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Comments of Richard J. Pierce, Jr. on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication

Docket Number OMB-2019-0006

February 11, 2020

Introduction

My name is Richard J. Pierce, Jr. I am submitting these comments as a teacher and scholar in the field of administrative law and government regulation. I am the Lyle T. Alverson Professor of Law at George Washington University. I have taught, researched and written about administrative law and government regulation for over forty years. I have written over twenty books and over one hundred and thirty scholarly articles on the subject. My books and articles have been cited in hundreds of judicial opinions, including over a dozen opinions of the U.S. Supreme Court. I can be reached at rpierce@law.gwu.edu or 703-304-1623. I have long been the author of the most frequently cited Treatise in the field of administrative law. I added Professor Kristin Hickman, Distinguished McKnight University Professor and Harlan Albert Rogers Professor of Law at the University of Minnesota, as a co-author of the Sixth Edition that was published in 2019.

On January 30, 2020, the Office of Management and Budget (OMB) issued a Notice in which it announced that it wanted to identify “reforms that will ensure adequate due process in regulatory enforcement and adjudication” and that it was soliciting comments from the public to aid it in that process. 85 Fed. Reg. 5483. The Notice included eleven questions that OMB identified as “topics of interest” on which it invited feedback. I will comment primarily on four of those topics on which I have particular expertise—application of *res judicata* to agency adjudicative decisions, presumptions and burdens of proof in agency adjudications, evidentiary rules in agency adjudications, and the independence of agency adjudicators. I will begin, however, by making an important point that applies generally to the entire OMB effort to obtain useful input on the eleven points that OMB has identified.

The Notice states that: “Abstract, general principles will do little to advance actionable reform.” I agree. The Notice also states that OMB seeks “specific, concrete examples of current due process shortfalls.” That suggests that OMB is open to the possibility of relying on anecdotes as the basis for reforms. Anecdotes are potentially useful as means of illustrating a problem that has been identified and documented in a study. Anecdotes are worthless as evidence in support of the need to make a reform.

Changes in law can only be supported by studies. Studies rely on data and analysis to support findings. Courts regularly hold that an agency is only required to address and to respond to comments that are “well-supported” by data and analysis. See the cases discussed in Kristin Hickman & Richard Pierce, *Treatise on Administrative Law* §§5.4 and 10.4 (6th ed. 2019). OMB should ignore anecdotes that are described in comments unless those anecdotes are supported by findings based on studies.

Each of the issues on which OMB has requested comments has been the subject of numerous studies. The best single source of studies of those issues is the Administrative Conference of the United

States (ACUS). ACUS is a federal agency that studies the ways in which agencies make decisions and recommends reforms in agency procedures. ACUS has one hundred and one members who vote on whether to make recommendations based on the studies it sponsors. Fifty of the members are experts on administrative law who work for the federal government. Forty of the members are experts in administrative law who are employed in the private sector. Ten are members of a Council that has the power to veto a recommendation. One member is the Chairman. The Chairman and the members of the Council are appointed by the President.

Most ACUS recommendations are approved by a unanimous vote of the members. Before ACUS votes on recommendations for reform, it commissions a comprehensive study of a practice that is a candidate for reform. The study is completed by one or more consultants who are chosen because of their expertise on the issues to be studied. The consultant submits his or her report, along with draft recommendations for reform, to an ACUS committee that consists of public and private members and at least one Council member. The committee then meets to discuss the report and proposed recommendations. Typically, the committee meets several times for many hours to discuss the report and proposed recommendations. The committee then submits its proposed report and recommendations to the Council, which has the power to amend the recommendations and often exercises that power. The amended proposed recommendations are then presented to the entire membership of ACUS at a semi-annual plenary conference. Additional amendments are often made at the plenary. The proposed recommendations are adopted only if the membership votes to approve the recommendations. Most ACUS decisions are unanimous.

ACUS has performed the functions of studying the administrative process and recommending reforms in that process since 1964. Its members and consultants have included virtually every nationally recognized expert on government regulation and the administrative process. Thus, for instance, Antonin Scalia was Chairman of ACUS before he became a Supreme Court Justice. In Congressional testimony, Justice Scalia referred to ACUS as “one of the best bargains for the buck” in the federal government. The ACUS website has tens of thousands of pages of studies of every “topic of interest” that OMB has identified in its Notice. I urge OMB to begin its consideration of potential reforms of the administrative adjudication process by reading the reports that are readily accessible on the ACUS website.

I. Res Judicata

OMB asked: “Would applying the principle of res judicata in the regulatory context reduce duplicative proceedings? How would agencies effectively apply res judicata?”

My answer: As I describe and document in detail in my Treatise, res judicata has long applied to agency decisions made in adjudications, and collateral estoppel has long applied to agency findings of fact made in adjudications if the agency used procedures that courts consider adequate. Kristin Hickman & Richard Pierce, *Administrative Law Treatise* §15.3 (6th ed. 2019). It is as easy to apply res judicata and collateral estoppel to agency adjudicative decisions as it is to apply those doctrines to judicial decisions.

There is one difference between the application of collateral estoppel to agency decisions and the application of collateral estoppel to judicial decisions. As I explain in detail in my Treatise, collateral estoppel does not apply against the government on an issue of law. Kristin Hickman & Richard Pierce, *Administrative Law Treatise* §15.4 (6th ed. 2019). The Supreme Court has refused to apply collateral estoppel against the government on an issue of law for two reasons. It wants issues to be addressed by

multiple circuit courts before they come before the Supreme Court, and it wants agencies to apply federal law in a uniform manner across the country to the extent that the regional structure of the federal courts permits.

II. Presumptions and Burdens of Proof

OMB asked: “In the regulatory/civil context, when does an American have to prove an absence of legal liability? Put differently, need an American prove innocence in regulatory proceeding(s)? What reform(s) would ensure an American never has to prove the absence of liability? To the extent permissible, should the Administration address burdens of persuasion and /or production in regulatory proceedings? Or should the scope of this reform focus strictly on an initial presumption of innocence?”

My answer: There is no presumption of innocence in any civil proceeding either in court or at an agency. The presumption of innocence applies only in criminal proceedings. No agency has the power to adjudicate a criminal case. Only the Department of Justice can initiate a criminal case, and a criminal case can only be adjudicated in a court.

The law governing burden of proof and presumptions is the same in civil proceedings in court and in agency adjudications. No one must prove absence of liability in any regulatory proceeding. The proponent of a change in the status quo bears the burden of proof in agency adjudications. Thus, the agency bears the burden of proof in an enforcement proceeding.

Courts sometimes shift the burden of production on an issue from the proponent to another party if there is reason to believe that the other party has unique access to the evidence that is relevant to the resolution of the issue. In most such cases the proponent continues to bear the risk of non-persuasion. I am not aware of any context in which agencies engage in this practice.

As in civil cases in court, a presumption can have the effect of changing the burden of proof in agency adjudications. Presumptions are based on correlations coupled with problems in obtaining direct evidence on an issue. Thus, for instance, if we know that fact X is almost invariably true when fact Y is true, and we know that it is much more difficult to obtain evidence relevant to the existence of fact X than it is to obtain evidence relevant to the existence of fact Y, we presume the existence of fact X when the party with the burden of proof proves that fact Y exists.

Most presumptions in both civil cases in court and in agency adjudications are rebuttable. Thus, in my example, if the party with the burden of proof proves the existence of fact Y, the other party then has the burden of proving the non-existence of fact X. In some cases in both civil cases in court and in agency proceedings, the presumption is irrebuttable, i.e., if the party who has the burden of proof proves the existence of fact Y, fact X must be found to be true.

An agency does not have the power to change the burden of proof or to create presumptions of any type in an adjudication unless Congress has specifically authorized the agency to do so. 5 U.S.C. §556(d) provides: “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” Congress sometimes authorizes an agency to use the notice and comment rulemaking process to issue a rule that creates a presumption, and Congress can always create a presumption by statute.

Thus, for instance, when the FAA decides whether to issue or renew the license of an elderly commercial passenger aircraft pilot, it must decide whether age has had such an adverse effect on the pilot's health that issuing or renewing the pilot's license would impose an undue risk on the flying public. That determination is so difficult to make in a timely and accurate manner in the thousands of cases in which the agency must make it every year, that FAA has always relied on an irrebuttable presumption based on age.

For decades, FAA applied the "age sixty rule" that it adopted through use of the notice and comment process. The "age sixty rule" prohibited anyone over the age of sixty from obtaining or renewing a license to pilot a commercial passenger aircraft. The Federal Aviation Act of 1958 conferred on the FAA the power to determine by rule the qualifications to fly a commercial aircraft. The FAA adopted the age sixty rule to implement the Federal Aviation Act of 1958.

The age sixty rule was challenged in numerous cases, but courts always upheld it based on the evidence that FAA provided. That evidence demonstrated that there was a powerful correlation between unacceptable health risks to pilots and a pilot's age once the pilot reaches the age of sixty, and that FAA could not possibly conduct all of the hearings required to make timely and accurate determinations that each of thousands of pilots over the age of sixty has a health state that enables him to pilot commercial passenger aircraft with acceptable risks to the public. See e.g., *Yetman v. Garvey*, 261 F. 3d 664 (7th Cir. 2001).

In 2007, Congress enacted a statute that eliminated the absolute prohibition on renewing the license of a pilot over the age of sixty and allowed pilots over sixty but under sixty-five to renew their licenses subject to strict conditions, e.g., a plane must have at least one pilot under the age of sixty in the cockpit at all times, and pilots over sixty must pass a comprehensive physical examination every six months. Fair Treatment of Experienced Pilots Act, Pub. L. No. 110-135. The statute also created a new irrebuttable presumption that renders all applicants to obtain or to renew a license to pilot a commercial passenger aircraft ineligible once they reach the age of sixty-five. Congress found that the changes it made by statute in 2007 were desirable partly because of advances in our ability to evaluate the health state of elderly pilots and partly because other countries and international aviation authorities had changed their rules by replacing sixty with sixty-five as the maximum age for eligibility to obtain or renew a license to pilot a commercial passenger aircraft.

III. Rules of Evidence

OMB asked: "What evidentiary rules apply in regulatory proceedings to guard against hearsay and/or weigh reliability and relevance. Would the application of the Federal Rules of Evidence create a fairer evidentiary framework, and if so, which rules?"

My answer: I have taught and written about the Federal Rules of Evidence for forty-three years. I have also devoted countless hours to the study of the specific questions that OMB asks.

A. The Federal Rules of Evidence Are Designed for Use in Jury Trials

The Federal Rules of Evidence (FRE) are extremely long and complicated. They have no application to agency adjudications. By contrast the rules of evidence applicable to agency adjudications are short: "Any oral or documentary evidence may be received, but the agency, as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. §556(d). A few

agencies are required by statute to apply the FRE “so far as practicable,” and a few have adopted that standard in their rules of procedure.

I conducted a comprehensive study of the question of what rules of evidence agencies should use in my role as a consultant for ACUS. The report of the results of that study is available at 1986 ACUS 133 (1986), and 39 Administrative Law Review 1 (1987). See also Kristin Hickman & Richard Pierce, Administrative Law Treatise Chapter 9 (6th ed. 2019). On the basis of my report, and after a great deal of study and discussion in committee meetings and during the plenary, ACUS made several unanimous recommendations. Those recommendations are reported at 1986 ACUS 6 and were published at 51 Fed. Reg. 25642.

ACUS unanimously recommended that agencies should not use the FRE with or without the qualifier “so far as practicable.” ACUS recommended that agencies should use only the rule of evidence stated at 5 U.S.C. §556(d), with the addition of FRE 403, the rule that authorizes a court to exclude evidence if “its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

The reason for the ACUS recommendation is easy to understand. The FRE are designed for use in jury trials. They reflect our ambivalence about the institution of jury trial. The high regard we have for the jury is reflected in our inclusion of the right to jury trial in both civil and criminal cases in the Sixth and Seventh Amendments of the Constitution. On the other hand, we distrust the ability of jurors to use their cognitive skills to make findings based on evidence, and we fear that they will instead make decisions that are based on emotional responses to evidence that has low probative value but high emotional impact. The psychology literature includes many studies that provide a basis for this fear.

Juries are irresponsible decision makers. Once jurors are exposed to some item of evidence we have no way of knowing whether or to what extent their decision making was influenced by evidence that has low probative value and high emotional impact. The only way that we can be sure that jurors do not act on the basis of such evidence is by precluding them from becoming aware of such evidence by excluding it.

By contrast, agencies are responsible decision makers. Agencies and the Administrative Law Judges (ALJs) who preside in agency hearings are required to explain why they take an action in an adjudication, including the findings of fact on which they base the action and the evidence they considered in the process of making those findings. There is no reason to use the complicated and crude proxies for reliability that are reflected in the FRE at the point of the decision to admit evidence. If an ALJ relies on unreliable evidence as the basis for a finding it is easy for the agency to detect the error and correct it in the process of reviewing the ALJ’s findings. If an agency errs and relies on unreliable evidence as the basis for a finding it is easy for a reviewing court to detect that error in the process of evaluating the quality of the evidence on which the agency relied in making its findings of fact.

It bears noting that neither the FRE nor the evidentiary rules that apply to agencies codify any of the many privileges that protect some important forms of evidence from public disclosure in a court or agency proceeding. The common law of privileges, with some additions that have been created by statute, applies equally to adjudications in court and to adjudications in agencies. Thus, neither a court nor an

agency can admit evidence that falls within the scope of the attorney-client privilege or any of the privileges, such as executive privilege, that apply to some government documents and communications.

B. Admissibility of Hearsay

The FRE prohibit the admission of hearsay evidence subject to thirty-one complicated exceptions, including a residual exception that allows a federal judge to admit hearsay evidence if the judge determines that it has “circumstantial guarantees of trustworthiness” that are “equivalent” to the trustworthiness of evidence that is admissible under any of the thirty exceptions that are described with particularity. By contrast, agencies are allowed to admit hearsay evidence subject to judicial review that assures that any hearsay evidence on which the agency relies is trustworthy and reliable.

The Supreme Court announced the rules applicable to agency reliance on hearsay in *Richardson v. Perales*, 402 U.S. 389 (1971). An applicant for Social Security disability benefits applied for benefits and presented only the testimony of his doctor, a general practitioner, in support of his application. The Social Security Administration (SSA) required the applicant to be examined by five other doctors, each of whom was a board-certified specialist in a field relevant to the disabilities that the applicant alleged. Social Security disability benefits are available only to applicants who have disabilities that are so severe that it is impossible for them to perform the functions required to hold any job that is available in significant numbers in the economy.

Each of the five specialists examined the applicant and subjected him to the diagnostic tests relevant to determining whether he had the disabilities that were the basis for his claim. Each submitted a report to the SSA in which he expressed the opinion that the applicant did not have the disabilities that he claimed to have. Each report described the diagnostic procedures that the doctor used and reported the results of those procedures.

At a hearing before an Administrative Law Judge (ALJ) the applicant presented the oral testimony of his doctor. The doctor expressed his opinion that the applicant was disabled but he did not support his opinion by reference to any diagnostic procedures. The record before the ALJ included the written reports of the five specialists to whom the SSA had referred the applicant. Each explained in detail why the doctor was of the opinion that the applicant did not suffer from the disabilities that he claimed as the basis for his application. The applicant did not ask the ALJ to subpoena any of those doctors to enable him to cross-examine them. The ALJ denied the application based on his finding that the applicant did not suffer from disabilities so severe that he could not perform the functions required to hold any job that is available in significant quantities.

In that context, the Supreme Court upheld the SSA decision. The Court held that reliable hearsay can form the basis for a finding of fact that supports an agency decision even if the hearsay evidence is the only evidence that supports the finding and if the only non-hearsay evidence in the record purports to contradict the reliable hearsay evidence that supports the agency finding. The Court emphasized, however, that hearsay evidence must be reliable to support an agency finding and that the private party did not attempt to persuade the ALJ to subpoena the sources of the hearsay evidence so that the applicant could confront and cross-examine the sources.

All agencies are bound by the Supreme Court’s holding in *Richardson v. Perales*. Thus, an agency can rely on hearsay as the basis for a finding only if the hearsay is reliable and if the private party does not

ask the ALJ to subpoena the source of the hearsay to allow the private party to confront and cross-examine the source.

C. The Difference Between Formal Adjudication and Informal Adjudication

The procedures that an agency must use in a formal adjudication are described in detail in 5 U.S.C. §§554-557. Those procedures are virtually identical to the procedures used by a federal court in a civil case. A party has the right to notice of the issues raised and the remedies sought by the agency. It has a right to a hearing before an ALJ in which it can present oral evidence and can cross-examine opposing witnesses. A party also can ask the ALJ to subpoena additional witnesses and to authorize the party to take depositions. An ALJ must issue a subpoena “on a showing of general relevance and reasonable scope of the evidence sought,” 5 U.S.C. §555(d), and an ALJ must allow a deposition “when the ends of justice would be served.” 5 U.S.C. §556(c) (4).

Those statutory provisions also provide a large number of safeguards of the rights of private parties that are virtually identical to the safeguards that are available in a civil proceeding in a federal court. Thus, for instance, no one is allowed to communicate with the ALJ off the record; 5 U.S.C. §§554(d)(1),557(d)(1); an agency cannot discipline an ALJ, 5 U.S.C. §7521; an agency cannot determine the compensation of an ALJ, 5 U.S.C. §5372; an agency cannot assign an ALJ any duties that are inconsistent with the duties of an ALJ and must assign cases to ALJs in rotation, 5 U.S.C. §3105; and, an agency cannot subject an ALJ to supervision or direction by any agency employee who engages in the performance of investigative or prosecuting functions, 5 U.S.C. §554(d)(2).

After a hearing ends and the parties submit their briefs, the ALJ is required to write an opinion in which he states and explains all of his findings of fact and conclusions of law. 5 U.S.C. §557(c)(3). All regulatory agencies have procedures through which a decision of an ALJ can be appealed to a higher authority in the agency. “On appeal from or review of the initial decision [of the ALJ] the agency has all the powers which it would have in making the initial decision” 5 U.S.C. §557(b). Once the agency takes a final action, its action can be reviewed by a court at the request of any person who is “adversely affected or aggrieved by agency action” 5 U.S.C. §702.

An agency must use formal adjudication when a statute authorizes the agency to act “on the record after opportunity for agency hearing,” the agency proposes to revoke, amend, suspend or condition a license, or a statute requires the agency to act in accordance with 5 U.S.C. §§556 and 557. 5 U.S.C. §§554(a), 558(c). Statutes that authorize an agency to impose a significant penalty require the agency to use formal adjudication. The Clean Water Act is typical. It requires EPA to use formal adjudication in any proceeding in which it seeks a penalty in excess of \$10,000. 33 U.S.C. §1319 (g)(2).

If an agency has the power to adjudicate a dispute and the statute it is implementing does not require it to use formal adjudication, it has the discretion to use informal adjudication. Agencies have more discretion with respect to the details of the procedures they use in an informal adjudication. The agency must comply with 5 U.S.C. §555, but that statutory provision provides for only a few procedural rights. In some cases, the statute that authorizes the agency to conduct the adjudication imposes other procedural requirements. If an agency action has the potential to deprive anyone of “life, liberty, or property,” the agency must provide the party who is the subject of the proceeding with all of the safeguards required by due process. Kristin Hickman & Richard Pierce, *Administrative Law Treatise*

chapter 7 (6th ed. 2019). All enforcement proceedings are subject to due process. Agencies must describe the procedures they use in their rules.

Studies of the ways in which agencies conduct informal adjudications have found that agencies always provide notice of the issues presented, an opportunity to provide data and arguments either in written or oral form, a decision by a neutral decision maker, and a statement of reasons for the decision. Many agencies add a variety of other procedural safeguards. Michael Asimow, *Evidentiary Hearings Outside of the Administrative Procedure Act: Final Report*, Administrative Conference of the United States (2016); Paul Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. Chi. L. Rev. 739 (1976). See also Kristin Hickman & Richard Pierce, *Administrative Law Treatise* chapter six (6th ed. 2019).

D. Oral Hearings Versus Written Hearings

Until 1973, many people assumed that when Congress required an agency to act after a “hearing” it intended to require the agency to provide an oral evidentiary hearing. The Supreme Court corrected that assumption in *United States v. Florida East Coast Railway*, 410 U.S. 224 (1973). The Court held that an agency can comply with the requirement to provide a hearing in many circumstances by providing an opportunity for a written exchange of data and arguments. The facts of the *Florida East Coast* case illustrate such a circumstance.

Congress enacted a statute in which it told the Interstate Commerce Commission (ICC) to issue a rule to solve a serious problem. Every year at the time that grain was harvested in the midwest some of the grain rotted because there were not enough rail cars available to transport all of the grain to market. Congress told the ICC to issue a rule to address the problem after first conducting a “hearing.” The ICC issued a public notice in which it described the problem, proposed to solve it by imposing a per diem penalty on the owner of any rail siding outside the grain harvesting area that had in its possession a rail car suitable for carrying grain during the grain harvesting season. The ICC solicited comments on the proposed rule.

After receiving and considering the comments, but without holding an oral evidentiary hearing, the ICC issued the rule in which it adopted the proposed penalty on railroads that had rail cars suitable for use in hauling grain in their possession outside the grain harvesting area during the grain harvesting season. Some railroads challenged the validity of the rule in court by arguing that the agency had not conducted the oral evidentiary hearing that they believed that Congress had required. The petitioners argued that, when a statute requires a “hearing” and when there are contested issues of fact, the agency must conduct an oral evidentiary hearing to resolve the contested issues of fact.

The Supreme Court rejected that argument. It held that “hearing” is an ambiguous term that can refer to many different types of procedures to resolve disputes. The Court concluded that the ICC complied with the statutory duty to conduct a “hearing” in the case before the Court by providing an opportunity for interested parties to submit evidence and arguments in a written form.

The Court based its decision on two factors. First, the action the agency took was the issuance of a rule that affects many firms, rather than the issuance of an order in an adjudication that singles out a firm for adverse treatment based on the actions or characteristics of the firm. The Court repeated the statement of principle it first stated in 1915 in *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915): “Where a rule of conduct applies to more than a few people, it is impracticable

that everyone should have a voice in its adoption. . . . There must be a limit to individual argument in such matters if government is to go on.” Second, the Court based its decision on the nature of the disputed facts. Oral evidentiary hearings may be appropriate to resolve contested issues of fact like who did what when, where, and why. They are not essential to resolve issues of general fact of the type the ICC considered as the basis for its rule: what kinds of rail cars can carry grain; how many of those cars exist in the country, where are they during the grain harvesting season, and how can the ICC create incentives to persuade the people who have possession of the cars to ensure that they are in the grain harvesting region at the time the grain is harvested?

Immediately after the Court decided *Florida East Coast*, circuit courts adopted different interpretations of the decision. Some courts interpreted it to permit agencies to use written hearings only in rulemakings, while others interpreted it to permit agencies to use written hearings in any case in which the agency must resolve only disputes with respect to general facts of the type the ICC resolved in the process of issuing its per diem rule. Over time, all of the circuits adopted the latter interpretation, culminating with the First Circuit’s decision in *Dominion Brayton Point v. Johnson*, 443 F. 3d 12 (1st Cir. 2006). The circuit court overruled a circuit precedent and held that the EPA could use a paper hearing to decide whether to issue a discharge permit under the Clean Water Act. By then all circuits agreed that agencies could decide contested issues of general fact more accurately and in much less time through use of a paper hearing than through use of an oral evidentiary hearing. See Kristin Hickman & Richard Pierce, *Administrative Law Treatise* §6.2 (6th ed. 2019).

E. Reliance on Scientific Studies

A recent Supreme Court decision creates a risk that agencies will be too willing to rely on unsupported expert testimony and untested studies as the basis for findings of fact in adjudications. I have described and criticized that decision in Pierce, *Has the Supreme Court Endorsed the Use of Junk Science in the Administrative State?* *The Regulatory Review* (Apr. 29, 2019) and *Is the Court Encouraging Agencies to Rely on Junk Science?* *Biestek v. Berryhill*, *On the Docket*, *George Washington Law Review* (Apr. 23, 2019).

The six-Justice majority opinion in *Biestek v. Berryhill*, 139 S. Ct. 1128 (2019), can be interpreted as an invitation to agencies to make important decisions based on junk science, i.e., opinions of putative experts that are not supported by reliable data or analysis. I hope that agencies and lower courts resist that interpretation of the case, but it is an entirely plausible interpretation.

The facts of *Biestek* are simple. Biestek applied for Social Security disability benefits. At a hearing before an ALJ Biestek claimed that he was so disabled that he could not perform the functions required by any job that is available in significant numbers in the U.S. economy.

In such a hearing the applicant has the burden of proving his health state, while the government has the burden of proving the availability of a significant number of jobs that can be performed by someone with the age, education, experience and health state of the applicant. The Social Security Administration (“SSA”) attempted to prove the availability of jobs that Biestek could perform by introducing the testimony of a vocational expert. The witness testified that there were 120,000 jobs available for “sorters” and 40,000 jobs available for “bench assemblers” that Biestek could perform.

Biestek's lawyer asked the witness to describe the basis for the remarkably specific number of jobs of each type that the witness claimed to be available. The witness referred to two sources—the Bureau of Labor Statistics (“BLS”) and private surveys the witness had conducted for other clients. Since BLS does not report job availability statistics with the specificity required to support the number of jobs of a particular type the witness claimed to be available, the only possible basis for those numbers were the private surveys.

Biestek's lawyer asked the witness to provide the private surveys. The witness refused on the basis that they were part of her confidential client files. Biestek's lawyer then asked the witness to provide redacted versions of the surveys that excluded any client-specific information. The witness should have been prepared to comply with that request. SSA's Vocational Expert Handbook instructs witnesses to “have available, at the hearing, any vocational resource materials that you are likely to rely upon” because “the ALJ may ask you to provide relevant portions of [those] materials.”

We will never know whether the witness had a redacted version of the surveys with her because the ALJ then interrupted the cross-examination and stated that he would not require the witness to provide a redacted version of the surveys. The ALJ then relied solely on the testimony of the vocational witness as the basis for his decision to deny Biestek's application for benefits based on his finding that there were a significant number of jobs available that Biestek could perform.

Of course, we will also never know whether the private surveys exist. If they exist, we will never know whether they support the witness's testimony. If they support the witness's testimony, we will never know whether they are based on reliable data. If they are supported by reliable data, we will never know whether the methodology the witness used to draw inferences from the data was reliable.

No court would admit evidence of the type the ALJ relied on as the basis for his critical finding that there are a significant number of jobs that Biestek can perform. If a district court admitted evidence of that type and relied on it as the basis for a finding in a bench trial, its decision would be summarily reversed on appeal.

In its famous opinion in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the Supreme Court took a major step toward assuring that our legal system functions on the basis of sound scientific principles. The Court held that judges must apply criteria based on sound scientific principles when they decide whether to admit expert testimony. *Daubert* was a reaction to the well-documented problem of court decisions that are based on “junk science.” That term refers to opinions offered in evidence by supposed experts that were not supported by reliable data and analysis but that often were the basis for jury verdicts before the Court decided *Daubert*.

Daubert requires an expert witness to disclose to the court and to opposing counsel the data and methodology the expert relied on as the basis for any opinion the expert proposes to offer in court. The judge is then assigned the task of deciding whether the data and methodology are sufficiently reliable to support a decision to admit the expert's testimony. If the reliability of the data or methodology is challenged by opposing counsel, the judge conducts a voir dire hearing during which opposing counsel have the opportunity to test the reliability of the data and methodology by cross-examining the witness. No expert witness is permitted to testify unless the witness has disclosed the data and methodology that are the basis for the opinion offered by the witness.

Three Justices expressed the view that the ALJ's decision to deny Biestek's application for disability benefits based solely on the totally unsupported testimony of the vocational expert should be reversed for all of the same reasons that any court would reverse the decision of a district judge in similar circumstances. Unfortunately, they had to express that view in dissenting opinions.

The majority upheld the ALJ's decision. The majority held that the ALJ's finding was conclusive because it was supported by substantial evidence. The majority reasoned that the ALJ could rely on the unsupported opinion of the witness and deny Biestek access to all of the means through which he could challenge that testimony for two reasons—the evidence satisfied the substantial evidence test, and the Federal Rules of Evidence (“FRE”) do not apply to SSA disability hearings. The first reason is based on a misunderstanding of the substantial evidence test, while the second is based on a misunderstanding of the reasons why Congress decided that the FRE do not apply to agency hearings.

The majority argued that it would make no sense to conclude that an expert witness's opinion qualifies as substantial evidence when no one asks the expert to provide the data and analysis to support the opinion but that it does not qualify as substantial evidence when someone asks for the supporting data and analysis and the witness refuses to comply with the request. That reasoning is inconsistent with the Court's well-reasoned opinion in *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951): “The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” A refusal to provide support for an expert opinion clearly detracts from its weight.

The inapplicability of the FRE to agency hearings is unrelated to the wisdom of the Court's decision in *Daubert* to keep juries from deciding cases based on junk science. The substantive reasoning in *Daubert* is equally applicable to agency hearings. Like juries, agencies should not be allowed to make decisions based on junk science. The difference in context bears only on the mechanism that courts can and should use to implement the *Daubert* principle. In the context of a jury trial, the *Daubert* criteria must be applied at the time that an expert opinion is offered in evidence. In the context of an agency hearing, the *Daubert* criteria can be applied in the process of judicial review of the stated basis for an agency's decision to rely on expert testimony as the basis for a finding.

The FRE are designed for application in jury trials. They are essential in that context because juries are not required to state reasons for their decisions. Thus, if we want to ensure that juries do not make decisions based on unreliable evidence, we must preclude them from having access to the types of evidence that are likely to be unreliable. The FRE are not appropriate for application in agency hearings because agencies must give reasons for their findings of fact. Thus, if an ALJ admits evidence that the ALJ later determines to be unreliable, the ALJ can decline to rely on it as the basis for a finding. If an ALJ erroneously relies on unreliable evidence as the basis for a finding, a reviewing court can detect the error and reject the finding as not supported by substantial evidence.

The *Biestek* majority referred to the credentials and reputation of an expert witness as an adequate independent basis to conclude that the opinions of the expert are sufficiently reliable to support a finding of fact even if the expert refuses to provide anyone access to the data and analysis that she relies on to support her opinion. That is a dangerous method of reasoning that is inconsistent with *Daubert*.

The *Daubert* Court did not indulge the naïve assumption that a putative expert should be believed because she has impressive credentials and an impeccable reputation. There is a mountain of evidence that contradicts that assumption. Thus, for instance, in just a two month period, Harvard, Cornell,

Dartmouth and Sloan Kettering were forced to announce that some of their top researchers had committed academic fraud in conducting some of the most important studies that those prestigious institutions have produced. See Benedict Carey, *Prominent Cancer Researcher Resigns from Dartmouth Amid Plagiarism Charges*, N.Y. TIMES (Sept. 14, 2018); Gina Kolata, *He Promised to Restore Damaged Hearts. Harvard Says His Lab Fabricated Research*, N.Y. TIMES (Oct. 29, 2018); Anahad O'Connor, *More Evidence that Nutrition Studies Don't Always Add Up: A Cornell Food Scientist's Downfall Could Reveal a Bigger Problem in Nutrition Research*, N.Y. TIMES (Sept. 29, 2018); Charles Ornstein & Katie Thomas, *Top Cancer Researcher Fails to Disclose Corporate Financial Ties in Major Research Journals*, N.Y. TIMES (Sept. 8, 2018).

Attempts to replicate the findings of hundreds of important studies have produced powerful circumstantial evidence that academic fraud in conducting studies is a widespread problem. Thus, for instance, four attempts to replicate the findings of hundreds of studies published in prestigious journals found that only 36% to 67% of the findings could be replicated using the data and methodology that the researchers claimed to have used. Colin F. Camerer et al., *Evaluating the Replicability of Social Science Experiments in Nature and Science Between 2010 and 2015*, 2 NATURE HUM. BEHAV., 637 (2018). It is fair to infer that the other 33% to 64% of the findings were the product of either academic fraud or incompetence.

Academic fraud can be extremely costly to society. The measles epidemic that now afflicts the nation is the result of an academic fraud that took place over twenty years ago. A team of twelve distinguished researchers published a study in 1998 in *Lancet*, the most prestigious British medical journal, in which they reported the results of a study of the relationship between vaccines and autism. A.J. Wakefield et al., *Ileal-lymphoid-nodular Hyperplasia, Non-specific Colitis, and Pervasive Developmental Disorder in Children*, 351 THE LANCET 637–41 (1998). They found a correlation between taking a vaccine and autism so high that the lead author used the finding as the basis for an international speaking tour in which he warned that vaccines cause autism.

The vaccine/autism study was a fraud perpetrated by the lead author, who was well paid by attorneys who wanted to have access to a study they could use in lawsuits against vaccine manufacturers. The fraud was not detected and publicly disclosed until 2011, however. Each of scores of studies conducted since 1998 have found no relationship between vaccines and autism. See The Coll. of Physicians of Philadelphia, *Do Vaccines Cause Autism? THE HISTORY OF VACCINES* (Jan. 25, 2019). The fraudulent 1998 study caused a dramatic decrease in the proportion of the population of parents who vaccinate their children, however, and a corresponding increase in the number of children who suffer from a variety of potentially lethal communicable diseases like measles. Some parents still cling stubbornly to the belief that was instilled by the fraudulent study, with adverse effects on vulnerable populations all over the world.

We need to act aggressively to reduce the risk of damage caused by junk science. *Daubert* was an important step in the right direction. *Biestek* was an unfortunate step in the wrong direction.

The dissenting Justices expressed the hope that lower courts will not interpret the majority opinion as an invitation to uphold all uses of junk science by agencies. They suggested that the majority opinion might be just the first step of many in which the majority will provide agencies and courts with guidance that will discourage, if not eliminate, the risk that they will base their decisions on junk science.

The reasoning in the majority opinion can be interpreted narrowly. At the end of its opinion, the majority stated that it was only rejecting a “categorical rule” that the petitioner’s lawyer had urged the Court to adopt. It went on to disavow any intent to decide “whether, in the absence of that rule, substantial evidence supported the ALJ in denying [Biestek] benefits.”

I hope the optimism of the dissenting Justices proves to be accurate, but it would be easy for lower courts to interpret the majority opinion as an invitation to allow agencies to rely on junk science in virtually all cases. The Court needs to follow *Biestek* with a series of opinions in which it makes it clear that an agency can rely on the unsupported opinion of a putative expert only in rare circumstances in which the agency has no other viable option and the agency has good reasons to excuse the expert from providing support for the opinion.

F. Judicial Review

The tests that courts must apply in the process of reviewing agency actions are set forth in 5 U.S.C. §706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--**(1)** compel agency action unlawfully withheld or unreasonably delayed; and **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be--

- (A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B)** contrary to constitutional right, power, privilege, or immunity;
- (C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D)** without observance of procedure required by law;
- (E)** 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; or
- (F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The substantial evidence test applies to judicial review of all findings of fact made in formal adjudications. Congress based the test on a 1913 Supreme Court opinion: *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U.S. 88 (1913). The Supreme Court described and explained the test in *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939):

Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. ‘It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

The Court added an important component to the definition of the term in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951):

The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.

The arbitrary and capricious test also applies to findings of fact made in formal adjudications. As a result of the combination of the two tests, an agency must explain why it chose to rely on some evidence instead of conflicting evidence when it makes a finding in a formal adjudication. See Kristin Hickman & Richard Pierce, *Administrative Law Treatise* §10.2.2 (6th ed. 2019). The history, interpretations and applications of the substantial evidence test are described in detail in Kristin Hickman & Richard Pierce, *Administrative Law Treatise* §10.2 (6th ed. 2019).

The arbitrary and capricious test applies to judicial review of findings of fact made by agencies in informal adjudications. There is a difference of opinion among judges on the question whether the arbitrary and capricious test is identical to the substantial evidence test, as then-judge Antonin Scalia concluded in *Ass'n of Data Processing Service Organizations v. Board of Governors of the Federal Reserve System*, 745 F. 2d 677, 683-84 (D.C. Cir. 1984), or whether the substantial evidence test is “arguably more stringent” than the arbitrary and capricious test as the Tenth Circuit said in *Olenhouse v. Commodity Credit Corp.*, 42 F. 3d 1560, 1575 (10th Cir. 1994). The debate among judges and many of the applications of the arbitrary and capricious test to agency findings of fact adopted in informal adjudications are discussed in Kristin Hickman & Richard Pierce, *Administrative Law Treatise* §10.4 (6th ed. 2019).

IV. Independent Adjudicators

OMB asked: “Do adjudicators sometimes lack independence from the enforcement arm of the agency? What reform[s] would adequately separate functions and guarantee an adjudicator’s independence?”

My answer: Congress enacted a statute in 1946 that ensured that adjudicators have adequate decisional independence. Recent decisions by the Supreme Court, the Department of Justice and the President have the effect of jeopardizing the decisional independence of adjudicators.

The Supreme Court has consistently held that due process requires an unbiased decision maker in any adjudication in which the government has the potential to deprive an individual or a corporation of life, liberty or property. Due process and the requirement of a neutral decision maker apply to all agency enforcement proceeding. The major cases that announce and apply the requirement of a neutral decision maker are described in Kristin Hickman & Richard Pierce, *Administrative Law Treatise* §7.7 (6th ed. 2019).

A. The Solution Adopted by Congress in 1946

Congress studied and debated the question of how best to assure that agency adjudicators are unbiased for fifteen years, ultimately leading to the unanimous decision of both Houses of Congress to adopt the solution that is reflected in the Administrative Procedure Act of 1946. The question was difficult to answer because there is a potential conflict between the independence of agency adjudicators that is required by due process and the responsibility that Article II of the constitution imposes on the president to take care that the laws be faithfully executed.

During the 1930s and 1940s, Congress devoted a great deal of time and effort to crafting legislation to govern actions taken by federal agencies. After fifteen years of debates and studies, Congress unanimously enacted the Administrative Procedure Act of 1946 (APA). See George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 N.W. U.L. Rev. 1557 (1996).

One of the core issues that Congress resolved when it enacted the APA was the status of the hearing examiners who were authorized to preside over oral evidentiary hearings in adjudications in the common situation in which the head of the agency did not personally preside. That issue was challenging because Congress sought to accomplish two potentially competing goals.

Members of Congress had received many complaints that the hearing examiners who presided in agency hearings prior to enactment of the APA were biased in favor of the agency and against the private parties who participated in those hearings. See *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 131-132 (1953). Congress responded to that concern by conferring on the new hearing examiners who would preside after enactment of the APA a high degree of independence from the agencies for which they worked. *Id.* at 132-134.

Congress also wanted to further the potentially conflicting goal of ensuring that the agencies themselves would retain control of policy decisions in implementing their statutory directions. Congress recognized that hearing examiners who were sufficiently independent of the agency that employed them to reduce concerns of bias had the potential to usurp some of the policymaking power Congress had conferred on their agencies by the manner in which they resolved adjudications that they heard. Congress responded by including in the APA provisions that ensure that agencies retain the ability to make all of the policy decisions that might be raised in an adjudication in which a hearing examiner presides. See Paul Verkuil et al., *The Federal Administrative Judiciary*, Admin. Conf. of the United States, Recommendations and Reports, Vol. II, 770, 801-802 (1992).

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

In the APA, Congress gave agencies the power to appoint hearing examiners, 5 U.S.C. § 3105. In 1972, the Civil Service Commission changed the name of hearing examiners to administrative law judges (ALJs). Change of Title to Administrative Law Judge, 37 Fed. Reg. 16,787 (Aug. 19, 1972). In 1978, Congress ratified that decision by statute. Pub. L. No. 95-251, 92 Stat. 187 (1978). (In the remainder of these comments I will use the terms hearing examiner and ALJ interchangeably.) Congress also reallocated the responsibilities of the Civil Service Commission among three new agencies--the Office of Personnel Management (OPM), the Federal Labor Relations Authority, and the Merit Systems Protection Board (MSPB). Pub. L. No. 95-454, 92 Stat. 1111 (1978).

Congress limited agency power to manage hearing examiners in several ways that are designed to confer a degree of independence on them, thereby protecting the due process rights of the regulated

entities involved in adjudications. Congress's goal was to reduce the risk of pro-agency bias by the person presiding at an adjudicatory hearing by precluding agencies from using managerial tools as means of inducing hearing examiners to conduct hearings in ways that favor the agency and disfavor the private parties who are on the other side. Thus, the employing agency cannot discipline a hearing examiner, 5 U.S.C. § 7521; cannot determine the compensation of a hearing examiner, 5 U.S.C. § 5372; cannot assign a case to a hearing examiner except in rotation, 5 U.S.C. § 3105; cannot assign a hearing examiner any duties that are inconsistent with the duties and responsibilities of a hearing examiner, 5 U.S.C. § 3105; and cannot subject a hearing examiner to supervision or direction by any agency employee who engages in "the performance of investigative or prosecuting functions for an agency." 5 U.S.C. § 554(d) (2).

Finally, and most important, a disciplinary action can be taken against an ALJ "only for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521. (In the Civil Service Reform Act of 1978, Congress reallocated the responsibility to implement the APA provision that limits the power of an agency to remove or otherwise discipline an ALJ from the Civil Service Commission to the MSPB). Thus, although an agency can initiate a proceeding against an ALJ, only the independent MSPB can impose any form of discipline against him or her.

At the same time that Congress protected the integrity of the hearing process by conferring a high degree of independence on hearing examiners, Congress ensured that agencies retained complete control over the legal basis and policy content of any decision in an adjudication. Congress accomplished that goal by providing that a hearing examiner can make only an initial decision and that the agency has complete discretion to replace it: "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b). The Supreme Court has reinforced that congressional decision by holding that the initial decision qualifies only as part of the record on which the court must base its review. *Universal Camera v. NLRB*, 340 U.S. 474, 496-497 (1951).

Shortly after Congress enacted the APA, the Supreme Court issued a series of decisions regarding the qualified independence of hearing examiners in which it praised the APA and urged Congress to use it as a model for all agency decision-making. In *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953), the Court upheld the initial rules issued by the Civil Service Commission to govern the compensation and tenure of hearing examiners, and the rules governing assignment of cases to hearing examiners. It did so over an objection by an association of hearing examiners that the rules were not adequately protective of their independent status that the APA was enacted to protect.

The six-Justice majority described the reasons Congress conferred a high degree of independence on hearing examiners in the APA: "Many complaints were voiced against the actions of hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." *Id.* at 131. The majority described studies that supported the complaints of bias and that urged Congress to make hearing examiners "partially independent of the agency by which they were employed." *Id.* at 131. The majority then described the congressional deliberations about the best ways of accomplishing that agreed-upon goal, and described with apparent approval the treatment of hearing examiners in the APA: "Several proposals were considered, and in the final bill Congress provided that hearing examiners should be given independence and tenure in the existing Civil Service system." *Id.* at 131-32.

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

Congress intended to make hearing examiners ‘a special class of semi-independent subordinate hearing officers’ by vesting control of their compensation, promotion and tenure in the Civil Service Commission to a much greater extent than in the case of other federal employees. *Id.* at 132.

The majority upheld the Civil Service rules based on its conclusion that the rules were consistent with congressional intent:

The position of hearing examiner is not a constitutionally protected position. It is a creature of congressional enactment. The respondents have no vested right to positions as examiners. They hold their posts by such tenure as Congress sees fit to give them. Their positions may be regulated completely by Congress, or Congress may delegate the exercise of its regulatory power, under proper standards, to the Civil Service Commission, which it has done in his case. *Id.* at 133.

The three dissenting Justices also implicitly approved of the congressional decision to confer qualified independence on hearing examiners. However, they would have held the rules invalid because of their belief that the rules should have gone even further in conferring qualified independence on hearing examiners:

The Administrative Procedure Act was designed to give trial examiners in the various administrative agencies a new status of freedom from agency control. Henceforth they were to be ‘very nearly the equivalent of judges even though operating within the Federal system of administrative justice.’ Agencies were stripped of power to remove examiners working with them. Henceforth removal could be effected only after hearings by the Civil Service Commission. That same Commission was empowered to prescribe an examiner’s compensation independently of recommendations or ratings by the agency in which the examiner worked. And to deprive regulatory agencies of all power to pick particular examiners for particular cases, § 11 of the Act commanded that examiners be ‘assigned to cases in rotation so far as practicable * * *.’ I agree with the District Court and the Court of Appeals that the regulations here sustained go a long way toward frustrating the purposes of Congress to give examiners independence. *Id.* at 144 (citation omitted) (Black, J., dissenting).

The Court was even more forceful in its approval of, and praise for, the congressional decision to confer a high degree of independence on hearing examiners in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). The question before the Court was whether the APA provisions applicable to hearing examiners applied to deportation proceedings. The Court held that they did even though no statute explicitly made the APA applicable to those hearings.

The Court began by describing the widespread complaints of bias that led to the enactment of the APA and to its treatment of hearing examiners as independent of the agencies at which they preside. It also cited to the many studies that had substantiated those complaints and that had urged statutory changes to reduce the pro-agency bias. It then described the years of study and deliberation that led to enactment of the APA by unanimous votes in both Houses of Congress. *Id.* at 37-45. The Court summarized the process through which the APA was enacted: “The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.” *Id.* at 40.

The Court then compared the unfair and biased hearing that the government had provided in the case before the Court with the hearing before an impartial hearing examiner that the APA requires. *Id.* at 45-47. The Court even suggested that the Constitution might compel an agency to use the APA hearing procedures:

The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body...

We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency.

Indeed, to so construe the Immigration Act might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. *Id.* at 49-50.

The Court concluded that the APA represented an effort by Congress to set forth the "currently prevailing standards of impartiality" and thereby to codify the minimum requirements of due process. *Id.* at 50. Based on that conclusion, the Court held that the provisions in the APA relating to hearing examiners applied to deportation proceedings. *Id.* at 51. In later cases, the Court relied on the reasoning in *Wong Yang Sung* as the basis to hold that the APA applies to hearings under the Interstate Commerce Act, *Riss & Co. v. U.S.*, 341 U.S. 907 (1951), and to Post Office fraud hearings, *Cates v. Haderlein*, 342 U.S. 804 (1952).

The Court eventually retreated from its suggestion that the APA codified due process when Congress explicitly rejected that interpretation of the Act in the process of enacting a deportation statute that authorized hearings that fell short of the procedural safeguards reflected in the APA. *Marcello v. Bonds*, 349 U.S. 302 (1955). But the Court never retreated from its belief that the APA adjudication provisions created a model of fairness by which all other agency adjudicatory procedures should be judged. Indeed, the Court upheld the procedures Congress authorized in deportation proceedings largely because it believed that Congress was "drawing liberally on the analogous provisions of the Administrative Procedure Act and adapting them to the deportation process." *Id.* at 310.

The vast majority of adjudications in which agencies decide whether to impose a civil penalty are presided over by ALJs who are assured a high degree of decisional independence by the APA. In some other types of adjudications, Congress has departed from the APA model by conferring the power to preside on Administrative Judges (AJs) who lack the assurances of decisional independence that ALJs have. The circumstances in which Congress chose to assign responsibility to preside in agency adjudications to AJs rather than to ALJs are described in detail in Kent Barnett, et al., *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight and Removal*, Administrative Conference of the United States (2018); Paul Verkuil, et al., *The Federal Administrative Judiciary*, Administrative Conference of the United States (1992).

B. The Department of Justice Is Jeopardizing the Independence of ALJs

In several cases the Solicitor General (SG) of the United States and the Department of Justice (DOJ) are attempting to persuade courts to reduce the decisional independence of ALJs. DOJ and the SG are arguing that the statute that protects ALJs from being removed except for cause is unconstitutional unless a court adopts a new construction of the statute that would make it easier for agency heads to remove

ALJs. This is creating a situation in which no one is defending the constitutionality of the statute that assures that ALJs will serve as unbiased adjudicators.

I have attached as an Appendix to these comments the amicus brief that I and several of my colleagues just filed in one of these cases, *Fleming v. Department of Agriculture*, D.C. Circuit Docket Number 17-1246. As you can see, DOJ is refusing to defend the constitutionality of the statutory provision that protects ALJs from being removed by an agency head at will. This is an extremely short-sighted position to take. If DOJ is successful, its actions will undermine the rights of regulated firms to have their disputes with agencies adjudicated by unbiased decision makers. It is easy to predict a resulting return to the conditions of the 1930s when ALJs presided in ways that reflected a powerful bias in favor of agencies and against regulated firms.

C. The Supreme Court Has Issued Decisions that Jeopardize the Independence of Agency Adjudicators

In *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Supreme Court held that Administrative Law Judges (ALJs) at the SEC are inferior officers rather than employees. That holding probably means that all 2000 ALJs and many thousand administrative judges (AJs) are inferior officers. In *Edmond v. U.S.*, 520 U.S. 651 (1997), the Court held that an officer is an inferior officer only if he is inferior to a principal officer who is nominated by the president and confirmed by the Senate. He must be inferior in two ways—his decisions must be reviewable by a principal officer and he must be removable by a principal officer. When Congress drafted the statutes that apply to agency adjudications it had no idea that the Court would decide *Lucia* and *Edmond* as it did. Many of those statutes create decision making structures that are unconstitutional as a result of those two holdings.

The statute that creates the decision making structure at the Patent and Trademark Appeals Board (PTAB) illustrates the problem. Hundreds of Administrative Patent Judges (APJs) have the power to make decisions with respect to the validity of patents. Their decisions are not reviewable by anyone. The Federal Circuit held that the PTAB decision making structure is unconstitutional in *Arthrex v. Smith & Nephew*, 941 F. 3d 1320 (Fed. Cir. 2019). Since the court believed that it could not add to the statute a right to obtain review of an APJ decision by a principal officer, the court concluded that it could save the statute from a holding that it is unconstitutional only by making all APJs removable at will by a principal officer. The court held that even the statutory provision that provides a modest degree of protection from arbitrary removal for most civil servants cannot be applied to APJs.

The House Subcommittee on Intellectual Property held a hearing on the *Arthrex* opinion. There was broad agreement among the members and the witnesses that the result of the *Arthrex* decision was unacceptable because it created a situation in which the Director of PTAB could tell an APJ that he must decide a case in a particular way or risk removal by the Director. University of Virginia Law Professor John Duffy identified three ways in which the statute could be amended to eliminate the fatal flaw that the Federal Circuit identified. Congress could confer the power to review APJ decisions on the Director, who is a principal officer; it could create a multi-member board comprised of principal officers and confer review power on the board; or, it could make all of the hundreds of APJs principal officers who must be nominated by the president and confirmed by the Senate.

ALJs at the Department of Agriculture provide another example. As a result of a statute enacted in 1940, ALJ decisions at DOA are reviewed only by a “Judicial Officer” who is not nominated by the president and confirmed by the Senate. In *Fleming v. DOA*, D.C. Circuit Docket No. 17-1246, the petitioner is arguing that the DOA ALJ who presided in its case was unconstitutionally appointed because his decisions are not reviewable by a principal officer and, like all ALJs, he is removable only for cause by the

Merits Systems Protection Board. The petitioner is likely to win under *Edmond*, thereby creating a situation analogous to the situation of the hundreds of APJs at PTAB.

Many other agency decision making structures have similar constitutional flaws. Decisions of ALJs at the Social Security Administration (SSA) are reviewable by the Social Security Appeals Council. The members of the Council are not principal officers. Thus, the 1600 SSA ALJs are also in a situation analogous to the hundreds of APJs at PTAB.

Decisions of Immigration Judges (IJs) are reviewable by the Board of Immigration Appeals, but the members of the Board are not nominated by the president and confirmed by the Senate. IJ decisions are also reviewable, in theory, by the Attorney General (AG). In fact, however, the AG cannot possibly review more than a tiny fraction of the decisions of IJs. The Department of Justice requires each of the hundreds of IJs to decide 700 cases per year in an effort to reduce the backlog of 1,100,000 pending cases. If the *Edmond* test requires actual review rather than merely theoretical review, IJs are also in a situation analogous to the hundreds of APJs at PTAB.

Unless Congress amends the statutes applicable to APJs at PTAB, ALJs at DOA, ALJs at SSA, and IJs, courts are likely to agree with the reasoning of the Federal Circuit in *Arthrex* and hold that all of those judges must be removable at will. That would eliminate any conceivable argument that they have the degree of decisional independence required to comply with due process.

Thus, Congress must amend many of the statutes that govern adjudicative decision making at the many agencies that have statutorily-mandated decision making structures that violate the constitution as the Supreme Court interpreted it in *Lucia* and *Edmond*. Any of the three types of amendments that Professor Duffy recommended for the PTAB statute would be effective at any of the other agencies that are in a situation analogous to that of PTAB.

This is the point at which political polarity becomes a formidable obstacle, however. It has become nearly impossible for Congress to enact or to amend a statute. It seems unlikely that Congress will be able to amend all of the statutes that now create decision making structures that are unconstitutional in a timely manner. In any context in which Congress is unable to accomplish that daunting task, a court is likely to follow the lead of the Federal Circuit and to hold that the judges at that agency must be subject to at will removal. That, in turn, will create a situation in which those judges do not have any degree of decisional independence from the agencies at which they preside. We could easily find ourselves in a situation in which over a million cases per year are decided in a decision making environment that lacks one of the most important safeguards of due process—an unbiased decision maker.

Political polarity also creates another serious obstacle to the kinds of changes in decision making structure that are required to comply with *Lucia* and *Edmond*. Amendments that add enough principal officers to review the millions of decisions made by the judges whose decisions are not now subject to review by a principal officer would add scores of principal officers to the approximately 1200 agency officials who now must be nominated by the president and confirmed by the Senate. Amendments that make those judges principal officers would more than double the number of agency officials who must be nominated by the president and confirmed by the Senate.

As Stanford University Law Professor Anne Joseph O'Connell has documented in detail, political polarity has created a situation in which the process of nomination and confirmation has gotten slower in every administration. It is so slow now that we have a large number of vacancies in many important positions. It seems highly unlikely that the process of appointment and confirmation would be able to cope with any significant increase in the number of agency officials who must be nominated and confirmed.

I am confident that the Supreme Court was not aware of the effects of its decisions in *Lucia* and *Edmond* when it made those decisions. Now that those effects have become apparent, it should reconsider the tests that apply to determine whether an ALJ or an AJ is an officer or an inferior officer in light of the disastrous effects of the tests that it applied in *Lucia* and *Edmond*. In the meantime Congress will have to amend many statutes to create decision making structures that are consistent with *Lucia* and *Edmond*. Courts can help Congress make the needed changes and they can help agencies adjust to those changes by following the lead of the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). After holding that the initial structure of the Federal Election Commission was unconstitutional, the Court gave Congress thirty days to amend the statute to create a structure that is constitutional.

D. The Process of Appointing Agency Adjudicators Must Be Improved

Until 2018, ALJs were part of the Competitive Service of the Civil Service. They were chosen through a multi-step process that included evaluation of their experience and suitability to be judges. The first part of the decision making process was implemented by the OPM. It used a combination of evaluative tools that included a test that was designed by psychologists to determine whether applicants have the kind of temperament that allows someone to engage in unbiased adjudication of disputes. OPM decided which applicants were suitable for appointment and ranked each based on the applicant's performance in the evaluation process. OPM put everyone who achieved a passing score in the evaluative process on a register in the order in which they ranked through application of the competitive evaluation process. Agencies then had the discretion to appoint a new ALJ by choosing one of the three candidates on the register who had attained the highest score in the competitive evaluation process.

In *Lucia v. SEC*, 138 S.Ct. 2044 (2018), the Supreme Court held that ALJs at the SEC are "inferior officers" who must be appointed by agency heads. That holding probably applies to all ALJs and AJs. Immediately after the Court handed down its decision, President Trump issued Executive Order 13843, Excepting Administrative Law Judges from the Competitive Service (July 10, 2018). That order abolished the OPM selection process and the registry that OPM had created through use of that process. It announced that the only national qualification to be an ALJ is membership in good standing in a State Bar. The order authorized agencies to add qualifications for appointment to their agencies and empowered agency heads to appoint anyone who satisfies the national and agency-based qualifications.

Executive Order 13843 creates an appointment process that has the potential to bring back the kind of systemically biased decision making process that infected the agency adjudicative process prior to the statutory reforms of that process in 1946. Agencies are now free to appoint ALJs who are virtually certain to conduct adjudications in ways that favor regulatory agencies and disfavor regulated firms.

The President should issue a new Executive Order that eliminates that risk. The new Executive Order should authorize OPM to apply appropriate criteria to applicants for positions as ALJs to assure that they are likely to conduct adjudications in a fair and unbiased manner. OPM should then compile a list of applicants who have been determined to be qualified to be ALJs from which agency heads can choose in making decisions to appoint ALJs.

Conclusion

As I have explained in meticulous detail, the process of adjudication of regulatory disputes that was created unanimously by Congress in 1946 and praised in several unanimous decisions of the Supreme Court in the 1950s is fair and unbiased in all respects. The only threats to that system have come from President Trump, the Department of Justice and a few recent Supreme Court opinions.

The fair and unbiased system for adjudication of regulatory disputes that we have today contrasts starkly with the horribly biased system for adjudicating immigration disputes that exists today. That system is a national disgrace. It violates the most basic principles of due process in many respects. See Jill Family, *Immigration Adjudication Bankruptcy*, 21 Penn. J. Con. L. 1025 (2019).