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# To Find the Best Future System of Agency Adjudication We Should Return to the Past

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In 1946, Congress and the Supreme Court unanimously embraced a method of conducting agency adjudications. We abandoned that method gradually through a variety of steps that we have taken in the ensuing years. We should return to the original model for conducting agency adjudications.

In section one, I describe and evaluate the method of agency adjudication that Congress adopted in the Administrative Procedure Act of 1946 after years of study and debate. In section two, I describe and criticize the changes that we have made in that method. In section three, I explain why a return to the original 1946 method of agency adjudication is entirely consistent with the Supreme Court's recent emphasis on separation of powers.

## I .Adoption of a System for Agency Adjudication in 1946

The New Deal Congress responded to the great depression by enacting many statutes that created new agencies and empowered them to take a variety of actions to regulate businesses and to distribute government benefits to citizens. Most of the statutes said little about the procedures the agencies were

required to use when they took actions of various types. Agencies used many different procedures to take similar actions.

The actions of the new agencies produced a great deal of controversy about the procedures that agencies should use and about the appropriate relationship between the agencies and courts. There was broad agreement that all agencies should be required to use the same procedures to take similar actions and that courts should play important roles in ensuring that agencies act only within the boundaries created by statutes and the constitution. There were lively debates about the nature of the required procedures and the roles that courts should take in reviewing agency actions.

These debates took place continuously and simultaneously in Congress and in law reviews for over a decade.[1] The most important steps in the process of study and debate were the publication of a series of monographs that described the procedures that every major agency used, publication of the 474-page report of the bi-partisan Attorney General's Committee on Administrative Procedure, and selection of a bi-partisan trio of experts to draft a statute that would require every agency to use the same procedures to adjudicate disputes and to issue rules and would confer on courts the power to review agency actions.

[1] See generally Kristin Hickman & Richard Pierce, Administrative Law §1.4 (6th ed. 2019).

The three experts drafted what became the Administrative Procedure Act (APA)--a statute that was enacted unanimously by both Houses of Congress in 1946. It described the process for issuing rules in section 553[2] and the relationship between agencies and courts in sections 701 through 706.[3] Sections 554 through 557 described a process for agency adjudication that was modeled after the process for adjudication used by federal courts in bench trials. It includes the right to present evidence and to cross-examine opposing witnesses in an oral evidentiary hearing conducted before an adjudicative officer who is independent of the agency where she presides.[4]

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.[5] Congress responded to that concern by conferring on the new

[2] 5 U.S.C. §553.
[3] 5 U.S.C. §§701-706.
[4] 5 U.S.C. §§554-557.

hearing examiners who would preside after enactment of the APA a high degree of independence from the agencies at which they presided.[6]

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 directives. 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 through their decisions in adjudications.[7] Congress responded by including in the APA provisions that ensure that agencies retain the ability to make all the policy decisions that might be raised in an adjudication in which a hearing examiner presides.[8]

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 further both goals simultaneously. The APA includes provisions that are designed to confer a high degree of independence on hearing

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[5] *See Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 131-132 (1953).
[6] *Id.* at 132-134.
[7] As Professors Eisenberg & Mendelson explain, agency adjudications rarely raise policy issues. They usually focus on the specific facts of the case. Rebecca Eisenberg & Nina Mendelson, The Not-So-Standard Model: Reconsidering Agency Head Review of Administrative Adjudication Decisions, 75 Ad. L. Rev. 1 (2023)..
[8] *See* Paul Verkuil et al., *The Federal Administrative Judiciary*, Admin. Conf. of the United States, Recommendations and Reports, Vol. II, 770, 801-802 (1992).

examiners by regulating the agency processes of managing and removing hearing examiners. But it also includes provisions that ensure that agencies retain complete control of the policy implications of adjudicatory decisions by conferring on the agency the authority to issue rules that bind hearing examiners and 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.[9] In 1972, the Commission changed the name of hearing examiners to administrative law judges (ALJs).[10] In 1978, Congress ratified that decision by statute.[11] In 2018, the Supreme Court held that ALJs who preside in adjudications at regulatory agencies are inferior officers who must be appointed by the head of a department.[12] In the remainder of this article I will use the terms hearing examiner and ALJ interchangeably.

Congress limited agency power to manage ALJs in several ways that are designed to confer decisional independence on them, thereby protecting the due process rights of the regulated entities involved in adjudications. Congress's goal

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[9] 5 U.S.C. § 3105.
[10] Change of Title to Administrative Law Judge, 37 Fed. Reg. 16,787 (Aug. 19, 1972).
[11] Pub. L. No. 95-251, 92 Stat. 187 (1978).
[12] *Lucia v. SEC*, 138 S.Ct. 2044 (2018).

was to reduce the risk of pro-agency bias by the person presiding at an adjudicatory hearing. It accomplished that goal by precluding agencies from using managerial tools as means of inducing ALJs 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 an ALJ,[13] cannot determine the compensation of an ALJ,[14] cannot assign a case to an ALJ except in rotation,[15] cannot assign an ALJ any duties that are inconsistent with the duties and responsibilities of an ALJ,[16] and cannot subject an ALJ to supervision or direction by any agency employee who engages in "the performance of investigative or prosecuting functions for an agency."[17] 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."[18]

At the same time that Congress protected the integrity of the hearing process by conferring decisional independence on ALJs, Congress ensured that agencies retained complete control over the legal basis and policy content of any decision in an adjudication. Congress accomplished that goal in two ways. First, it made it

[13] 5 U.S.C. § 7521.
[14] 5 U.S.C. § 5372.
[15] 5 U.S.C. § 3105.
[16] 5 U.S.C. § 3105.
[17] 5 U.S.C. § 554(d) (2).
[18] 5 U.S.C. § 7521.

clear that ALJs are bound by the rules that agencies issue to resolve most policy issues.[19] Second, Congress provided that an ALJ 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."[20] 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.[21]

Shortly after Congress enacted the APA, the Supreme Court issued a series of decisions regarding the independence of ALJs 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*,[22] the Court upheld the initial rules issued by the Civil Service Commission to govern the compensation and tenure of ALJs, and the rules governing assignment of cases to ALJs. It did so over an objection by an association of ALJs that the rules were not adequately protective of their independence.

The six-Justice majority described the reasons Congress conferred decisional qualified independence on ALJs in the APA: "Many complaints were voiced

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[19] 5 U.S.C. §556©10. See also *Warder v. Shalala*, 149 F. 3d 73, 83 (1st Circ. 1998) (ALJs are bound by interpretative rules as well as substantive rules).
[20] 5. U.S.C. § 557(b).
[21] *Universal Camera v. NLRB*, 340 U.S. 474, 496-497 (1951).
[22] 345 U.S. 128 (1953).

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."[23] 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."[24] 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."[25]

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 decisional independence on hearing examiners:[26]

> 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.

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[23] *Id.* at 131.
[24] *Id*. at 131.
[25] *Id*. at 131-32.
[26] *Id.* at 132.

The majority upheld the Civil Service rules based on its conclusion that the rules were consistent with congressional intent:[27]

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 decisional independence on hearing examiners:[28]

> 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.

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[27] *Id.* at 133.
[28] *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 qualified independence on hearing examiners in *Wong Yang Sung v. McGrath.*[29] 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 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.[30] 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."[31]

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[29] 339 U.S. 33 (1950).

[30] *Id*. at 37-45.

[31] *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.[32] The Court even suggested that the Constitution might compel an agency to use the APA hearing procedures:[33]

> 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.

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.[34] Based on that conclusion, the Court held that the provisions in the APA relating to hearing examiners applied to deportation proceedings.[35] In later cases, the Court relied on the reasoning in *Wong Yang Sung*

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[32] *Id.* at 45-47.
[33] *Id.* at 49-50.

[34] *Id*. at 50.
[35] *Id*. at 51.

as the basis to hold that the APA applies to hearings under the Interstate Commerce Act[36] and to Post Office fraud hearings[37].

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.[38] 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." [39]

## II. Departures from the APA Agency Adjudication System

The APA system of adjudication applies only to a fraction of agency adjudications. In a few cases, such as the immigration adjudication system that the Court upheld in *Marcelo v. Bonds*,[40] Congress expressly decided to reject the APA

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[36] *Riss & Co. v. U.S.*, 341 U.S. 907 (1951).
[37] *Cates v. Haderlein*, 342 U.S. 804 (1952).
[38] *Marcello v. Bonds*, 349 U.S. 302 (1955).
[39] Id. at 310.

[40] Id.

system. In most cases, however, the decision not to adopt the APA system was the unintentional result of miscommunications between Congress and the courts.

In its 1973 opinion in *United States v. Florida East Coast Railway Co*.[41] the Supreme Court held that a statute that required an agency to conduct a "hearing" before it issued a rule did not require the agency to use the oral evidentiary procedures required by APA sections 554 through 557. The Court held that an agency must use those procedures only when Congress requires the agency to act "on the record after opportunity for agency hearing."

In the rulemaking context, the *Florida East Coast* holding had the desirable effect of eliminating the need for an agency to conduct what the Court had characterized as "nigh interminable" oral evidentiary hearings before it could issue a rule.[42] Oral evidentiary hearings are not needed to address the contested issues of legislative fact that arise in rulemaking proceedings. They are often essential, however, to resolve the contested issues of adjudicative fact that arise in adjudications.

Over time, circuit courts held that the *Florida East Coast* holding applies to adjudications.[43] Since Congress rarely uses the words "on the record after opportunity for agency hearing" in statutes that authorize agencies to adjudicate

[41] 410 U.S. 224 (1973).
[42] E.G., Federal Power Commission v. Louisiana Power & Light Co., 406 U.S. 633,655 (1972).
[43] See cases discussed in Hickman & Pierce, supra note ___ at §6.2.3.

cases, the effect of the circuit courts' application of the *Florida East Coast* holding to adjudications has been to give agencies near complete discretion with respect to the procedures they use to conduct adjudications.[44] Agencies almost invariably provide a right to an oral evidentiary hearing, including the right to cross-examine opposing witnesses. In most cases, however, agencies have chosen not to use ALJs to preside in adjudications. They have opted to use decision makers who lack the many safeguards of decisional independence that the APA provides for ALJs. Agencies use a variety of titles to refer to these adjudicators, but they are often referred to as Administrative Judges, or AJs, to distinguish them from the ALJs whose decisional independence is protected by the APA. There are far more AJs than ALJs.[45]

As a result of this miscommunication between Congress and the courts, we have gradually returned to the pre-APA era in which there is a high risk that AJs will experience a great deal of pressure to decide cases the way that agency management wants them to decide cases. Empirical studies confirm the existence of this pro-agency bias. Thus, for instance, the Government Accountability Organization found that 67% of Administrative Patent Judges experience pressure from agency management to decide cases in ways that management prefers.[46]

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[44] In *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990), the Court held that only APA section 554 applies to agency adjudications unless the statute contains the "on the record" language. Id. at 655.

[45] Michael Asimow, Best Practices for Evidentiary Hearings Outside the Administrative Procedure Act, 26 George Mason L. Rev. 923 (2019).

The results of this pressure to decide cases in accordance with the wishes of agency management are impossible for reviewing courts to detect. As far as the reviewing court can tell, the AJs decision was the product of her independent evaluation of the evidence. By contrast, when an agency replaces an ALJ's decision with the agency's own decision, as it can under the APA, a reviewing court knows that it has before it both the views of the independent ALJ and the contrasting views of the agency. It can then evaluate the evidence in the record and decide which findings and conclusions are supported by substantial evidence.

Either Congress or the Supreme Court could easily correct this problem and return the agency adjudication system to the model that Congress and the Court unanimously embraced in 1946. Congress could amend the APA to make it clear that the typical language in a statute that confers the power to adjudicate on an agency—"after hearing"—requires a hearing that complies with APA sections 554 through 557. Alternatively, the Supreme Court could clarify its holding in *Florida East Coast* by limiting it to rulemakings and interpreting language like "after hearing" to refer to a hearing that complies with APA sections 554 through 557 in the context of an adjudication.

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[46] GAO-23-105336, Patent Trial and Appeal Board: Increased Transparency Needed in Oversight of Judicial Decisionmaking 23-33 (Dec. 2022).

## III. A System of Adjudication that Is True to the Intent of the Congress of 1946 Would Be Constitutional

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[47] the Supreme Court held that it is unconstitutional for Congress to provide two layers of for cause insulation between the president and an officer who has the power to make policy decisions on behalf of the United States. The Court went on to hold that the for cause limit on the power of the SEC to remove a member of the Board was unconstitutional.

The Fifth Circuit has held that the *Free Enterprise Fund* holding requires a court to hold that the for cause limit on the power of agencies to remove ALJs is unconstitutional in the context of agencies whose members are subject to a for cause limit on the president's removal power.[48] That holding is wrong for many reasons.

In *Free Enterprise Fund*, the Court specifically reserved the issue of the validity of the good cause limit on the power of an agency to remove an ALJ.[49] ALJs are easy to distinguish from the Board members whose tenure was challenged in *Free Enterprise Fund.* The Board members are policymakers, while ALJs perform solely adjudicative functions and have no power to make policy

[47] 561 U.S. 477 (2010).
[48] *Jarkesy v. SEC*, 34 F. 4th 446, 464 (5th Cir. 2022).
[49] 561 U.S. at 507 n. 10.

decisions. The proper analogy is to the members of the War Claims Tribunal in *Wiener v. United States*.[50] The Court held that they could not be removed except for cause because they performed solely adjudicative functions. The analogy between the Tribunal members in *Wiener* and ALJs is so compelling that the Court would have to overrule *Wiener* in order to hold that the for cause limit on the removal of ALJs is unconstitutional.

If the Court sees a need to overrule a precedent in order to enforce the ban on multiple levels of for cause protection from removal it announced in *Free Enterprise Fund,* it should instead overrule its holding in *Humphrey's Executor v. United States*.[51] There the Court upheld that for cause limit on the power of the president to remove an FTC Commissioner because the FTC's functions are solely "quasi-judicial or quasi-legislative.[52] That is no longer an accurate characterization of the functions of the FTC. It has become an extremely aggressive policy making agency that is attempting to change antitrust law dramatically.[53]

## Conclusion

Congress or the Supreme Court should recreate the model of agency adjudication that both unanimously endorsed in 1946.

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[50] 357 U.S. 349 (1958).
[51] 295 U.S. 602 (1935).
[52] Id. At 627-29.
[53] See, e.g., FTC-DOJ Proposed Merger Guidelines (July 19. 2023); Policy Statement Regarding the Scope of unfair Methods of Competition (Nov. 10, 2022).