial and Appeals Board (PTAB) combined with a provision prohibiting the agency head (the Director of the Patent and Trademark Office (PTO)) from reviewing PTAB decisions violated the separation of powers. The problem with this combination is that it made the APJs principal officers. And as principal officers, the APJs could not constitutionally be appointed by the head of the agency, as the statute contemplates. Interestingly, the Supreme Court remedied the problem by inserting agency head control into the regime rather than by severing the

[150] *See* 138 S. Ct. 2044. The damage could be cabined if ALJs in the entitlement programs, such as Social Security, were distinguishable and found to be employees rather than officers. Presumably the distinction would be the public rights nature of the adjudications. But the APA defines the ALJ's role without regard to the subject matter adjudicated. The ALJ position thus appears uniformly to meet *Freytag*'s standard for inferior officer status. *See id.* at 2047-48.

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

[152] 141 U.S. 1970 (2021).

APJ's for-cause removal protection.[153] This "charts a course distinct from" the Court's prior cases, which focused exclusively on removal as the lever of executive control.[154] "Instead of ready removability satisfying the constitutional requirement for supervision, *Arthrex* requires principal officer supervision on the front end of actions, with the discretion to review and reissue certain decisions before they become final for the Executive Branch."[155] Whether *Arthrex* is best understood as a shift from the straightforward formalism of *Free Enterprise Fund* and *Lucia* to a more functional analysis,[156] it offers new reasons to believe that the APA's ALJ regime, which combines for-cause protection with agency head control, is constitutional.

Despite *Arthrex*, the dominant view seems to be that the APA's ALJ structure is unconstitutional under this line of Supreme Court cases.[157] The Fifth Circuit recently so held in *Jarkesy v. SEC*, a case now before the Supreme Court.[158] The next part of this Article defends the constitutionality of the APA's ALJ regime.

II. Presidential Duty and Administrative Adjudication

There is an unavoidable tension in adjudicatory hearings: Article II requires presidential responsibility for agency policymaking, while the Due Process Clause requires some insulation for officers who must preside impartially over quasi-judicial hearings. This Part argues that the APA's ALJ regime strikes an optimal balance between these competing constitutional commands. Indeed, it is well-designed to promote presidential responsibility for agency policymaking, while still ensuring fair adjudication within agency programs and in the adjudication of adverse employment actions against ALJs. Finally, this Part argues that the constitutionality of the APA's

[153] The decision has been criticized as overstepping the judicial role and usurping Congress's authority to structure federal institutions. *See, e.g.*, Ronald A. Cass & Jack M. Beermann, *Interpretation, Remedy, and the Rule of Law: Why Courts Should Have the Courage of Their Constitutional Convictions*, 74 ADMIN. L. REV. 657, 678 (2022) (arguing that the Court's remedy in *Arthrex* was "unusual (perhaps unprecedented)" and an improper judicial 'rewrite' of the relevant statutes).

[154] Jennifer Mascott & John F. Duffy, *Executive Decisions After* Arthrex, 2021 SUP. CT. REV. 225, 227.

[155] Mascott & Duffy, *supra* note 154, at 228.

[156] *See e.g.*, GARY LAWSON, TEACHER'S MANUAL TO FEDERAL ADMINISTRATIVE LAW 96 (9th ed. 2022) ("I do not see the majority opinion [in *Arthrex*] as a formalist opinion. It strikes me as distinctively functionalist: Chief Justice Roberts talks a lot about accountability and decides the case on the basis of what mechanisms promote accountability.")

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

[158] *See* 34 F.4th 446, 463 (5th Cir. 2022), *cert. granted SEC v. Jarkesy*, 2023 WL 4278448 (2023).

provisions structuring the inferior office of the ALJ should be separated out from the distinct issue of the constitutionality of removal protections for the principal officers who collectively head independent agencies such as the SEC.

A. Presidential Responsibility for Agency Policymaking

In its recent separation of powers cases, the Supreme Court has emphasized the constitutional imperative for the President to retain authority over, and responsibility for, administrative policymaking.[159] A full view of this emphasis requires one to venture beyond the cases that most directly threaten the ALJ regime.[160] Particularly noteworthy are two cases in which the Supreme Court invalidated for-cause removal protection for the single principal officer at the head of an agency vested with significant administrative authority.

First, in *Seila Law*, the Supreme Court invalidated for-cause removal protections for the Director of the Consumer Financial Protection Bureau (CFPB), an agency created by Congress in 2010 "as an independent financial regulator within the Federal Reserve System."[161] Reacting in response to the subprime mortgage crisis, Congress tasked the CFPB with "the administration of 18 existing federal statutes" governing consumer credit, lending, and debt collection and also "vested the CFPB with potent enforcement powers."[162] The structure of the agency was also non-traditional: the CFPB was headed by a single Director rather than by a multi-member commission. The Director could be removed only for "inefficiency, neglect of duty, or malfeasance in office."[163] Moreover, "[i]n addition to lacking the most direct method of presidential control—removal at will—the agency's unique structure also forecloses certain indirect methods of control."[164] Indirect control via the President's appointment power is blunted by Congress's establishment of a 5-year term of service for the Director of the single-headed agency.[165] Indirect control via the budget process is also blunted because the agency's operations are funded outside the usual

[159] *Cf.* Margaret H. Lemos, *Democratic Enforcement? Accountability & Independence for the Litigation State,* 102 CORNELL L. REV 929, 944 (2017) ("Though scholars continue to debate whether the President is empowered to direct agency action, there is no doubt that he or she has the power to appoint and remove top agency officials, and at least to oversee administrative policy.")

[160] *See supra* at Part I.C.

[161] 140 S. Ct. at 2193; *see* Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376.

[162] 140 S. Ct. at 2193.

[163] 12 U.S.C. § 5491(c)(1), (3).

[164] *Seila Law*, 140 S. Ct. at 2204

[165] *Seila Law*, 140 S. Ct. at 2204.

appropriations process.[166] The consequence of these institutional design choices is that "[t]he Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans."[167] The Court held that such an officer, who wields executive power and policymaking authority, must be responsible to the President.[168] To remedy the constitutional defect, the Court severed the for-cause removal provision.[169]

Second, in *Collins v. Yellen*,[170] the Court invalidated for-cause removal protection for the single Director of the Fair Housing Finance Administration (FHFA).[171] The FHFA is an "independent agency"[172] created by Congress in the Housing and Economic Recovery Act of 2008 to oversee Fannie Mae and Freddie Mac in the wake of the financial crisis.[173] The statute grants the agency broad regulatory, supervisory, investigatory, and enforcement authority and also empowers the agency "to act as the companies' conservator or receiver for the purposes of reorganizing the companies, rehabilitating them, or winding down their affairs."[174] Although the FHFA has more limited duties than the CFPB and principally regulates "Government-sponsored entities" rather than "purely private actors," the Court found these factors insufficient to distinguish the FHFA from the CFPB for Article II purposes.[175] It reasoned that the "[t]he President's removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies."[176] These purposes include: (1) "help[ing] the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive

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[166] *Seila Law*, 140 S. Ct. at 2204.

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

[168] *See Seila Law*, 140 S. Ct. at 2199-200.

[169] *See Seila Law*, 140 S. Ct. at 2211.

[170] 141 S. Ct. 1761 (2021).

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

[172] 12 U.S.C. § 4511(a).

[173] *See Collins*, 141 S. Ct. at 1770, 1771.

[174] *Collins*, 141 S. Ct. at 1772.

[175] *See Collins*, 141 S. Ct. at 1783-84.

[176] *Collins*, 141 S. Ct. at 1784.

Branch;" (2) "ensur[ing] that these subordinates serve the people effectively and in accordance with the policies the people presumably elected the President to promote;" (3) and "subject[ing] Executive Branch actions to a degree of electoral accountability."[177] As in *Seila Law*, the Court held that the statute's for-cause removal provision violated the separation of powers and so severed it.[178]

These cases, which appear to embrace a strong unitary executive theory of Article II, amplified concern that the APA's ALJ regime unconstitutionally insulates ALJs from presidential control and responsibility. A potential distinguishing characteristic of the APA's regime is that ALJs are inferior officers: the officers at issue in *Seila Law* and *Collins* were principal officers. But *Free Enterprise Fund*, which involved inferior officers, might suggest this distinction doesn't matter.[179] Cutting the other direction is the Court's more recent opinion in *Arthrex*, in which the Court saved statutory for-cause protection for inferior adjudicative officers by inserting agency head review of adjudicatory decisions into the statute.[180]

Arthrex strongly suggests that the APA, with its robust preservation of agency head control, is consistent with the separation of powers. Under the APA, each agency is responsible for appointing its ALJs[181] and has the authority to issue procedural rules to govern how ALJs use the powers delegated to them to conduct hearings.[182] The agency can also issue policy statements, interpretive rules, or legislative rules governing the substantive law and policy that ALJs must apply or follow when deciding the cases that come before them.[183] The APA also recognizes broad agency procedural

[177] *Collins*, 141 S. Ct. at 1784.

[178] *Collins*, 141 S. Ct. at 1787.

[179] *See supra* at notes 138-149 and accompanying text.

[180] *See supra* at notes 152-156 and accompanying text.

[181] *See* 5 U.S.C. § 3105.

[182] *See* 5 U.S.C. § 556(c).

[183] The Court has consistently held that individual hearing rights are not abridged when an agency uses its rulemaking authority to resolve, on a classwide basis, legal or policy issues that arise repeatedly in individual hearings. *See, e.g.*, Heckler v. Campbell, 461 U.S. 458, 464 (1983) ("The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its own rulemaking authority to determine issues that do not require case-by-case consideration."); United States v. Storer Broad. Co., 351 U.S. 192, 205 (1956) (upholding the FCC's issuance of multi-ownership rules that then applied to individual adjudications of broadcast license applications); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225 (1943) (same); Nuclear Info. Res. Serv. v. NRC, 969 F.2d 1169, 1175 (D.C. Cir. 1992) ("[T]he Supreme Court has found agency reliance on prior determinations to be perfectly acceptable, even when the statute before it plainly calls for individualized hearings and findings."). An agency can alternatively establish generally applicable policy and legal determinations by designating decisions in individual adjudications as "precedential" and thus binding on front-line adjudicators. *See generally* Christopher J. Walker, Melissa Wasserman, & Matthew Lee Wiener, *Precedential*

discretion to design and implement the process for internal agency review of ALJ decisions. The ALJs' initial decisions may become final if the agency chooses (by rule or adjudication) not to review them.[184] But the APA also provides that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."[185] Agency head review is not plenary. But the limits on the agency head's discretion—which may come from the Constitution, applicable statutes, and the agency's own regulations—are those which would apply even if the agency did not use ALJs to conduct its hearings. Moreover, the MSPB's duties, which will be discussed in greater detail below, are extremely narrow and do not implicate the policymaking aspects of the adjudicatory hearings conducted within the individual agencies. For this reason, the for-cause protection afforded to the MSPB's members erects no barrier between the President and those vested with the authority and responsibility for that substantive policymaking.

In a traditional executive agency headed by a single principal officer subject to at-will removal by the President, the agency head control afforded by the APA's regime undoubtedly preserves the President's responsibility for the policymaking aspects of formal adjudication. The agency head retains the responsibility for appointing ALJs, procedural and substantive control over the hearing program, and the authority to review the individual, initial decisions issued by the agency's ALJs. And the President retains control over the agency head through the executive power of at-will removal. In this context, the APA's structure is indistinguishable from the structure of the *inter partes* review process that emerged from the Supreme Court's decision in *Arthrex*.[186] Indeed, the main difference between the two regimes is that the agency head control the Supreme Court injected into the *inter partes* review structure is already supplied expressly by the APA. If anything, an agency adjudicating under the APA has greater control over its hearing program than the control the Supreme Court found sufficient in *Arthrex*: the APA's minimum procedural requirements for adjudicatory hearings appear skeletal

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Decision Making in Agency Adjudication, Report for the Administrative Conference of the United States (Dec. 6, 2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4250533 (providing an in-depth study of this approach); *see also* Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023) (recommending best practices for same).

[184] *See* 5 U.S.C. § 557(b).

[185] 5 U.S.C. § 557(b).

[186] There is a mismatch *Arthrex* and *Jarkesy*: the former presented a challenge to the appointment of APJs, while the latter presents a challenge to removal restrictions for ALJs. Below, I address the implications of this mismatch for this Article's analysis. *See infra* at notes 197-200 and accompanying text.

in comparison to the detailed statutory requirements that Congress imposed upon the PTAB in the America Invents Act of 2011.[187]

At this point it becomes apparent that the APA's ALJ structure poses no special threat to the separation of powers in the context of adjudication by an independent regulatory commission such as the SEC.[188] As in an executive agency, the APA ensures that every policymaking aspect of adjudicatory hearings—from ALJ appointment to the applicable procedural rules to the substantive law and policy to the form and content of the final decisions—is subject to agency head control. The only difference is that the head of the agency is a multi-member body rather than a single principal officer.[189] Between the President and those responsible for the policymaking aspects of adjudicatory hearings, including the agency's final decisions, there is only one effective layer of for-cause protection: that which protects the individual principal officers who collectively form the agency head.

Free Enterprise Fund thus has no application in the context of APA adjudication, regardless of whether the adjudicating agency is an executive agency or an independent regulatory commission. Any doubt about this conclusion was dispelled by *Arthrex*, which clarifies that the APA's robust preservation of agency head control harmonizes ALJ for-cause protection with the demands of Article II.

This conclusion is further bolstered by approaching the analysis from the opposite direction, focusing not on the agency head's control but rather on the ALJ's status as an inferior officer vested with important but sharply limited duties.[190] The Court has long distinguished between principal and inferior officers, suggesting that Congress has broader authority to restrict the President's power to remove the latter. In *United States v. Perkins*,[191] the Supreme Court upheld Congress's authority to restrict the Secretary of the Navy's ability to remove a cadet engineer, an inferior officer whose appointment was vested by statute in the Secretary as the head of department.[192] The Court explained:

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[187] *See generally*, *Exceptionalism Norm*, *supra* note 61 (offering a deep dive into the statutory and regulatory provisions governing the *inter partes* review process).

[188] Or to put it another way, if there is a threat, it's to be found in the *commissioners'* for-cause removal protections. Although it seems that the Court has rejected *sub silentio* the rationale of *Humphrey's Executor*, it has so far retained its holding. This issue is addressed directly below. *See infra* Part II.C.

[189] *See Lucia*, 138 S. Ct. at 2050.

[190] *See Seila Law*, 140 S. Ct. at 2192 (noting that one of "only two exceptions to the President's unrestricted removal power" allows "Congress [to] provide tenure protections to certain *inferior* officers with narrowly defined duties").

[191] 116 U.S. 483 (1886).

[192] *See Perkins*, 116 U.S. at 484. The case contains no mention or discussion of whether Congress's broad authority to restrict the department head from removing the inferior officer would have similar effect against a President who sought to remove the inferior officer.

> We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto.[193]

But can this recognition of Congress's authority to restrict the removal of inferior officers survive under the Supreme Court's recent separation of powers cases? Although the Court so far has distinguished *Perkins* from the structures it has invalidated, its opinions contain some language suggesting the officer's rank may not be enough to justify removal restrictions.[194] For example, the Court has explained that "[a]t-will removal ensures that 'the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.'"[195] On the other hand, *Arthrex* preserved the APJ's for-cause removal protection by inserting agency head control into the *inter partes* review structure, thereby transforming the APJs from principal to inferior officers.[196] This may suggest that ALJ for-cause removal protections are similarly constitutional.

More important than an ALJ's status as an inferior officer, however, is the ALJ's adjudicatory functions. In the line of cases through which the Supreme Court recently has developed its unitary executive theory of administration, *Arthrex* is unique in that it involved officers with adjudicatory functions, like ALJs. One objection to this Article's reliance on *Arthrex* to

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Myers seems to approve of *Perkins* and of the proposition that Congress generally has the authority to specify the qualifications of an executive office. *See* Myers v. United States, 272 U.S. 52, 127-28 (1926).

[193] *Perkins*, 116 U.S. at 485.

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

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

[196] *See Arthrex*, 141 S. Ct. at 1987.

defend the APA's ALJ regime, however, is that *Arthrex* presented a challenge to the *appointment* of APJs, while *Jarkesy* presents a challenge to *removal* protections for ALJs.[197] In this regard, it is notable that in *Arthrex*, the Federal Circuit cured the appointments problem by severing the APJs' for-cause removal protections.[198] The expectation when *Arthrex* was before the Supreme Court was that, if the Court affirmed the Federal Circuit's finding of an Appointments Clause violation, it too would solve the problem by severing the for-cause removal provisions. This is what the Court had done in prior cases, including *Seila Law* and *Collins v. Yellen*. Instead, the Court took an unexpected turn: it found a constitutional violation but cured that violation by injecting agency head control into the PTAB regime and leaving the APJs' for-cause removal protection intact. This provoked much criticism because it seems to be a less minimal, more intrusive solution to the constitutional problem.[199] Although the Court could have been clearer about what warranted this differential treatment, it did explain that its approach brought the PTAB into line with the standard model for agency adjudication. And in doing so, it offered the APA's ALJ structure as a prime example of the standard model.[200] Although the matter is not entirely certain, both the reasoning and the result in *Arthrex* strongly suggest that the Supreme Court understands the combination of for-cause removal protection and agency head control to be consistent with the separation of powers, at least in the adjudicative context. *Jarkesy* offers the Supreme Court the opportunity to clarify this understanding and thereby remove the cloud of constitutional doubt from the APA's core compromise.[201]

The next Section turns explicitly to what is implied in *Arthrex*, arguing that the APA's structure enables the President to ensure fair and faithful execution of the law through the most purely quasi-judicial type of administration: formal adjudicatory hearings.

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[197] In framing the case in his opinion for the Court, Chief Justice Roberts states the question presented is whether the PTAB structure is consistent with *both* the Take Care Clause *and* the Appointments Clause. 141 S. Ct. at 1976.

[198] *See* Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320, 1338 (Fed. Cir. 2019).

[199] *See, e.g.*, Cass & Beermann, *supra* note 153, at 678.

[200] *See Arthrex*, 141 S. Ct. at 1984.

[201] Based on the oral argument, it seems likely that the Supreme Court may affirm the Fifth Circuit in *Jarkesy* on the 7th Amendment question, thereby making it unnecessary to address the non-delegation or removal question. Although that outcome might make this Article more valuable for a longer period of time, the public interest would be better served if the Supreme Court took the opportunity to resolve the question of whether *Free Enterprise Fund* in fact doomed the APA.

B. The Duty to Fairly Adjudicate

The exclusive function of the ALJ—presiding over the formal hearings necessary to finally adjudicate individual cases—is different from other kinds of administrative responsibilities.[202] The Supreme Court consistently has recognized this distinction. In *Myers v. United States*, the Court explained that executive officers may have "duties of a quasi judicial character" that "the President cannot in a particular case properly influence or control," although he may have the authority to remove such officers for cause when necessary to "discharge his own constitutional duty of seeing that the laws be faithfully executed."[203] In *Humphrey's Executor*, the quasi-judicial responsibilities of the Federal Trade Commission (FTC) provided significant support for the Court's conclusion that the for-cause removal protections afforded to the commissioners were constitutional.[204] In *Wiener v. United States*, the Court *read into a statute* limitations on the President's power to remove officers vested exclusively with adjudicatory duties.[205] This marked a departure from the general rule that statutory silence on the question of removal is interpreted to leave in place the executive power to remove an officer at will.[206] More recently, in *Seila Law*, the Court distinguished the constitutional (if narrowly so) single Administrator at the head of the SSA from the unconstitutional single Director of the CFPB on the grounds that SSA's "role is largely limited to adjudicating claims for Social Security benefits."[207] Even in *Free Enterprise Fund*, the inclusion of rulemaking and enforcement functions in the PCAOB's statutory mandate contributed significantly to the Court's disapproval of the dual for-cause removal

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

[203] Myers v. U.S., 272 U.S. 52, 135 (1926). The Court describes cause as the "the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." *Id.*

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

[205] 357 U.S. 349 (1958). In response to "the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission," the Court was "compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it." *Id.* at 356.

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

[207] *Seila Law*, 140 S. Ct. 2183, 2202 (2020).

provisions and provided the basis for distinguishing officers such as ALJs that are vested with exclusively adjudicatory functions.[208]

But *why* is adjudication—and particularly the conduct of adjudicatory hearings—different from other sorts of administrative responsibilities? The simple answer is that it is a quasi-judicial function that is not primarily about policymaking or enforcement discretion.[209] An ALJ's function is to find facts and develop a record that can support an ultimate determination of how established law and policy apply to individual cases. In this way, the ALJ's job is more like that of a judge in a trial court than it is like that of a legislator participating in committee work or deliberating on proposed legislation.[210] Only in rare cases does a formal hearing in an individual dispute require the resolution of an undetermined policy matter. And when that occurs, the policy question typically is narrow. This reality explains much of the modern disfavor for administrative policymaking through adjudication: it is incremental, *ad hoc*, narrow in legal effect, and slow to emerge and evolve. The APA's regime ensures that ALJs have the structural position and protection to faithfully discharge their adjudicative duties, while (for the reasons previously discussed) preserving agency head control of the policymaking aspects of agency adjudication.

Adjudicatory hearings are also different in how they implicate constitutional due process.[211] In some instances, due process and Article III may require the same thing: resort to an Article III tribunal.[212] But even when a proceeding is properly assigned to an Article II decisionmaker, due process requires a fair hearing: one that is procedurally fair and also one that has the appearance of fairness.[213] Crucially, a fair hearing is one conducted by an

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[208] *See Free Enterprise Fund*, 561 U.S. at 507 n.10; Stack, *supra* note 167, at 2392.

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

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

[211] As I explain later, many principles of ordinary administrative law have due process origins. *See infra* at Part III.B.

[212] *See, e.g.*, Chapman & McConnell, *supra* note 21. Although this Article does not focus on it, the APA's appellate model of judicial review ensured minimum access to an Article III tribunal when decisions are vested in the first instance in agencies. *See* John M. Golden & Thomas H. Lee, *Congressional Power, Public Rights, and Non-Article III Adjudication*, 98 NOTRE DAME L. REV. 1113, 1152-53 (2023); *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).

[213] *See* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 619 (1993). These characteristics are also necessary to make adjudication effective. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 282-84 (1997); *see also* Shu-Yi Oei, *Getting*

impartial adjudicator.[214] While the APA's various protections of agency head control ensure presidential control over (and responsibility for) policymaking, the statute's tenure protection for ALJs is essential for ensuring ALJ impartiality.[215]

The President's lawful exercise of executive power under Article II—just like Congress's lawful exercise of the legislative power under Article I—presupposes conformity with due process.[216] In the context of administrative adjudication, both of these propositions are implicated, although the Supreme Court historically has focused on the legislative implications rather than the executive implications.[217] A good example is found in *Wong Yang Sung v. McGrath*,[218] in which the Court held that immigration deportation hearings were subject to the APA's hearing provisions.[219] The government argued that the APA did not apply because the hearing in deportation was not "required by statute"[220] but rather by due process as determined by pre-APA judicial precedent.[221] While Congress had authorized the Immigration and Naturalization Service (INS) to deport persons found unlawfully within the United States, the statute conveying this authority did not require the agency to conduct pre-deportation hearings. In response to a claim that the statute as written violated due process and "to save the statute from invalidity," the Supreme Court read a hearing requirement into it.[222] Justice Jackson, writing

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More by Asking Less: Justifying and Reforming Tax Law's Offer-in-Compromise Procedure, 160 U. PA. L. REV. 1071, 1129-32 (2012) (arguing that the IRS's Offer in Compromise procedure would be more effective if it employed a more impartial initial adjudicator).

[214] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004); *Concrete Pipe & Prods.*, 508 U.S. at 617. "A fair hearing necessarily includes an impartial tribunal." Marcello v. Bonds, 349 U.S. 302, 315 (Black, J., dissenting). This is a bedrock principle of procedural due process: that a person cannot be a judge in their own case. *See generally* JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 15-32 (2003) (discussing the history and meaning of this maxim).

[215] *See* Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. RSRV. L. REV. 1083, 1084 (2015).

[216] *Cf.* JAMES HART, THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES 207 (1925) (explaining "that special and arbitrary acts of a legislative body would be in violation of due process," and "[a] fortiori, such acts of the Executive would involve a lack of due process").

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

[218] 339 U.S. 33 (1950).

[219] *Wong Yang Sung*, 339 U.S. at 51.

[220] 5 U.S.C. § 554(a).

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

[222] *Wong Yang Sung*, 339 U.S. at 50; *see also The Japanese Immigrant Case*, 189 U.S. at 101 ("In the case of all acts of Congress, such interpretation ought to be adopted as, without

for the Court in *Wong Yang Sung*, treated the APA as a legislative specification of the minimum requirements of due process in adjudicatory hearings, reasoning that to place the Immigration Act outside of the APA's hearing requirements would "again bring [it] into constitutional jeopardy."[223] Justice Jackson explained that the "constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body."[224] In similar fashion, the President's duty to take care that the laws be faithfully executed arises from the same source as the constitutional requirement of procedural due process of law. In the context of adjudicatory hearings conducted by administrative agencies, the constitutional requirement of procedural due process permeates every valid exercise of the executive power.

From this perspective, it emerges that the APA's hearing regime enables the President to fulfill his constitutional obligation to ensure fair hearings in administrative adjudication. This is not necessarily to say that the APA's regime is constitutionally mandated. Indeed, at least under current doctrine, it probably is not.[225] For example, the Supreme Court has suggested that due process does little to mandate a separation of functions in federal agency adjudication,[226] although the D.C. Circuit has held that due process may require some ex parte restrictions in agency rulemakings that have quasi-judicial character.[227] More broadly, the modern approach to procedural due process is managerial in its focus, sharply limited by the public rights

doing violence to the import of the words used, will bring them into harmony with the Constitution.").

[223] *Wong Yang Sung*, 339 U.S. at 50.

[224] 339 U.S. at 49.

[225] This brief discussion acknowledges an interesting and difficult question, the full examination of which is beyond the scope of this Article, of whether and how to give effect simultaneously to contemporary conceptions of due process and the older and somewhat different conceptions of due process that animated the APA. So too for conceptions of the separation of powers, both alone and in combination with due process. *Cf.* John M. Golden & Thomas H. Lee, *Article III, the Bill of Rights, and Administrative Adjudication*, 92 FORDHAM L. REV. 397, 418 (2023) (explaining that judicial decisions increasing the political accountability of agency adjudicators may require the courts to adjudicate more due process challenges arising out of agency adjudications).

[226] *See* Stack, *supra* note 167, at 2397-98 (discussing FTC v. Cement Inst., 333 U.S. 683 (1948)).

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

doctrine,[228] and governed by the highly flexible cost-benefit framework of *Matthews v. Eldridge*.[229] On the other hand, the APA's 1946 enactment may have substantially relieved the Supreme Court of continuing responsibility for determining the minimum requirements of due process in federal administrative hearings. As *Wong Yang Sung* suggests, Congress took on that responsibility in the APA, with the likely effect of radically reducing the need for litigation on the subject. The Court should be reluctant to dismantle the APA's regime, which quelled a vigorous and longstanding fight over the basic impartiality and competence of ALJs and the fundamental fairness of vesting in administrative agencies (rather than courts) the primary jurisdiction to conduct the hearings necessary to resolve disputes that arise out of administrative programs.[230] Surely it is preferable to enforce the legislature's hard-fought compromise on these issues, as well as its determination that the benefits of using ALJs outweigh their costs.[231] And by upholding and enforcing the APA, the Supreme Court will ensure the President's continued access to a hearing regime that ensures presidential responsibility for executive policymaking through fair adjudicatory hearings. In short, the Court should recognize that the APA was well designed to ensure properly presidential adjudication.[232]

The President's duty to ensure fair adjudication also extends to the MSPB's adjudication of cause against an ALJ. The MSPB's duties with

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[228] This Article, which is concerned with the conduct of Article II adjudications, operates downstream of the public rights doctrine, which determines when Congress has the option of assigning adjudication to an Article II tribunal. The public rights doctrine is messy and contested, and many scholars have sought to explain and justify it. *See, e.g.,* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511 (2020); Golden & Lee, *supra* note 212; John M. Golden & Thomas H. Lee, *Federalism, Private Rights, and Article III Adjudication*, 108 VA. L. REV. 1547 (2022); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007).

[229] 424 U.S. 319 (1976); *see also* Matthew Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 883-85 (1997) (explaining the scholarly foundation for the balancing approach to due process later adopted by the Court in *Mathews*).

[230] *See* Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57 (1979); Fuchs, *Fiasco*, *supra* note 102.

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

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

respect to the APA's ALJ regime are extremely narrow: it is responsible for conducting the formal hearings necessary to determine whether there is good cause to remove or take other adverse action against an ALJ. As noted above, the MSPB has no role whatsoever in the execution of substantive law through the agency programs in which the various ALJs serve. Nor is the MSPB vested with the prosecutorial discretion to decide whether and when an ALJ should be accused of conduct that might constitute good cause for removal. These responsibilities—i.e., to oversee the policymaking aspects of agency hearings and to prosecute ALJs for good cause—are vested in the head of each adjudicatory agency. The MSPB's sole job is to conduct hearings and adjudicate claims of good cause for adverse action against ALJs. With respect to these limited duties, there is only one layer of for-cause protection that stands between the President and the members of the MSPB. And that layer of for-cause protection enables the President to meet the demands of due process in MSPB proceedings. In this way, the MSPB's role in the APA's ALJ regime enables the President to discharge the obligations imposed by both Article II and the Due Process Clause.

C. The President and the Independent Agencies

It is worth pausing at this point to acknowledge an obvious but potentially puzzling point: the APA ignores the President.[233] By its terms, the statute governs "agency" action, and judicial review thereof, defining "agency" to include "each authority of the Government of the United States, whether or not it is within or subject to review by another agency."[234] It expressly excludes from this definition "the Congress,"[235] and "the courts of the United States,"[236] but is silent about the President.[237] Other provisions of

[233] *See, e.g.*, Noah A. Rosenblum, *Making Sense of Absence: Interpreting the APA's Failure to Provide for Court Review of Presidential Administration*, 98 NOTRE DAME L. REV. 2143, 2144 (2023) ("[T]he most important law governing agency action [i.e., the APA] is oddly silent about the Chief Executive.")

[234] 5 U.S.C. § 551(1).

[235] 5 U.S.C. § 551(1)(A).

[236] 5 U.S.C. § 551(1)(B). It also expressly excludes "the governments of the territories or possession of the United States," *id.* § 551(1)(C), "the government of the District of Columbia, except as to the requirements of section 552 of this title," i.e., the Freedom of Information Act, *id.* § 551(1)(D), "agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them," 5 U.S.C. § 551(1)(E), the "courts martial and military commissions," *id.* § 551(1)(F), "military authority exercised in the field in time of war or in occupied territory," *id.* § 551(1)(G), and various functions conferred by enumerated statutory provisions, *see id.* § 551(1)(H).

[237] Despite the statute's silence, the Supreme Court has held that the President is not an agency under the APA. *See* Franklin v. Massachusetts, 505 U.S. 788, 801 (1992). For an argument that *Franklin*'s interpretation of the APA is wrong, *see* Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63 (2020). For a brief rebuttal, *see* Rosenblum, *supra* note 233, at 2163 n.117.

the APA require each "agency" to publish or disclose information to the public[238] and to observe minimum procedural requirements in rulemaking and adjudication,[239] while still other provisions establish rules governing judicial review of final agency action.[240] None of these provisions mention the President, either. This is one of the glaring inconsistencies between the APA's "old world" and the "new world" of administrative law that exists today.[241] The last several decades have witnessed the rise of "presidential administration," and the expectation—perhaps even the constitutional requirement—that the President take a more active role in directing the activities of the many agencies charged with carrying out the work of the Federal Government.[242]

If the APA does not even mention the President, is the statute fundamentally at odds with the emerging modern understanding of Article II's requirements?

No: the APA conforms with Article II, albeit indirectly, by preserving and promoting *agency head* control. In *Arthrex*, the Supreme Court recognized that agency head control is the standard model in federal administrative adjudication.[243] Professors Becky Eisenberg and Nina Mendelson have objected to this proposition, but the Court got it right.[244] Although the APA does not use the phrase "agency head," its definition of "agency" was enacted against the backdrop of Congress's consistent practice of granting statutory "authority" to the head of each agency, i.e., a principal officer or a multi-member body composed of principal officers who are ultimately responsible for the agency's activities.[245] Examples are legion, in both executive and independent agencies. Congress has granted authority:

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[238] *See* 5 U.S.C. § 552.

[239] *See* 5 U.S.C. §§ 553, 554, 556, 557.

[240] *See* 5 U.S.C. §§ 701-706.

[241] *See* O'Connell & Farber, *supra* note 41; Walker & Wasserman, *supra* note 60; *see also* Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON. L. REV. 733 (2021).

[242] *See* Kagan, *supra* note 23.

[243] *See Arthrex*, 141 S. Ct. at 1984; *see also* Walker & Wasserman, *supra* note 60, at 143-44 ("Despite this great diversity in adjudication across the modern administrative state, the 'standard federal model' continues to vest final decision-making authority in the agency head." (quoting Ronald M. Levin, *Administrative Judges and Agency Policy Development: The Koch Way*, 22 WM. & MARY BILL RTS. J. 407, 412 (2013))).

[244] Eisenberg & Mendelson, *supra* note 123.

[245] 5 U.S.C. § 551(1); *cf.* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

- For federal student financial assistance to the Secretary of Education;[246]
- For Social Security benefits programs to the Commissioner of Social Security.[247]
- To issue national standards for the discharge of pollutants to the Administrator of the Environmental Protection Agency.[248]
- To issue pipeline safety standards to the Secretary of Transportation,[249] with express subdelegation to the Administrator of the Pipeline and Hazardous Materials Safety Administration, a subagency within the Department of Transportation.[250]
- To regulate wire and radio communication to the Federal Communications Commission.[251]

[246] *See, e.g.*, 10 U.S.C. § 1098bb ("[T]he Secretary of Education . . . may waive or modify any statutory or regulatory provisions applicable to the student financial assistance programs under title IV of the Act as the Secretary deems necessary in connection with a war or other military operation or national emergency . . .").

[247] *See, e.g.*, 42 U.S.C. § 901(b) ("It shall be the duty of the [Social Security] Administration to administer the old-age, survivors, and disability insurance program under subchapter II and the supplemental security income program under subchapter XVI."); *id.* § 902(a)(4) ("The Commissioner shall be responsible for the exercise of all powers and the discharge of all duties of the Administration, and shall have authority and control over all personnel and activities thereof.")

[248] *See, e.g.*, 33 U.S.C. § 1316(b)(1)(A) ("The Administrator shall, within ninety days after October 18, 1972 publish (and from time to time thereafter shall revise) a list of categories of sources…"); § 1316(b)(1)(B) ("[T]he Administrator shall propose and publish regulations establishing Federal Standards of performance for new sources within such category.").

[249] *See, e.g.*, 49 U.S.C. § 60102(a)(2) ("The Secretary shall prescribe minimum safety standards for pipeline transportation and for pipeline facilities.").

[250] *See* 49 U.S.C. § 108(a) ("The Pipeline and Hazardous Materials Safety Administration shall be an administration in the Department of Transportation."); § 108(c) ("The head of the Administration shall be the Administrator, who shall be appointed by the President, by and with the advice and consent of the Senate . . ."); § 108(f)(1) ("The Administrator shall carry out . . . duties and power related to pipeline and hazardous materials transportation and safety vested in the Secretary by chapter[] . . . .601 . . .").

[251] *See, e.g.*, 47 U.S.C. § 151 ("For the purpose of regulating interstate and foreign commerce in communication by wire and radio . . . there is created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."); *id.* § 205(a) ("Whenever, after full opportunity for hearing, . . . the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge . . .")

- For managing the national parks to the Director of the National Park Service, an agency within the Department of the Interior,[252] and also to the Secretary of the Interior.[253]

For practical reasons, these agency heads delegate much of their authority to inferior officers and employees of the institution that colloquially is referred to as the "agency." But as a legal matter, the "agency" under the APA is the officer or multi-member body that Congress has by statute identified as the "authority." Read with this context in mind, the APA's regime becomes clearer. For example, it becomes more obvious that the APA directs the agency head to appoint ALJs[254] and reserves the agency head's authority to preside over hearings[255] and to review the recommended or initial decisions of ALJs.[256]

Whether the APA's regime conforms with the Court's emerging conception of Article II thus depends not on the APA itself but on the legal doctrines governing the relationship between the President and the agency

[252] *See, e.g.*, 54 U.S.C. § 100301 ("There is in the Department of the Interior a service called the National Park Service."); *id.* § 100302 ("The Service shall be under the charge of a director who shall be appointed by the President, by and with the advice and consent of the Senate.")

[253] *See, e.g.*, 54 U.S.C. § 100802 ("The Secretary shall ensure the management of [the National Park] System units and related areas is enhanced by the availability and use of a broad program of the highest quality interpretation and education."); *id.* § 100732 ("[A]ll activities resulting from the exercise of mineral rights on patented or unpatented mining claims within any System unit shall be subject to such regulations prescribed by the Secretary as the Secretary considers necessary or desirable for the preservation and management of the System units.").

[254] 5 U.S.C. § 3105 provides: "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 meaning of this provision is clear when one understands that the "agency" is, e.g., the Commissioner of Social Security or the Federal Communications Commission. Its meaning is obscured if one employs the colloquial understanding of "agency" in the sense of the entire institution of, e.g., the Social Security Administration, from the Commissioner and other leadership all the way down to the bottom of the organizational chart.

[255] 5 U.S.C. § 556(b) provides: "There shall preside at the taking of evidence—(1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges appointed under section 3105 of this title." Again, this provision makes far more sense when one employs the statutory rather than the colloquial understanding of "agency." *See supra* at note 254.

[256] 5 U.S.C. § 557(b) provides that "When the agency did not preside at the reception of the evidence," the ALJ shall issue an initial decision, and "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decisions except as it may limit the issues on notice or by rule." Again, this provision makes far more sense when one employs the statutory rather than the colloquial understanding of "agency." *See supra* at note 254.

heads. The APA does its part by creating a regime that ensures due process while giving appropriate policymaking control and decisional responsibility to the head of the agency. As explained above, in an executive branch agency whose head has no removal protection, the APA's regime undoubtedly conforms with the separation of powers. *Arthrex* controls this question.

Viewed from this perspective, it becomes clear that the real issue in *Jarkesy* is not the APA's constitutionality—it is the constitutionality of removal protection for that principal officers that collectively form the agency head.[257] This is not about the APA or adjudication. Rather, the question is whether and in what circumstances Congress can protect principal officers from at-will presidential removal.[258] At the moment, the key precedent, *Humphrey's Executor*, stands as an empty husk, it's holding retained but its reasoning discarded.[259] Putting the removal protections that historically have been the legal sine qua non of agency independence back on firm legal ground would require retheorizing *Humphrey's Executor*, a project that is beyond the scope of this Article.[260] It is also beyond the scope

[257] It should not be assumed, however, that all independent regulatory commissions have precisely the same structure. They do not. For example, SEC commissioners are appointed for terms but do not have explicit statutory for-cause removal protection. *See* 15 U.S.C. § 78d(a). Members of the Consumer Product Safety Commission (CPSC) do enjoy such protections, *see* 15 U.S.C. § 2053(a), but the statute provides that "[t]he Chairman of the Commission shall be the principal executive officer of the Commission, and he shall exercise all of the executive functions of the Commission," *id.* § 2053(f)(1). This structure would seem to draw upon the traditional conception of "administrative" power that the Supreme Court has increasingly rejected. *See infra* Part III. The CPSC's structure recently has been held unconstitutional. *See* Consumers' Research v. Consumer Prod. Safety Comm'n, 592 F.Supp.3d 568 (E.D. Tex. 2022). The case is on appeal to the Fifth Circuit.

[258] *Cf. Perkins*, 116 U.S. at 484 (recognizing that removal protections for inferior officers and removal protections for principal officers raise different constitutional questions).

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

[260] Briefly, a new theory might be grounded in a recognition that, in a multi-member agency structure, administrative authority is diffused among the members and removal protections only diffuse presidential responsibility in proportion. *Cf.* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 166 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (explaining how the unique structural characteristics of multi-member agencies might protect individual liberty and ensure presidential control.) In evaluating whether this structure is consistent with the separation of powers, the analysis should not be personal to a particular President but determined based on its effects on *the office* of the President. *Cf.* Daphna Renan, *The President's Two Bodies*, 120 Colum. L. Rev. 1119 (2020) (exploring the duality of the presidency—an indefinite office occupied by individual persons—and the implications of that duality for public law). In addition, it may be worth considering recent empirical work suggesting that these removal protections are less effective than is commonly assumed, which undercuts both the imperative for retaining them and the argument that they are unconstitutional. *See generally* David E. Lewis & Neal Devins, *The Independent Agency Myth*, ___ CORNELL L. REV. ___ (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4382394.

of the questions presented in *Jarkesy*. Hopefully, the Supreme Court will recognize this and wait for a more appropriate vehicle before eliminating what remains of *Humphrey's Executor*.

III. Implications for Administrative Theory

Beneath the surface of the current constitutional challenge to the APA's hearing regime are deeper disputes about the nature of administrative action and the place of administrative agencies within the Constitution's tripartite structure. This Part explains the conceptual problem, suggests how it might be resolved, and identifies how that resolution might speak to a broader tension that has emerged between two different strands of the Supreme Court's approach to administrative law.

A. A Deeper, Conceptual Challenge

Part II argued that the APA's ALJ regime is constitutional under the Supreme Court's separation of powers precedents. As a matter of lawyerly craftsmanship, *Arthrex* saves the regime from the infirmity that seemed apparent under *Free Enterprise Fund*. But there is a deeper, conceptual problem lurking here: to defend the APA by distinguishing between agency policymaking and adjudicative functions is to draw upon a conception of administrative power that prevailed during the New Deal era but has since become antiquated.[261] This deeper, conceptual challenge warrants independent evaluation.

The New Deal conception of administration, which informed the APA, is exemplified by the Supreme Court's reasoning in *Humphrey's Executor*.[262] In this case, the Supreme Court upheld for-cause removal protection for FTC commissioners on the theory that the insulation was necessary for the agency to perform functions requiring the application of impartial expertise.[263] The Court explained:

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave, and, in the contemplation of the statute, must be free from executive control. . . . To the extent that it exercises any executive function—as distinguished from executive power

[261] *See Rediscovered Stages*, *supra* note 11, at 442-47.
[262] 295 U.S. 602 (1935).
[263] *See* 295 U.S. at 628.

> in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.[264]

The Court distinguished *Myers v. United States* by characterizing an FTC Commissioner as "an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President."[265] The President's "executive power" includes the power to remove *executive* officers at will, but that power does not extend to *administrative* officers. In this formulation, administrative power is quasi-legislative and quasi-judicial and fundamentally *not executive*.

Although *Humphrey's Executor* involved the FTC, it appeals to a conception that was dominant in the New Deal era and was used to understand the "administrative" functions of both independent regulatory commissions and traditional executive departments. For example, the Supreme Court employed the same conception in a case involving the ratemaking functions of the Department of Agriculture.[266] And the Attorney

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[264] *Humphrey's Executor*, 295 U.S. at 628. The last sentence is particularly confusing because the bracketed language suggests the possibility that the FTC exercises executive power, while the remainder denies the idea that the FTC could be an agency of the executive. This apparent disconnect between power and structure was the defining feature of independent agencies and contributed substantially to the charge that such agencies make up a "headless 'fourth branch' of Government, a haphazard deposit of irresponsible agencies and uncoordinated powers" that "do violence to the basic theory of the American Constitution that there should be three major branches of the Government and only three." REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT 38-39 (1937); *see also* FTC v. Ruberoid Co., 343 U.S. 470, 487-88 (1952) (Jackson, J. dissenting) ("[Administrative bodies] have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories as much as the concept of a fourth dimension unsettles our three-dimensional thinking."). The term "fourth branch" soon expanded to include agencies located in the executive branch, however, because it was obvious that many such agencies were charged with similarly "administrative" functions, while many independent agencies also executed the law. *See, e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579 (1984) ("The Department of Agriculture and the Securities and Exchange Commission both adopt rules, execute laws, and adjudicate cases, all pursuant to statutory authority."); JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 6 (1978) ("In virtually every relevant respect, the administrative process has become a fourth branch of government, comparable in the scope of its authority and the impact of its decision making to the three more familiar constitutional branches.").

[265] *Humphrey's Executor*, 295 U.S. at 628; *see also Seila Law*, 140 S. Ct. at 2198 ("Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'").

[266] *See* Morgan v. United States, 298 U.S. 468, 481-82 (1936); *Rediscovered Stages*, *supra* note 11. *Morgan* doesn't cite *Humphrey's Executor*, suggesting that the latter's

General's Committee on Administrative Procedure used it to define the scope of its study of the procedures and practices of "administrative" agencies.[267] The Committee accordingly limited itself to examining only the agencies or divisions of agencies that affected private parties through the performance of quasi-legislative or quasi-judicial functions.[268] It defined these as the quintessential "administrative" functions and, importantly, "treated administration and executive action as two separate and mutually exclusive options available to Congress" for achieving legislative ends.[269] Purely executive agencies, departments, and programs were omitted from the Committee's study and, ultimately, from the APA.[270]

The New Deal-era conception of administrative action as exclusively quasi-legislative and quasi-judicial and fundamentally *not* executive infuses the APA.[271] The statute only regulates *administrative* action, which it divides into the mutually exclusive categories of rulemaking (quasi-legislative) and adjudication (quasi-judicial).[272] Executive action accordingly was left unregulated by the statute.

The difficulty is that recent decisions of the Supreme Court expressly have rejected the New Deal conception, embracing an alternative understanding of administration as necessarily entailing the exercise of executive power.[273] For example, in *Morrison v. Olson*, both the majority and the dissent characterized the independent counsel's functions as executive, disagreeing primarily over how to define the Executive branch's "turf."[274] In so doing, the Court noted that "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered

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conception of administrative power was less novel and more dominant than modern readers assume. *See id.*

[267] *See* FINAL REPORT, *supra* note 14, at 11.

[268] *See, e.g.*, FINAL REPORT, *supra* note 14, at 7 ("The Committee has regarded as the distinguishing feature of an 'administrative' agency the power to determine, either by rule or by decisions, private rights and obligations."); *id.* at 8 n.1 ("[I]mportant agencies such as the Tennessee Valley Authority, the Office of Education, the Federal Works Agency, the National Youth Administration, and the Civil Conservation Corps are agencies which perform functions of great public significance, but they are here omitted because their importance lies in fields other than rule-making or adjudication.").

[269] *Rediscovered Stages*, *supra* 11, at 442 (citing FINAL REPORT, *supra* note 14, at 11); *see also* FINAL REPORT, *supra* note 14, at 11-12 (elaborating on the distinction between "executive" and "administrative" agencies and programs).

[270] *See* FINAL REPORT, *supra* note 14.

[271] *See* Pat McCarran, *Foreword* to ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY iii (1946).

[272] *See* 5 U.S.C. §§ 551(4)-(9); FINAL REPORT, *supra* note 14, at 7, 8 n.1.

[273] *See Rediscovered Stages*, *supra* note 11, at 446-47.

[274] *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1519 (1991).

'executive,' at least to some degree."[275] The Court in *Seila Law* similarly noted that "the Court's conclusion [in *Humphrey's Executor*] that the FTC did not exercise executive power has not withstood the test of time."[276] The *Seila Law* Court also explained that the CFPB "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy,"[277] and yet characterized it as "an independent agency that wields significant executive power."[278] This characterization is oxymoronic under the New Deal conception of administration. But today's Court rejects that conception. Although the Court so far has refused to "revisit" or overrule *Humphrey's Executor*,[279] it has reduced that foundational precedent to a simple "exception" to the background rule of at-will presidential removal.[280] In the Court's modern conception, administration necessarily entails the exercise of executive power.[281] Even the dissenting justices in *Seila Law*

[275] *Morrison*, 487 U.S. at 690, n. 28.

[276] *Seila Law*, 140 S. Ct. at 2192; *see also* Daniel A. Crane, *Debunking* Humphrey's Executor, 83 GEO. WASH. L. REV. 1835, 1839 (2016) (arguing that over time, the FTC has proven to be "the executive agency that the *Humphrey's Executor* Court denied it was").

[277] *Seila Law*, 140 S. Ct. at 2191.

[278] *Seila Law*, 140 S. Ct. at 2192. In *Free Enterprise Fund*, the Court similarly understood Congress to have "grant[ed] the [PCAOB] executive power." 561 U.S. at 498. And in *Collins*, the Court understood the FHFA to be exercising executive power "even when it acts as a conservator or receiver" for a regulated entity because "[i]n deciding what it must do, what it cannot do, and the standards that govern its work, the FHFA must interpret the Recovery Act, and '[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.'" 141 S. Ct. at 1761 (quoting Bowsher v. Synar, 478 U.S. 714, 733 (1986)).

[279] *Seila Law*, 140 S. Ct. at 2206.

[280] *Seila Law*, 140 S. Ct. at 2189. *see also* Richard E. Levy & Robert Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 78 (2020) (explaining that the Supreme "Court embraced a strong unitary executive theory under which the President's power to remove officers 'at will' is the default rule," and "[t]he exception in *Humprey's Executor* [i]s limited to multimember quasi-legislative and quasi-judicial bodies"); Richard W. Murphy, *The DIY Unitary Executive*, 63 ARIZ. L. REV. 439, 466-67 (2021) ("*Humphrey's Executor*, as recast, creates an exception 'for multimember expert agencies that do not wield substantial executive power.'" (quoting *Seila Law*, 140 S. Ct. at 2199-200)); Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 85 ("With *Myers* as the defining case, the Court said that it had recognized only two exceptions to the strongly unitary executive," including one for "'expert agencies led by a *group* of principal officers removable by the President only for good cause[.]'" (quoting *Seila Law*, 140 S. Ct. at 2192)).

[281] *E.g.*, City of Arlington v. FCC, 569 U.S. 290, 305, n.4 (2013) (explaining that administrative actions "are exercises of—indeed under our constitutional structure they *must be* exercises of—the 'executive Power'"); *see also Collins*, 141 S. Ct. at 1786 ("[T]he FHFA clearly exercises executive power."); *Seila Law*, 140 S. Ct. 2183, 2201 (describing the CFPB as "an independent agency led by a single Director and vested with significant executive power"); *Free Enterprise Fund*, 561 U.S. at 498 (understanding the Sarbanes-Oxley Act to "grant[] the [PCAOB] executive power").

agreed that "[t]he majority is quite right that today we view *all* the activities of administrative agencies as exercises of the executive power."[282]

B. Institutional Structures Empower the President

It is perhaps notable that the modern, executive conception of administrative power has emerged primarily through cases involving agencies vested with significant discretionary or policymaking functions, including investigation, enforcement, and rulemaking. More broadly, since the shift from adjudication to rulemaking in the 1960s and 70s,[283] administrative law has been heavily influenced by judicial decisions issued on review of such quasi-legislative agency action.[284] The Court's recent

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[282] 140 S. Ct. at 2234 n.7 (quoting *City of Arlington*, 569 U.S. at 305, n.4) (quotation marks omitted).

[283] *See, e.g.*, M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1384-85 (2004) ("In the 1950s and 1960s, most administrative agencies implemented their statutes by deciding individual cases; by the 1970s, a detectable shift had occurred and most administrative agencies pursued their mandates by promulgating legislative rules."); Antonin Scalia, Vermont Yankee*, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 376 ("[T]he most notable development in federal government administration during the past two decades" is "the constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking.").

[284] A locus of this phenomenon is the Supreme Court's 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which established the standard governing the scope of judicial review of an agency's interpretation of a statute it administers and has reigned for at least two decades as "the most-cited administrative law case of all time." Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 938 (2018); *see also, e.g.*, Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1044 (2017) ("By 2000, *Chevron* had become one of the most cited and applied Supreme Court decisions in history."); Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2227 (identifying *Chevron* as "one of the most important constitutional law decisions in history"). *Chevron* deference applies to agency actions that have a quasi-legislative "force of law," *see* United States v. Mead Corp., 533 U.S. 218 (2001); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 471 (2013), and it casts a long shadow in the field of administrative law, structuring how agencies, scholars, and courts understand the place of agencies in our federal system, *see, e.g.*, ADRIAN VERMEULE, LAW'S ABNEGATION 13 (2016) (holding up *Chevron* merely as an exemplar of "the trend of [judicial] deference" that is a "global feature of law in the administrative state"); Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 28-44 (2017) (empirically evaluating how *Chevron* affects judicial review of agency action in the U.S. Courts of Appeal); Christopher J. Walker, *Inside Statutory Interpretation*, 67 STAN. L. REV. 999, 1007, 1019-20 (2015) (empirically evaluating how *Chevron* affects agency statutory interpretation); *cf.* Kurt Eggert, *Deference and Fiction: Reforming* Chevron*'s Legal Fictions after* King v. Burwell, 95 NEB. L. REV. 702, 721 (2017) ("*Chevron* is so often discussed in the legal academy that there is even a small cottage industry of scholarship referring to *Chevron* scholarship as a 'cottage industry.'").

opinion in *Collins v. Yellen* focuses entirely on such functions because "the FHFA is not an adjudicatory body."[285] In *Free Enterprise Fund*, although the PCAOB has adjudicative functions, the majority left them out of its separation of powers analysis.[286] In a footnote, the Court explained that its disapproval of dual for-cause removal structures "does not address that subset of independent agency employees who serve as administrative law judges" because "unlike members of the [PCAOB], many [ALJs] of course perform adjudicative rather than enforcement or policymaking functions . . . or possess purely recommendatory powers."[287] In *Seila Law*, the Court acknowledged the CFPB's adjudicatory functions,[288] but it downplayed them in its separation of powers analysis, placing greater emphasis on the agency's non-adjudicatory functions. For example, the Court distinguished the CFPB from the SSA—which has been headed by a single Administrator since 1994—because "unlike the CFPB, the SSA lacks the authority to bring enforcement actions private parties. Its role is largely limited to adjudicating claims for Social Security benefits."[289] The result in these cases is in accord with the broader trend in administrative law doctrine: to afford central importance to the agencies' policymaking discretion. With respect to this aspect of administrative action, the Court's motivating concerns—preserving presidential control and promoting political accountability—fit most naturally.[290]

The Supreme Court has clearly indicated, however, that its executive conception of administrative action applies to agency adjudication. In *City of Arlington v. FCC*, the Court explained that "[a]gencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take 'legislative' and 'judicial' form, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the 'executive' power."[291] Most recently, in *Arthrex*, the Court described the PTAB as "an executive tribunal within the PTO,"[292] and explained that although "the duties of APJs 'partake of a Judiciary quality as well as Executive,' APJs are still exercising executive power and must remain

[285] 141 S. Ct. at 1783 n.18.

[286] *See Free Enterprise Fund*, 561 U.S. at 530-31 (Breyer, J., dissenting) (describing the Board's adjudicatory functions and criticizing the majority for "all but ignor[ing]" those functions).

[287] *Free Enterprise Fund*, 561 U.S. at 507 n.10.

[288] *Seila Law*, 140 S. Ct. at 2191, 2193, 2200, 2201.

[289] *Seila Law*, 140 S. Ct. at 2202.

[290] *See, e.g.*, Crane, *supra* note 276.

[291] *City of Arlington*, 569 U.S. at 304 n.4; *see also* Baude, *supra* note 228.

[292] 141 S. Ct. at 1976; *see also id.* at 1977 ("This suit centers on the [PTAB], an executive adjudicatory body within the PTO established by the Leahy-Smith America Invents Act of 2011.")

'dependent upon the President."[293] It would seem that the APJs, like the ALJs that are at issue in *Jarkesy* and were distinguished by the Court in *Free Enterprise Fund*, have exclusively adjudicative functions. As explained in Part II, *Arthrex* strongly suggests that for-cause removal protections for purely adjudicative officers are constitutional provided that the statutory regime provides for agency head review of those officers' decisions. The majority opinion does more to explain its insertion of agency head control into the PTAB regime, however, than it does to justify its decision not to sever the statute's for-cause removal protection for the APJs. But both sides of this trade-off, which surprised many and was controversial, must be important. So why did the Court save the APJ's for-cause protection?

It appears that, although the Supreme Court today views administration as necessarily entailing the exercise of executive power, it continues to recognize that: (1) administrative action may take either quasi-legislative or quasi-judicial forms; and (2) the distinction matters for evaluating whether a statutory regime is consistent with the separation of powers. With respect to the quasi-legislative aspects of agency action (i.e., discretion to make policy), the Supreme Court has taken the position that Article II requires the President to have control over and responsibility for the officer(s) to whom Congress has assigned the relevant statutory duty.[294] This can be achieved by affording the President the power to remove the officer at will. Or, at least when the officer is a front-line adjudicator, it can be achieved through agency head review of the officer's decisions.[295]

Formal adjudicatory hearings, as contrasted with rulemaking and informal (non-hearing) adjudication, have a genuinely quasi-judicial character.[296] As previously explained, they are conducted toward the end of the administrative process, to resolve otherwise intractable disputes between

[293] *Arthrex*, 141 S. Ct. at 1982 (quoting 1 Annals of Cong., at 611–612 (J. Madison)).

[294] Note that the quasi-legislative aspect of agency action may be present in both rulemaking and adjudication. As noted previously, the APA's definitions were inspired by these pre-APA concepts, but they do not line up perfectly. *See supra* note 15. An advantage of the APA's definitions is that they are clear and simple compared to the pre-APA categories. It may be regrettable that the Court's recent separation of powers cases have made it necessary to resurrect the pre-APA categories. *Cf.* HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 8 (1962) (critiquing "the sport, once so popular, of attempting to determine how far [administrative adjudication] is judicial or legislative or executive, even 'softened with a *quasi*'" (quoting Springer v. Philippine Islands, 277 U.S. 189, 210 (1928) (Holmes, J., dissenting)).

[295] *See Arthrex*, 141 S. Ct. at 1983-85 (PTO Director review of decisions issued by for-cause protected APJs satisfies the separation of powers); *Free Enterprise Fund*, 561 U.S. at 504-05 (for-cause protection for PCAOB members violates separation of powers because SEC powers to control Board's activities did not extend to investigations and was otherwise too weak).

[296] *See Rediscovered Stages*, *supra* note 11.

the agency and a private party about how an individual case should be resolved under the law. They often involve a determination that implicates the private party's right to life, liberty, or property. And they also involve little in the way of policymaking.[297] In this narrow stage are to be found the most legalistic aspects of the administrative process.[298] Indeed, when one focuses on formal adjudicatory hearings, the compulsory aspects of administration swiftly rise to the fore. Employing the modern, executive conception of administrative action only clarifies that, at the level of constitutional law, formal hearings implicate the commands of *both* the Take Care Clause[299] *and* the Due Process Clause.[300] As Justice Robert Jackson explained in *Youngstown Sheet & Tube Co. v. Sawyer*, the former "gives a governmental authority that reaches so far as there is law," while the latter "gives a private right that authority shall go no farther."[301] Formal hearings enable agencies to reach a final decision when a private citizen objects that the law does not reach as far as the agency thinks it does. These proceedings are where the rubber meets the road for ensuring administrative conformity to "the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules."[302]

When an agency issues a final decision after an adjudicatory hearing, it must discharge a variety of legal duties imposed by the Constitution, statutes, regulations, and judicial decisions.[303] The goal is to produce a sound decision—one that might be accepted by the affected party and, if not, will

[297] *See* Golden & Lee, *supra* note 225, at 403-404.

[298] *See generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM (2d ed. 2019).

[299] U.S. CONST. art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed").

[300] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); *cf.* Frederic P. Lee, *Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 309 (1948) ("[I]t is a duty of the courts, and not exclusively that of the Executive, to see to it not only that 'the laws be faithfully executed' but also that discretion committed to the executive under the laws be fairly administered.")

[301] 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

[302] 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

[303] These obligations often overlap and are grounded in more than one source of law. *See, e.g.*, Gerald L. Neuman, *The Constitutional Requirements of "Some Evidence,"* 25 SAN DIEGO L. REV. 631, 659 (1988) (explaining that the minimum constitutional requirement of evidentiary support "is a guarantee of 'due process,' and protects against 'arbitrary' decisions'" (quoting ICC v. Louisville & Nashville R.R. Co., 227 U.S. 88, 91 (1913)). Many instances of such overlap reflect the historical reality that the APA codified many principles of law that had been established by pre-APA judicial decisions grounded in constitutional due process. *See Rediscovered Stages*, *supra* note 11; *see also* Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1900 (2016) ("When the APA was drafted, the 'arbitrary and capricious' language was lifted from the extant due process caselaw and adapted as a statutory standard of review.").

survive judicial review.[304] A sound decision is one that faithfully executes the statute the agency is charged with administering.[305] In a formal adjudication, the decision must be based exclusively on the hearing record.[306] The decision must be non-arbitrary,[307] with factual findings supported by substantial evidence on the record as a whole.[308] These foundational requirements are typically understood to be based in ordinary administrative law or the APA. That's right but incomplete because most of the requirements are rooted more deeply, in fundamental principles of due process.[309]

The office of the ALJ is critical for agencies to discharge these duties. In formal hearings—as in most areas of administration—agency leadership must be able to rely on subordinate officers to competently perform their functions. Although the APA preserves agency head control over the ALJ's

[304] These possibilities are interconnected because a private party's decision about whether to seek judicial review will be made at least in part based on a prediction about the likelihood of prevailing before the courts. It also bears noting that, although the discourse in administrative law often seems to assume that judicial review is inevitable, that's not so. Comprehensive data is not presently available, but even a cursory look at available data reveals that judicial review is sought relatively rarely. *See Power Corrupts*, *supra* note 24.

[305] *See* U.S. CONST. art. II, § 3; 5 U.S.C. § 706(2)(C) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."). The Take Care Clause's passive voice suggests a constitutional obligation on *both* the agencies *and* the President. That is, the President must "take Care that the Laws be faithfully executed" by the heads of the departments, who in turn are responsible for ensuring that their subordinates faithfully execute the law.

[306] *See* 5 U.S.C. §§ 556(e) ("The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title."); *Morgan*, 298 U.S. at 480-82 (holding that the Secretary of Agriculture violated constitutional due process by issuing a decision based on considerations outside the hearing record).

[307] *See, e.g.*, 5 U.S.C. § 706(2)(A); Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983).

[308] *See, e.g.*, 5 U.S.C. § 706(2).

[309] For example, the APA's arbitrary and capricious review standard has roots in the due process principle against arbitrary government action. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (explaining that the "touchstone of due process is protection of the individual against arbitrary action of the government"); Emily Berman, *A Government of Laws and Not of Machines*, 98 B.U. L. REV. 1277, 1347 (2018) ("What process is due will vary depending on the relative strength of the government's and the individuals' interests, but the *purpose* of due process is to ensure that the government reaches accurate—i.e., individualized, non-arbitrary—decisions to the extent possible.") (footnotes omitted); David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U. L. REV. 1013, 1021 (2018) ("Arbitrary and capricious review of executive orders followed logically from cases reviewing non-presidential actions, since the Court applied the same reasonableness test to all government actions—including presidential, agency, and legislative actions—under the Due Process Clause."); Simona Grossi, *Procedural Due Process*, 13 SETON HALL CIRCUIT REV. 155, 163 (2017) ("[T]o comply with due process an action ought to accord with an established, non-arbitrary standard of law.").

initial decisions, the agency head is not required to review every ALJ decision and, in many agencies, such review rarely or never occurs.[310] This reflects the practical reality that agency heads have enormous responsibility and must reserve their limited attention. To do the job, principal officers *must* delegate and rely on inferior officers, including ALJs, to faithfully execute the law, follow agency regulations and guidance, and do their jobs competently. This need to rely on competent subordinates only becomes more critical for the highest officer in the Executive branch: the President. "Presidents (and their staff) lack the bandwidth to micromanage adjudications of millions of individual cases across different agencies and policy areas."[311] The APA's regime is well designed to ensure that agency heads and, in turn, the President, can rely on ALJs to have the individual competence and institutional position necessary to discharge their significant responsibilities.

Thus, the seemingly restrictive provisions of the APA's hearing regime, including its for-cause removal protections for adjudicators, are necessary to enable the President to "take Care that the Laws be faithfully executed" through adjudicatory hearings.[312]

C. A Path Toward Resolving a Broader Tension

The current dispute regarding the constitutionality of the APA's ALJ regime may also offer the Court an opportunity to reconcile a broader tension that has emerged in its separation of powers cases. Several scholars have noted this tension, with some variation in how they identify and describe it. After the Court decided *Lucia* and *Oil States*, Christopher Walker observed that a constitutional tension was emerging in agency adjudication between the need for political accountability and the dangers of political control.[313] Adam Cox and Emma Kaufman more recently have argued that the Supreme Court's formalist approach to separation of powers and its embrace of a unitary executive theory of the presidency "run[] aground when it comes to administrative courts."[314] They use immigration adjudication—a context that is not governed by the APA's hearing regime—to demonstrate how the commitment to political control of administrative adjudication can result in systematic devaluation of due process and faithful execution. Finally, Jodi Short and Jed Shugerman have argued that there is a "contradiction" between the Court's unitary executive theory in appointment and removal cases and

[310] Some agency heads rarely review ALJ decisions as a practical matter, while others (most notably the SSA) have created an internal review structure that eschews agency head review. *See* Eisenberg & Mendelson, *supra* note 123, at 122-31.

[311] Chachko, *supra* note 27, at 1123.

[312] U.S. CONST. art. II, § 3; *see also id.* art. I, § 8, cl.

[313] Walker, *supra* note 38, at 2680.

[314] Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1771 (2023).

its failure to take due account of the President's support for policies challenged and struck down in major questions cases.[315]

Embracing the compulsory aspects of administration offers a possible resolution for these tensions. With respect to the discretionary aspects of administration, political control of unelected officials through the Presidency may serve democratic values. But much administrative action is *not* discretionary. To the contrary, it requires faithful execution of the laws that Congress has enacted, regardless of whether the current occupant of the office of the President politically supports those policies. In the context of adjudication, due process also requires an adjudicatory hearing conducted by an impartial adjudicator, resulting in a final decision based exclusively on the hearing record and reversed, if at all, through the transparent mechanism of review on appeal to the agency head. Here, as in the context of the major question cases, the agency's duty and the President's constitutional obligation is to faithfully execute the law. Administrative law principles that constrain the administration to fulfill this duty are entirely consistent with the Supreme Court's formalist approach to the separation of powers.[316]

Conclusion

Administration is always a blend of duty and discretion. Administrative law tends to focus on discretion, a tendency that perhaps has been amplified by the shift from adjudication to rulemaking. If agencies are exercising executive power in making discretionary decisions, the case for political control of those decisions by the President is relatively obvious. In formal adjudication, however, administration involves more duty than discretion: duty to conform to due process, to competently conduct hearings, to decide based only on the record, and to faithfully execute the law in individual cases. In this context, political control should be more limited. And properly designed restrictions and institutional structures are necessary to enable to the President to discharge her constitutional obligations under Article II. The APA strikes the right balance between political accountability and the constraints of due process and faithful execution, offering a regime well designed to promote properly presidential adjudication.

[315] *See* Jodi L. Short & Jed H. Shugerman, *Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, at 2-3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4531721.

[316] *See generally* Glicksman & Levy, *supra* note 37.