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## Against Administrative Judges

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# UC DAVIS LAW REVIEW

VOL. 49, NO. 5



JUNE 2016

## Against Administrative Judges

Kent Barnett\*

*The single largest cadre of federal adjudicators goes largely ignored by scholars, policymakers, courts, and even litigating parties. These Administrative Judges or "AJs," often confused with well-known federal Administrative Law Judges or "ALJs," operate by the thousands in numerous federal agencies. Yet unlike ALJs, the significantly more numerous AJs preside over less formal hearings and have no significant statutory provisions that preserve their impartiality. The national press has recently called attention to the alleged unfairness of certain ALJ proceedings, and regulated parties have successfully enjoined agencies' use of ALJs. While fixes are necessary for ALJ adjudication, any solution that ignores more widespread, less independent, and less litigant-protective AJ adjudication falls woefully short.*

*This Article argues that, contrary to agency orthodoxy and regardless of regulated parties' interests, agencies should choose ALJs over AJs to further their own interests. With broad direction to choose AJs or ALJs, agencies prefer the former because of increased control over AJs' job performance and policy implementation in flexible, informal proceedings — all for less cost. Yet, not only are the relative informality and cost savings of AJ proceedings exaggerated (based on data that this Article is the first to consider meaningfully), but the use of AJs has overlooked*

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\* Copyright © 2016 Kent Barnett. Assistant Professor, University of Georgia School of Law. I appreciate extremely valuable comments from Michael Asimow, Mehrsa Baradaran, Emily Bremer, Aziz Huq, Brian Lea, Jeff Lubbers, Aaron Nielson, Usha Rodrigues, Miriam Seifter, David Shipley, Hon. J.E. Sullivan, and Chris Walker.

*downsides. Agency control of AJs undermines their perceived impartiality, creating unacknowledged due process concerns under two recent Supreme Court decisions — Caperton v. A.T. Massey Coal Co. and Free Enterprise Fund v. PCAOB — and complicating agencies' missions. Choosing ALJs also increases the likelihood of agencies receiving deferential judicial review and absolute official immunity for agency adjudicators. Thus, this Article broadens and contextualizes the current ALJ controversy by highlighting the more pervasive and problematic phenomenon of AJs in administrative adjudication.*

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## INTRODUCTION

Federal administrative adjudicators — Administrative Law Judges (“ALJs”) and their doppelgängers Administrative Judges (“AJs”) — comprise the “hidden judiciary.”<sup>1</sup> Despite numbers and caseloads substantially larger than Article III courts’, ALJs and AJs mostly go about unnoticed, toiling in the shadows of agency rulemaking.<sup>2</sup> Scholarly attention to agency adjudication has, at best, been fleeting.<sup>3</sup> ALJs have, however, recently done something uncharacteristic: they got the national media’s attention — but not in a good way. *The New York Times* and *The Wall Street Journal* have reported that the Securities and Exchange Commission (“SEC”) prevails much more frequently — sometimes 100% of the time in a given year — in its in-house enforcement proceedings than in court.<sup>4</sup> Whether or not selection effects impact those statistics’ validity,<sup>5</sup> parties subject to

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<sup>1</sup> See Chris Guthrie et al., *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1478 (2009).

<sup>2</sup> Ronald M. Levin, *Administrative Judges and Agency Policy Development: The Koch Way*, 22 WM. & MARY BILL RTS. J. 407, 409 (2013) (“Administrative adjudication as a whole gets much less attention in modern scholarship than rulemaking does.”).

<sup>3</sup> Scholars last gave agency adjudication a sustained look in the early 1990s. See, e.g., 2 PAUL R. VERKUIL ET AL., ADMIN. CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS 1058 (1992); John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261 (1992); Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481 (1990) [hereinafter *Political Control*]; Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341 (1992) [hereinafter *Reflections*]. In the past ten years, agency adjudication has only occasionally returned to meaningful scholarly discussion. See, e.g., Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797 (2013) [hereinafter *Resolving the ALJ Quandary*]; Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693 (2005) [hereinafter *Policymaking*]; James E. Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 WAKE FOREST L. REV. 1191 (2006); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805 (2015).

<sup>4</sup> Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015, 10:30 PM), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803> [hereinafter *SEC Wins*]; Gretchen Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y. TIMES (Oct. 5, 2013), <http://www.nytimes.com/2013/10/06/business/at-the-sec-a-question-of-home-court-edge.html> (contrasting SEC’s 88% win rate in ALJ hearings to its 63% win rate in district courts). For instance, the SEC prevailed in all agency proceedings in 2012, and in more than 75% in 2011, 2013, and 2014. In comparison, it prevailed in less than 75% of similar judicial proceedings. See *id.*

<sup>5</sup> Perhaps the SEC prevails more often in its in-house tribunals because it is sending easier cases there rather than to federal court. See, e.g., Stephen Joyce, *Rakoff, Practitioners Question SEC Practice of Sending More Enforcement Cases to ALJs*, BLOOMBERG BNA (Mar. 6, 2015), <http://www.bna.com/rakoff-practitioners-question-n17179923714/>; *infra* Part IV.A.2.

these increasingly frequent proceedings have taken note.<sup>6</sup> In several recent judicial proceedings, they have challenged — and have had enjoined<sup>7</sup> — those SEC administrative proceedings on separation-of-powers grounds, complained of the limited protections and procedures that those proceedings afford them, and emphasized the partiality concerns that arise from the SEC's higher win rate before its own judges than before Article III courts.<sup>8</sup>

When responding to the partiality concerns (and a disruptive attempt to depose an ALJ), the SEC did something very curious. It invited the ALJ at issue to file an affidavit to declare whether he had felt undue pressure from the SEC to rule in the agency's favor.<sup>9</sup> The ALJ declined to do so,<sup>10</sup> creating an unfavorable impression of impinged independence. A former ALJ's recent allegations that she came under fire for ruling against the SEC only magnified this impression.<sup>11</sup>

What the public and even many lawyers may not realize is that this high-profile indictment of the SEC's in-house proceedings implicates the most formal, most litigant-protective form of federal agency adjudication — so-called “formal adjudication” under the Administrative Procedure Act (“APA”).<sup>12</sup> Numerous, if not most,

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<sup>6</sup> See Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, WALL ST. J. (Oct. 21, 2014, 9:40 AM), <http://www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590> (quoting Kara Brockmeyer, head of the SEC's anti-foreign-corruption enforcement unit).

<sup>7</sup> See *Hill v. SEC*, 114 F. Supp. 3d 1297, 1320-21 (N.D. Ga. 2015) (granting preliminary injunction based on substantial likelihood of Appointments Clause violation); *accord Duka v. SEC*, No. 1:15-cv-00357, 2015 WL 4940083, at \*1 (S.D.N.Y. Aug. 12, 2015).

<sup>8</sup> See, e.g., *Gray Fin. Group, Inc. v. SEC*, No. 1:15-cv-00492-LMM (N.D. Ga. Aug. 4, 2015); *Timbervest v. SEC*, No. 1:15-cv-02106-LMM (N.D. Ga. Aug. 4, 2015); *Tilton v. SEC*, No. 15-cv-02472-RA (S.D.N.Y. June 30, 2015); *Hill*, 114 F. Supp. 3d at 1304; *Stilwell v. SEC*, No. 14-cv-7931 (S.D.N.Y. Oct. 1, 2014).

<sup>9</sup> *Timbervest, LLC*, SEC File No. 3-15519 (June 4, 2015), available at <https://www.sec.gov/litigation/opinions/2015/ia-4103.pdf>.

<sup>10</sup> Cara Salvatore, *SEC Judge Refuses to Say Whether He Favors Agency*, LAW360 (June 12, 2015), <http://www.law360.com/articles/667248/sec-judge-refuses-to-say-whether-he-favors-agency>.

<sup>11</sup> See Eaglesham, *SEC Wins*, *supra* note 4 (referring to former SEC ALJ Lillian McEwen, who complained of coming “under fire” for finding in favor of regulated parties).

<sup>12</sup> The SEC's enforcement proceedings are required to be “on the record, after notice and opportunity for hearing,” when it seeks to impose a civil penalty. 15 U.S.C. § 77h-1(g)(1) (2012). That phrase serves as triggering language under the APA to require formal adjudication protections. See 5 U.S.C. § 554(a) (2012). Those protections include requiring an ALJ to preside (in the absence of the agency or its

agency adjudications — more than 550,000 annually<sup>13</sup> — are less formal than those formal SEC proceedings. And, most importantly for this Article, these informal proceedings are overseen by mere AJs, agency employees whose number is likely twice as large as ALJs.<sup>14</sup> Agencies across the federal administrative state use AJs, but AJs are most prevalent in the Department of Commerce (with more than 1,000 AJs), the Internal Revenue Service (950), the Department of Veterans Affairs (306), the Department of Justice (250), and the Equal Employment Opportunity Commission (111).<sup>15</sup> ALJs and AJs perform the same function: they preside over oral hearings to award benefits and licenses, enforce agency penalties, and adjudicate claims primarily between private parties. Indeed, some agencies use both ALJs and AJs to hear the exact same kinds of cases, including federal employment cases before the Merit Systems Protection Board (“MSPB”).<sup>16</sup>

Despite sharing nearly identical titles and functions with ALJs, AJs lack the statutory protection from removal, professional discipline, and performance reviews that ALJs have under the APA.<sup>17</sup> Relatedly, agencies directly hire AJs, while another independent agency, the Office of Personnel Management (“OPM”), oversees ALJ hiring. Unlike ALJs, AJs can (and often do) carry out other duties for the agency when not presiding over hearings. Perhaps most unsettling, no statute prohibits them from communicating *ex parte* with agency officials during and about their hearings.<sup>18</sup> These distinctions provide agencies more control over AJs than ALJs (and, reflexively, AJs less independence than ALJs). Despite their widespread use and obvious lack of independence, AJs’ understandable confusion with better-known ALJs means that they are “the real hidden judiciary.”<sup>19</sup>

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members), *see id.* § 556(b) (2012), limiting *ex parte* communications, and limiting the ALJs’ functions within the agency, *see id.* § 554(d).

<sup>13</sup> RAYMOND LIMON, OFFICE OF ADMIN. L. JUDGES, THE FEDERAL ADMINISTRATIVE JUDICIARY THEN AND NOW — A DECADE OF CHANGE 1992–2002, app. C (2002). Limon’s data from 2002 is the most recent data of which I am aware concerning AJs and their proceedings. I am not aware of any data (contemporary to data concerning the number of AJ proceedings) for ALJs. For limited, dated numbers, *see infra* note 40 and accompanying text.

<sup>14</sup> *See infra* notes 41–42 and accompanying text.

<sup>15</sup> *See* LIMON, *supra* note 13, at app. C (“2002 Top Ten List of Non-ALJs by Agency”).

<sup>16</sup> *See infra* notes 43–53 and accompanying text.

<sup>17</sup> *See infra* Part I.B.

<sup>18</sup> *See infra* Part I.

<sup>19</sup> Verkuil, *Reflections*, *supra* note 3, at 1345.

The key problem with all agency hearings — whether with an ALJ or AJ — is that they create inherent partiality concerns. The adjudicator's employing agency is often a party and controls the adjudicator's budget and perhaps salary. Indeed, the agency may even present expert witnesses who are the adjudicator's own co-workers.<sup>20</sup> Congress sought to address these concerns in the APA for ALJs by giving ALJs independence based on their hiring, removal, oversight, and limited interactions with agency officials.<sup>21</sup> Yet even with the APA's many ALJ-independence measures, scholars have questioned ALJs' appearance of partiality for decades, coming to different conclusions as to whether ALJs violate due process.<sup>22</sup> But Congress has not given AJs any of these indicia of independence, even after the well-publicized partisan hiring and firing of Immigration Judges (a type of AJ) during the George W. Bush Administration.<sup>23</sup> Yet if, as the recent SEC example and past scholarship reveal, the federal government's most formal form of adjudication with its most independent agency judges (ALJs) is problematic,<sup>24</sup> the use of less independent AJs in less litigant-protective proceedings is even more troubling. Any solutions that focus only on ALJs are myopic because more significant and pernicious problems surround AJs. This Article tackles AJs' place in the administrative state and thereby agency adjudication much more broadly.

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<sup>20</sup> Moliterno, *supra* note 3, at 1195.

<sup>21</sup> See *infra* notes 219, 221 and accompanying text. Congress has also given certain AJs — Board of Contracts Appeals Judges — some or all of the protections that ALJs have. For instance, all of those judges must be appointed like ALJs from a register by the hiring agency. See 41 U.S.C. § 7105(a)(1), (b)(2), (c)(2), (d)(2) (2012); VERKUIL ET AL., *supra* note 3, at 950-51. One group also has the same protection from at-will removal that ALJs share. See 41 U.S.C. § 7105(a) (no protection from at-will removal for Armed Services Board Judges); *id.* § 7105(b)(3) (same protection as ALJs from at-will removal for Civil Board of Contract Appeals Judge); *id.* § 7105(c) (no protection for Tennessee Valley Authority Board Judges), (d) (no protection from at-will removal for Postal Service Board Judges).

<sup>22</sup> See Barnett, *Resolving the ALJ Quandary*, *supra* note 3, at 817-20 (summarizing due-process debates surrounding ALJs).

<sup>23</sup> See, e.g., Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 KAN. J.L. & PUB. POL'Y 362, 380-81 (2008) (citing Carol Marin, *Patronage "Crime" Does Pay — for Justice Dept.*, CHI. SUN-TIMES, Mar. 25, 2007, at B6); Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties*, WASH. POST, June 11, 2007, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/10/AR2007061001229.html>.

<sup>24</sup> See Barnett, *Resolving the ALJ Quandary*, *supra* note 3, at 816-20 (discussing impartiality debates surrounding ALJs in legal scholarship).

Agencies, largely ignoring the partiality question, have increasingly chosen AJs to preside over oral hearings for several ostensible reasons. Proponents argue that agencies can use AJs to oversee less important, more flexible, and more efficient proceedings than the formal proceedings that the APA requires ALJs to oversee.<sup>25</sup> AJs, too, are likely to provide more subject-matter and policy expertise than ALJs because they come from within the agency and often are working on other agency projects.<sup>26</sup> Unlike with ALJs, agencies face no statutory impediment to controlling AJs' appointment, job performance, or termination. And agencies can obtain all of these indicia of control over AJs at a lower cost because AJs' salaries are purportedly cheaper than ALJs'. Because of these benefits, the conventional wisdom holds that agencies will and should — from their vantage point — choose AJs and informal adjudication over ALJs and formal adjudication.<sup>27</sup> But this Article identifies two examples to demonstrate that the choice is not inevitable<sup>28</sup> and, at any rate, argues that agencies' significant preference for AJs over ALJs has it backwards.

Agencies' control over AJs and purported cost savings exact a significant price for three reasons. First and foremost, AJs suffer from even more partiality concerns than ALJs because they lack ALJs' more rigorous appointment process led by an outside agency and ALJs' statutory protections from oversight and removal. This is a significant problem for regulated parties and agencies because, in light of one of the Supreme Court's most recent impartiality decisions (*Caperton v. A.T. Massey Coal Co.*<sup>29</sup>) and one of its most recent separation-of-powers decisions (*Free Enterprise Fund v. PCAOB*<sup>30</sup>), there is a

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<sup>25</sup> See Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1009 (2004) ("[Formal adjudication with ALJs] interferes with an agency's ability to manage its adjudicatory function and increases an agency's costs of conducting adjudication."); Frye, *supra* note 3, at 268 (discussing agencies' view that informality improves agency control and efficiency of achieving policy goals that Congress has set for the agency).

<sup>26</sup> See Frye, *supra* note 3, at 350-51 (noting that of the 2,692 AJs reported in the 1992 Frye Survey, more than 2,000 (including those who do not work for agencies) perform other tasks for the agency or employer); Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, app. I (2007) ("In addition to the ALJs, there are many other administrative judges who are chosen and appointed within the agencies to positions that may not be full-time or permanent.").

<sup>27</sup> See *infra* Part III.

<sup>28</sup> See *infra* Part II.

<sup>29</sup> 556 U.S. 868 (2009).

<sup>30</sup> 561 U.S. 477 (2010).



compelling, unacknowledged argument that agency control over AJs creates an unconstitutional appearance of partiality under the Due Process Clause and thereby renders invalid tainted agency proceedings. Moreover, even without a due process violation, the perception of partiality — as the SEC's current litigation demonstrates — leads to wholesale resistance from regulated parties and perhaps even courts (as partiality concerns over Immigration Judges did in the mid-2000s) and Congress for agency initiatives. Second, using AJs, instead of ALJs and formal adjudication, decreases the likelihood under current doctrine that agencies will receive deference from courts (under administrative law's well-known *Chevron* doctrine) when they interpret statutes that they administer. Third, using AJs, instead of ALJs, is less likely to limit onerous agency litigation because the latter receive absolute official immunity as a matter of course, while the former must satisfy an uncertain, open-ended inquiry.

Aside from the perils of agency control over AJs, the other benefits for AJs — cost savings, informality, and better expertise — are exaggerated. The cost savings of using AJs is not as significant as it may first appear because approximately half of all AJs make more than, the same as, or almost as much as ALJs.<sup>31</sup> Even when assuming the greatest (and unrealistic) pay differential between ALJs and the remaining AJs, the cost savings is small — almost always less than \$3 million per agency (out of multi-million- or multi-billion-dollar budgets). Likewise, the value of informality is also overstated. Many AJ proceedings are relatively formal already, and formal adjudication with ALJs under the APA provides more flexibility than its name suggests, leaving only an extremely small number of cases in which formal adjudication would be ill-suited.<sup>32</sup> Finally, significant technical expertise is not always necessary for agency adjudication. But when it is, the administrative state can allow agencies to consider expertise when hiring ALJs, while mitigating concerns that agencies will hire only their own employees with certain biases. In short, agencies have overstated the benefits and understated the costs of choosing AJs over ALJs.<sup>33</sup>

The purpose of this Article is threefold. First, it seeks to highlight and contextualize the often-forgotten hearing officers who preside over hundreds of thousands of federal adjudications. Second, it seeks to convince agencies that they should not accept the seemingly intuitive benefits of using AJs without much deeper consideration,

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<sup>31</sup> See *infra* Part IV.B.1.

<sup>32</sup> But even these few proceedings should have AJs with increased indicia of independence for the reasons provided *infra* Part IV.

<sup>33</sup> See *infra* Part IV.

especially in light of new doctrine since the early 1990s when informal adjudication received its last meaningful glance from scholars. Third, it seeks to reorient the largely forgotten discussion of AJs from the 1990s by shifting the focus from when *Congress* should require the use of ALJs for the sake of regulated parties<sup>34</sup> to how agencies themselves have discretion and incentive to choose AJs or, when necessary, seek congressional authorization to do so.

Two caveats apply. First, this Article does not take a view on when an oral hearing is necessary or appropriate.<sup>35</sup> Instead, this Article addresses whether ALJs and statutory formalities better serve agency interests once Congress or an agency has determined that one is needed. Second, it does not address how ALJs and formal proceedings could be further improved to avoid the SEC's predicament. Notably, ALJs provide no panacea. But I have considered that question, in part, elsewhere,<sup>36</sup> and its full treatment requires more space than this Article permits.

With these goals and limitations in mind, this Article proceeds as follows. Part I distinguishes ALJs from AJs, concentrating on their appointment, removal, and protections from agency influence and control. Part II considers agencies' significant discretion in choosing who presides over agency hearings, and Part III describes why agencies have reflexively chosen AJs over ALJs. Part IV argues that agencies should choose ALJs over AJs to further agencies' own interests by highlighting the overlooked costs of controlling AJs, the benefits of ALJs, and the overstated arguments for AJs.

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<sup>34</sup> See, e.g., VERKUIL ET AL., *supra* note 3, at 1058 ("Congress should consider expanding the category of cases where ALJs are required . . .").

<sup>35</sup> For a leading discussion of when informal adjudication proceedings satisfy due process, see Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 779-93 (1976) [hereinafter *Informal Adjudication*]. Scholars have also more recently reconsidered the virtues of formal administrative proceedings. See also, e.g., William Funk, *The Rise and Purported Demise of Wong Yang Sung*, 58 ADMIN. L. REV. 881, 884 (2006) [hereinafter *Wong Yang Sung*] (reconsidering the viability of early Supreme Court decision evaluating when Congress requires formal adjudication "on the record" under the APA); Aaron Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 292 (2014) (calling for agencies and Congress to reevaluate the benefits of formal rulemaking with oral hearings).

<sup>36</sup> See generally Barnett, *Resolving the ALJ Quandary*, *supra* note 3 (identifying three constitutional and practical concerns that surround ALJs and arguing that ALJs' appointment and removal by the D.C. Circuit would largely mitigate those concerns).

## I. DISTINGUISHING ALJS FROM AJS

ALJs and AJs outnumber and handle a substantially larger caseload than Article III judges. Although there are 860 permanently authorized Article III judgeships as of 2014,<sup>37</sup> there are more than 1,500 ALJs<sup>38</sup> and, based on the latest data from 2002, more than 3,300 AJs.<sup>39</sup> Along with their substantially greater numbers, ALJs and AJs decide a large number of cases, likely more than federal courts. Based on historical data, AJs and ALJs together likely preside, at the least, over more than 750,000 proceedings annually.<sup>40</sup> For comparison's sake, federal district courts had only about 375,000 civil and criminal-felony case filings in 2015.<sup>41</sup>

ALJs and AJs perform the same kinds of duties as their Article III analogues, although those duties vary by agency or proceeding.<sup>42</sup> In general, they preside over hearings, admit evidence and compile a record of the proceedings, make credibility determinations, and issue initial opinions.<sup>43</sup> They also often have authority to assess monetary penalties<sup>44</sup> or revoke valuable licenses<sup>45</sup> or security clearances.<sup>46</sup> Aside from or while adjudicating factual disputes, they also make social policy by interpreting statutes, agency regulations, and agency

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<sup>37</sup> *Authorized Judgeships*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/authorized-judgeships> (last visited July 11, 2015) (click "Authorized Judgeships-From 1789 to Present").

<sup>38</sup> See *infra* note 53 and accompanying text.

<sup>39</sup> See *infra* note 92 and accompanying text.

<sup>40</sup> LIMON, *supra* note 13, at 4 (noting that AJs presided over approximately 393,000 proceedings in 1992); Verkuil, *Reflections*, *supra* note 3, at 1346 n.18 (noting that ALJs decided over 250,000 cases in 1990).

<sup>41</sup> See Table N/A — U.S. District Courts — Combined Civil and Criminal Federal Court Management Statistics, U.S. COURTS (Mar. 31, 2015), <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/03/31-2>.

<sup>42</sup> For empirical data from the early 1990s concerning the kinds of proceedings and matters that AJs oversee and consider, see Frye, *supra* note 3, at 263-69.

<sup>43</sup> See Antonin Scalia, *The ALJ Fiasco — A Reprise*, 47 U. CHI. L. REV. 57, 71 (1979); Verkuil, *Reflections*, *supra* note 3, at 1345.

<sup>44</sup> See, e.g., 15 U.S.C. § 77h-1(g) (2012) (permitting ALJs to award civil penalties in SEC enforcement proceedings); Frye, *supra* note 3, at 283 (discussing informal adjudications in Coast Guard); *id.* at 287 n.65 (discussing certain informal EPA and FDIC enforcement proceedings).

<sup>45</sup> See, e.g., Frye, *supra* note 3, at 287 n.65 (discussing license-revocation proceedings by the Bureau of Alcohol, Tobacco and Firearms); *id.* at 308-14 (considering administrative cases in which the remedies or licensing apparatuses primarily benefit private parties).

<sup>46</sup> See *id.* at 279-80 (discussing security-clearance revocation hearings by the Directorate for Industrial Security Clearance Review).

guidance documents<sup>47</sup> and by compiling a record necessary to support policy decisions.<sup>48</sup>

The hearings that they oversee may concern exceedingly similar subject matters. For instance, both ALJs and AJs award entitlement benefits. ALJs award social-security benefits, while AJs award veterans benefits.<sup>49</sup> Likewise, ALJs preside over MSPB disciplinary hearings concerning other ALJs, but AJs oversee those same hearings for all other federal employees.<sup>50</sup>

Unsurprisingly, because of AJs' and ALJs' shared functions, similar hearings, and nearly identical titles and acronyms, they are frequently confused with one another or treated as if they are nearly synonymous. Some scholars consciously group them together when addressing concerns about administrative adjudication generally.<sup>51</sup> Others seem to group them together inadvertently, although understandably.<sup>52</sup> Yet, as compared to their functional similarities, AJs and ALJs differ in ways that are less obvious to litigants: their number and potential employers, appointment, removal, and ability to resist agency oversight.

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<sup>47</sup> See Charles Koch, Jr., *Administrative Judges' Role in Developing Social Policy*, 68 LA. L. REV. 1095, 1100-01 (2008) (explaining how administrative judges' interpretations can aid in the development of rules and policy).

<sup>48</sup> See *id.* at 1099 ("[Adjudicators' ability to develop the record] is one of the ways administrative adjudication is superior to other forms, especially in confronting policy issues. Administrative judges must ensure that the record contains the necessary technical and other policy oriented information, what administrative law defines as 'legislative facts.'"); see also *id.* at 1102-03 ("Administrative judges serve the policy-making function as both record builders and initial decision-makers. . . . The agency must develop policy that carries forward the intent of the statute, and administrative judges should contribute to that policy development.").

<sup>49</sup> ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 92-7: THE FEDERAL ADMINISTRATIVE JUDICIARY 3 (1992) [hereinafter 1992 ACUS RPT.], available at <https://www.acus.gov/sites/default/files/documents/92-7.pdf>.

<sup>50</sup> See Verkuil, *Reflections*, *supra* note 3, at 1352 n.47 (noting that Congress specifically permitted the use of AJs, except in hearings concerning ALJs).

<sup>51</sup> See Koch, *Policymaking*, *supra* note 3, at 701 n.40.

<sup>52</sup> Robert J. McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 WM. & MARY POL'Y REV. 184, 215 n.207 (2012) [hereinafter *Blowing in the Wind*] (citing an article in a leading law journal that purported to examine bias in "administrative law judges," but referred to U.S. Department of Labor statistics that grouped "administrative law judges, adjudicators, and hearing officers" together).

*A. Administrative Law Judges*

As of 2010, there were nearly 1,600 federal ALJs, more than 1,300 of whom work for the Social Security Administration ("SSA").<sup>53</sup> Their positions are established by statute.<sup>54</sup> Agencies may appoint them<sup>55</sup> but only after the OPM has winnowed a list of candidates. ALJ candidates must be licensed attorneys, have seven years' litigation experience in courts or administrative agencies (but not necessarily in matters related to the hiring agency), and pass an examination that the OPM administers.<sup>56</sup> The OPM then ranks candidates based on examination scores, experience,<sup>57</sup> and veteran status.<sup>58</sup> The OPM then prepares, under what is known as the "Rule of Three," a list of the three highest-scoring candidates from which the appointing agency can select its ALJ.<sup>59</sup> The goal of this OPM-led process is to render the appointments nonpolitical.<sup>60</sup> To obtain more control over the appointment process, agencies often hire ALJs who already work in another agency,<sup>61</sup> or they can wait until several vacancies exist to obtain a larger register of candidates.<sup>62</sup> Agencies may also borrow an ALJ from another agency with that agency's consent.<sup>63</sup>

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<sup>53</sup> See *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 586 app. C (2010) (Breyer, J., dissenting) (noting that the OPM informed the Court that there were 1,584 federal ALJs, 1,334 of whom work for the SSA).

<sup>54</sup> 5 U.S.C. § 3105 (2012).

<sup>55</sup> *Id.* ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.").

<sup>56</sup> VANESSA K. BURROWS, CONG. RESEARCH SERV., *ADMINISTRATIVE LAW JUDGES: AN OVERVIEW* 2 (2010).

<sup>57</sup> *Id.*

<sup>58</sup> Veterans' Preference Act, 5 U.S.C. § 3309 (2012); 5 C.F.R. § 302.201 (2015). For a discussion on the significant impact of the controversial veterans' preference on the final list of ALJ candidates, see Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 115-16 (1981) [hereinafter *Federal Administrative Law Judges*]. The Administrative Conference of the United States has recommended repeatedly that Congress modify the preference because it further limits agencies in hiring candidates with relevant skills or expertise. See 1992 ACUS RPT., *supra* note 49, at 6.

<sup>59</sup> See BURROWS, *supra* note 56, at 2-3. The OPM's scoring formulation for veterans led to protracted litigation and the suspension of ALJ hiring for four years. See *Meeker v. M.S.P.B.*, 319 F.3d 1368, 1370-72 (Fed. Cir. 2003); BURROWS, *supra* note 56, at 3.

<sup>60</sup> Verkuil, *Reflections*, *supra* note 3, at 1344.

<sup>61</sup> See *id.* at 1361 n.82.

<sup>62</sup> See 1992 ACUS RPT., *supra* note 49, at 5.

<sup>63</sup> 5 U.S.C. § 3344 (2012).

After their appointment, ALJs have some statutory protection from agency oversight to protect their decisional independence. ALJs oversee rulemaking or adjudicatory hearings that Congress requires to be “on the record.”<sup>64</sup> This on-the-record phrase triggers “formal adjudication,” as it is colloquially known,<sup>65</sup> with certain rights and protections under the APA.<sup>66</sup> One of the key characteristics of formal hearings is that the agency heads<sup>67</sup> or an ALJ must preside.<sup>68</sup> When an ALJ presides (as is almost always the case<sup>69</sup>), the APA requires a separation of functions for ALJs, meaning that they cannot perform investigative or prosecutorial functions or report to an employee who does.<sup>70</sup> They also generally cannot have ex parte contacts (including with agency officials) concerning a fact at issue.<sup>71</sup> But heads of agencies can still set agency policy by reversing ALJs’ decisions in full, as to both fact and law.<sup>72</sup>

ALJs, too, have significant protection from performance reviews. They are exempt from the Civil Service Reform Act’s performance appraisal requirements, which apply to most federal employees.<sup>73</sup> Their pay is set by statute and OPM regulation, not tied to performance reviews.<sup>74</sup> Agencies also cannot reward ALJs with

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<sup>64</sup> *Id.* § 553(c) (2012) (rulemaking); *id.* § 554(a) (2012) (adjudication). There is a longstanding debate over whether the SSA, which uses ALJs for its hearings, is required to engage in formal adjudication for its hearings. See *Social Security Subcommittee House Ways and Means Committee* 4-5 (June 27, 2012) (statement of Professor Jeffrey S. Lubbers); Robin J. Arzt, *Adjudications by Administrative Law Judges Pursuant to the Social Security Act Are Adjudications Pursuant to the Administrative Procedure Act*, 22 J. NAT’L ASS’N ADMIN. L. JUDGES 279, 281-82 (2002) [hereinafter *Adjudications*]. One of the SSA’s ALJs has asserted that ALJs are permitted to oversee only formal proceedings. See *id.*

<sup>65</sup> Asimow, *supra* note 25, at 1005-06 (noting that some “informal” proceedings can be equally as “formal” as those that are not governed by the APA’s on-the-record requirements).

<sup>66</sup> 5 U.S.C. §§ 554, 556, 557 (2012).

<sup>67</sup> *Id.* § 556(b)(1)–(2) (permitting an agency head or members of a multi-member body to preside).

<sup>68</sup> *Id.* § 556(b)(3).

<sup>69</sup> Asimow, *supra* note 25, at 1005 n.11 (“The APA also permits the agency head or heads to preside at hearings instead of ALJs (although this almost never happens).”).

<sup>70</sup> 5 U.S.C. §§ 554(d)(2), 3105 (2012); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 346 (1991) (describing separation of functions for ALJs).

<sup>71</sup> 5 U.S.C. § 554(d)(1).

<sup>72</sup> *Id.* § 557(b) (2012); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 495 (1951).

<sup>73</sup> 1992 ACUS RPT., *supra* note 49, at 2.

<sup>74</sup> *Id.*; see also Harold J. Krent, *Presidential Control of Adjudication Within the*

bonuses.<sup>75</sup> Agencies do have some authority to implement quality-control mechanisms to improve efficiency and accuracy in the adjudicative process.<sup>76</sup> Yet, despite some scholarly support,<sup>77</sup> these mechanisms have proven controversial and of limited use in removing less productive ALJs.<sup>78</sup>

Agencies, too, have a circumscribed ability to discipline and remove ALJs. They may generally discipline or remove ALJs only for “good cause established and determined by the [MSPB]” after a formal administrative hearing.<sup>79</sup> The MSPB members, like ALJs, also enjoy protection from removal because the President can remove them “only for inefficiency, neglect of duty, or malfeasance in office.”<sup>80</sup> Otherwise, ALJs essentially have life tenure because they do not serve for a period of years in office.<sup>81</sup> That said, ALJs are quick to note that agencies have sought to remove more than twenty ALJs since 1946, and the SSA — which employs most ALJs — has sought to obtain authority to “discipline” ALJs for “offenses” without prior findings by the MSPB.<sup>82</sup>

### B. Administrative Judges

With ALJs’ place in the administrative firmament in mind, the differences between AJs and ALJs become readily apparent. But as an initial admonition, one key reason that AJs remain the most unknown

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*Executive Branch*, 65 CASE W. RES. L. REV. 1083, 1108 (2015) (citing 5 U.S.C. § 4301 (2012)). ALJs’ pay is set out in significant detail in 5 U.S.C. § 5372 (2012), with three levels of basic pay. Notably, Congress moved from a two-tiered pay grade for ALJs — which was supposed to account for the difficulty of the kinds of cases that ALJs heard, see Scalia, *supra* note 43, at 65-67, and raised their pay. See Verkuil, *Reflections*, *supra* note 3, at 1352.

<sup>75</sup> See 5 C.F.R. § 930.210(b) (2015) (OPM regulation).

<sup>76</sup> See *Ass’n of Admin. Law Judges v. Colvin*, 777 F.3d 402, 405-06 (7th Cir. 2015) (holding that ALJs could not assert a claim to invalidate the SSA’s current 500-decision “goal” under the APA, but instead had to seek relief under the Civil Service Reform Act); *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989) (upholding SSA’s implementation of “reasonable production goals”).

<sup>77</sup> See Pierce, *Political Control*, *supra* note 3, at 506.

<sup>78</sup> See *Colvin*, 777 F.3d at 402 (ALJ Association challenging SSA’s disposition “goals”); *Soc. Sec. Admin. v. Goodman*, 19 M.S.P.R. 321 (1984) (refusing to remove ALJ with productivity rate more than 50% below agency average of monthly case dispositions). For a thorough discussion of productivity-related actions against ALJs, see Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589 (1994).

<sup>79</sup> 5 U.S.C. § 7521(a) (2012).

<sup>80</sup> *Id.* § 1202(d) (2012).

<sup>81</sup> See Verkuil, *Reflections*, *supra* note 3, at 1344.

<sup>82</sup> See Barnett, *Resolving the ALJ Quandary*, *supra* note 3, at 808.

of the “hidden judiciary” is that the data for AJs, as compared to ALJs is much more limited, dated, and inconsistent from survey to survey. Because the government does not regularly collect data on AJs, surveyors must “go directly to the employing agencies.”<sup>83</sup>

Most of the data in this Article comes from either a 1992 survey collected by Administrative Law Judge John Frye concerning AJs (hereinafter, 1992 Frye Survey)<sup>84</sup> or a 2002 (and most recent) update by Raymond Limon, then Acting Assistant Deputy Director at the OPM’s Office of Administrative Law Judges (hereinafter, Limon Updated Survey).<sup>85</sup> These surveys asked numerous agencies similar questions about the number of AJs who preside over oral hearings, AJs’ titles, AJs’ pay grade or scale, how agencies review AJs’ performance (if at all), and types of cases that AJs hear.<sup>86</sup> But, likely because of statutory changes or responding agencies’ differing interpretations of the questions asked, responses from the agencies to these similar questions, at times, provided disparate answers. For instance, the respondents appear to have interpreted who qualified as a “non-ALJ” or what qualified as an “oral hearing” differently. The 1992 Frye Survey reports Veterans Affairs (“VA”) regional administrators as the largest group of federal AJs, but the VA did not include them in its response in the Limon Updated Survey.<sup>87</sup> Likewise, the Limon Updated Survey reported that the Commerce and Treasury departments housed the most AJs with 1,000 patent examiners and 950 IRS AJs, respectively, but neither appeared to count these positions in the 1992 Frye Survey.<sup>88</sup> Moreover, some agencies responded to one study but not the other.<sup>89</sup> Unless identified otherwise, I rely upon the Limon Updated Survey data because it is more recent, was sent to more agencies,<sup>90</sup> and received more responses.<sup>91</sup>

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<sup>83</sup> LIMON, *supra* note 13, at app. B n.1.

<sup>84</sup> See generally Frye, *supra* note 3.

<sup>85</sup> See generally LIMON, *supra* note 13.

<sup>86</sup> See *id.* app. B (“2002 Survey Questions of Non-ALJ Hearing Programs”); Frye, *supra* note 3, app. A, at 348 (“Study of Non-ALJ Hearing Programs”).

<sup>87</sup> Compare Frye, *supra* note 3, app. B at 351 (listing 1,692 VA AJs), with LIMON, *supra* note 13, app. C, at 6 (listing total number of 306 AJs at the VA).

<sup>88</sup> Compare LIMON, *supra* note 13, app. C, at 1, 6 (listing total number of 1,097 AJs at Commerce and 950 at Treasury), with Frye, *supra* note 3, app. B, at 349-51 (listing 58 AJs for Commerce (including the Board of Patent Appeals) and 21 for Treasury AJs).

<sup>89</sup> Compare LIMON, *supra* note 13, at 2 (noting that surveys were sent to “over 80 Federal agencies”) & app. C (listing agencies that responded to surveys), with Frye, *supra* note 3, app. A at 347 (listing surveyed agencies and those that responded).

<sup>90</sup> Compare LIMON, *supra* note 13, at 2 (“[W]e eventually contacted over 80



These concerns with the data's validity are important to keep in mind, but they affect my analysis in only one minor way. The data's primary purpose is to establish the general widespread use and variety of AJs. I have no reason to think that more contemporary data, other than revealing more use and variety of AJs, would undermine these descriptive points. Any specific data is largely irrelevant to my key points concerning partiality, formality, or expertise. The only area that the data's limitations may slightly impact my conclusions is in the magnitude of cost savings from using AJs. Because the number of AJs is probably greater now than in 2002, the cost savings may be slightly greater than I indicate in Part IV.B.1. Nonetheless, it is extremely likely that my larger point — that the cost savings are not as large as they first appear based on AJs' various salaries and agencies' relative budgets — continues to be true, and I attempted to address concerns over the data's limits by assuming the best case for agencies' cost savings when interpreting the most current data.

From the existing data, AJs and ALJs differ in number and potential employers. Based on the most recent data, the number of AJs is likely more than double that of ALJs.<sup>92</sup> The Limon Updated Survey reveals that of the reported 3,370 AJs in 2002, almost one-third worked for the Department of Commerce, most as patent examiners.<sup>93</sup> The next largest category from the Limon Updated Report is 950 AJs for the Internal Revenue Service.<sup>94</sup> In the 1992 Frye Survey (but not included

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Federal agencies and offices . . .”), with Frye, *supra* note 3, app. A (listing 48 agencies to which surveys were sent).

<sup>91</sup> Compare LIMON, *supra* note 13, app. C (listing 65 agencies responding and 36 indicating that they administered responsive hearings), with Frye, *supra* note 3, app. A (listing 47 agencies as responding and 35 indicating that they administered responsive hearings). The 1992 Frye Study is helpful, however, in describing how AJs frequently engage in more activities than adjudication and in identifying how some AJs are not government employees. See *id.* app. B.

<sup>92</sup> Verkuil, *Reflections*, *supra* note 3, at 1345-46 (noting, in 1989, that 2,600 AJs worked for the federal government fulltime or part-time, rendering the corps of AJs “about twice as large as the ALJ corps . . . [with] a decision load that is at least the magnitude of that carried by the ALJs”); Frye, *supra* note 3, at 270 n.20 (noting that there were “601 presiding officers without other duties . . . [and] some 2,262 presiding officers with other duties, including those who are not government employees”). Limon also reported 1,351 ALJs in 2002. LIMON, *supra* note 13, at 3 n.4.

<sup>93</sup> See LIMON, *supra* note 13, app. C, at 1 & “2002 Top Ten List of Non-ALJs by Agency” Chart.

<sup>94</sup> See LIMON, *supra* note 13, app. C, at 6. The 1992 Frye Survey did not include these IRS AJs. See Frye, *supra* note 3, app. B, at 349-51 (reporting only 21 AJs for the Department of Treasury).

in the Limon Updated Survey<sup>95</sup>), the second largest group of AJs is comprised of privately employed hearing officers who adjudicate certain Medicare disputes that health insurers administer for the government.<sup>96</sup> These 185 AJs reveal a key difference between some AJs and ALJs. Unlike all ALJs, these Medicare hearing officers are part of a slightly larger group of 237 AJs, as reported in 1992, who are employed by private parties, not government agencies.<sup>97</sup>

Insurance-carrier “hearing officers” reveal another, and much less appreciated, difference between ALJs and AJs: the nature of their titles is not the same. “Administrative Law Judge” is a statutory term, as indicated above, that applies to those OPM-approved adjudicators who have statutory protections and preside over formal adjudication.<sup>98</sup> AJs, in contrast, can, but rarely do, have a statutorily provided title. For example, Congress expressly used the term “administrative judge” in describing the initial adjudicators of certain civil-penalty hearings under the Nuclear Non-Proliferation Treaty<sup>99</sup> and adverse actions concerning senior executives within the VA.<sup>100</sup> Congress also provides similar titles, such as “Immigration Judges,” defined as those “attorney[s] whom the Attorney General appoints as an administrative judge within the Executive Office of Immigration Review.”<sup>101</sup> Much more frequently, however, the agency establishes the term by regulation.<sup>102</sup> In yet other instances, “AJ” or “administrative judge” is a

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<sup>95</sup> See LIMON, *supra* note 13, app. C, at 3 (not listing Carrier Hearing Officers under entry for “U.S. Department of Health & Human Services”).

<sup>96</sup> See Frye, *supra* note 3, at 291, app. B, at 349-52.

<sup>97</sup> See *id.* at 351-52. The Limon Updated Survey does not appear to include privately employed AJs, aside from a response from the Administrative Office of the Courts, which indicated that it uses AJs on a contractual basis and listed the pay plan as “N/A.” See LIMON, *supra* note 13, app. C, at 1. For this reason, I generally limit my discussion to government-employed AJs.

<sup>98</sup> See LIMON, *supra* note 13, at 2 n.2 (“[O]nly ALJs appointed under 5 U.S.C. 3105 may be given the title of ALJ.”).

<sup>99</sup> See 22 U.S.C. § 8142(a)(2)–(3) (2012).

<sup>100</sup> 38 U.S.C. § 713(e) (2012) (removal of senior executives within Department of Veterans Affairs). The U.S. Code makes a few other references to “administrative judges.” See, e.g., 25 U.S.C. §§ 458aaa–6(h)(2), 450f(e)(2)(B) (2012) (relating to hearings concerning, respectively, funding for Indian-health programs and Indian-tribe self-determination agreements).

<sup>101</sup> 8 U.S.C. § 1101(b)(4) (2012).

<sup>102</sup> See LIMON, *supra* note 13, at 2 n.2 (“Generally, individual agencies may create their own job titles for personnel, budget and fiscal purposes.”); see also, e.g., 29 C.F.R. § 1614.109(a) (2015) (permitting the EEOC to appoint “administrative judge[s]” to conduct hearings); 10 C.F.R. § 710.25(a)–(b) (2015) (requiring appointment of an “Administrative Judge” for certain Department of Energy hearings); 12 C.F.R. § 268.108 (2015) (having General Counsel of the Department of Defense

catch-all term that scholars use to describe those who oversee agency hearings (sometimes including ALJs<sup>103</sup>),<sup>104</sup> whatever their title.<sup>105</sup> For my purposes, I use the term “AJ” to refer to all non-ALJs who oversee oral hearings.

Agencies appoint agency-employed AJs without any outside agency’s (such as the OPM’s) involvement in the selection process.<sup>106</sup> Agencies often have established guidelines for selecting AJs as part of a competitive process for AJs who have no other duties.<sup>107</sup> For instance, the Nuclear Regulatory Commission requires that hearing examiners “shall be from a list of qualified attorneys possessing the highest degree of integrity, ability, and good judgment”; have certain authorization; be employed by the agency, or one of its licensees or contractors that are not parties to the hearing; have no ex parte knowledge of the proceedings; and otherwise be impartial.<sup>108</sup> But agencies are not generally required by any statute or the U.S. Constitution to be appointed in a particular way or to have any particular qualifications (such as being a lawyer<sup>109</sup>), aside from Civil Service statutes that apply to hiring generally.<sup>110</sup> Indeed, the Bush administration came under fire for appointing Immigration Judges (“IJs”) — a category of AJs — based on political criteria, instead of under a competitive process.<sup>111</sup> Half of the 37 hired IJs had no

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appoint “attorneys to be Administrative Judges assigned to the Defense Office of Hearings and Appeals (DOHA) and DOHA Appeal Board”).

<sup>103</sup> See Koch, *Policymaking*, *supra* note 3, at 701 n.40 (noting distinction between ALJs and AJs under federal statutory law but “adopt[ing] ‘administrative judge’ as a universal term” for his article).

<sup>104</sup> 1992 ACUS RPT., *supra* note 49, at 1; Verkuil, *Reflections*, *supra* note 3, at 1342 (“The second category is far more amorphous, but can still be distinguished from ‘non-hearing’ deciders. The deciders in this category are frequently called ‘administrative judges’ or ‘hearing examiners.’”).

<sup>105</sup> See, e.g., 10 C.F.R. § 10.26 (2015) (permitting the appointment of a Nuclear Regulatory Commission “Hearing Examiner” from qualified list of attorneys); 33 C.F.R. § 1.07-15 (2015) (referring to Coast Guard “hearing officers”).

<sup>106</sup> Verkuil, *Reflections*, *supra* note 3, at 1347 (“The selection and appointment procedures for administrative judges are controlled by the agencies themselves.”).

<sup>107</sup> See Frye, *supra* note 3, at 272. Frye notes that some of the respondents to his survey appeared to interpret his question as one concerning how employees are hired generally. See *id.* (describing AJs with no other duties); *id.* at 274 (describing AJs with other duties).

<sup>108</sup> See 10 C.F.R. § 10.26 (2015).

<sup>109</sup> The Limon Updated Survey indicates that 2,000 of the 3,370 AJs are not attorneys. See LIMON, *supra* note 13, at 4; see also Frye, *supra* note 3, app. B (identifying AJs who are and are not lawyers).

<sup>110</sup> See 5 U.S.C. §§ 2301–2302 (2012).

<sup>111</sup> See Susan Benesch, *Due Process and Decisionmaking in U.S. Immigration*

immigration experience, and those with experience had all worked in enforcement or as prosecutor.<sup>112</sup> And because many AJs have additional duties aside from presiding over hearings,<sup>113</sup> agencies may have a freer and less visible hand in selecting employees to serve as part-time adjudicators.

Once appointed, AJs have less independence than ALJs from their agency-employers. Unlike ALJs, most AJs (83%) are subject to performance appraisals within the agency,<sup>114</sup> and “several major groups of AJs [regularly] undergo such appraisals.”<sup>115</sup> Those appraisals can affect their salaries, which can be less than ALJs.<sup>116</sup> No statute prohibits them, unlike ALJs, from receiving pay bonuses from their agencies. Also unlike ALJs, AJs are not entitled to any particular protection from removal from office (such as ALJs’ “good cause” standard of removal).<sup>117</sup> Hidden, subtle pressures on AJs to rule in certain ways — to obtain favorable agency appraisals — often go unremarked.<sup>118</sup>

Agencies may also have a greater ability to influence AJ proceedings directly. Unlike ALJs who oversee formal proceedings under the APA, AJs typically preside over hearings that the APA minimally regulates.<sup>119</sup> In these proceedings (often referred to as “informal” adjudications), the APA’s prohibitions concerning separation of

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*Adjudication*, 59 ADMIN. L. REV. 557, 566 (2007). “An immigration judge is ‘an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review.’ 8 U.S.C. § 1101(b)(4). The [OPM] has categorized career attorney positions as Schedule A. 5 C.F.R. § 213.3102. All IJs are career Schedule A appointees. Consequently, the civil service laws set forth at 5 U.S.C. §§ 2301 and 2302 apply to the appointment of IJs.” U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), *available at* <https://oig.justice.gov/special/s0807/chapter6.htm>.

<sup>112</sup> See Benesch, *supra* note 111, at 566.

<sup>113</sup> See Frye, *supra* note 3, at 274 (noting lack of information on how presiding officers with other duties were selected to be arbitrators).

<sup>114</sup> See LIMON, *supra* note 13, at 4.

<sup>115</sup> 1992 ACUS RPT., *supra* note 49, at 2.

<sup>116</sup> See McCarthy, *Blowing in the Wind*, *supra* note 52, at 215. See discussion *infra* Part IV.B.1 for more detailed discussion of salaries.

<sup>117</sup> See McCarthy, *Blowing in the Wind*, *supra* note 52, at 217 (referring to IJs and MSPB AJs) (citing Jeffrey S. Lubbers, *Closing Remarks, Holes in the Fence: Immigration Reform and Border Security in the United States*, 59 ADMIN. L. REV. 621, 627 (2007)).

<sup>118</sup> See, e.g., *id.* at 217-23 (arguing that MSPB AJs are biased).

<sup>119</sup> One exception appears to concern enforcement of the Nuclear Non-Proliferation Treaty, where the implementing statute provides that AJs shall conduct hearings under 5 U.S.C. § 554, the formal-adjudication triggering provision under the APA. 22 U.S.C. § 8142(a)(2)–(a)(3) (2012).

functions and ex parte communications do not apply.<sup>120</sup> That said, agencies may have prohibitions concerning ex parte communications via rule, decision, or tradition.<sup>121</sup> Agencies, too, may have some express separation of functions simply by limiting AJs from engaging in, say, prosecutorial decisions.<sup>122</sup> Or they may have de facto separation by creating a class of AJs whose only duties are to preside over hearings<sup>123</sup> or by physically separating certain attorneys from other agency employees and titling them “administrative judges.”<sup>124</sup> These more informal methods of providing independence, where they exist, may be successful in leading AJs themselves to feel as free as ALJs from agency pressure.<sup>125</sup> But such informal agency protections do not exist throughout the administrative state, can be difficult to police, and are not beyond an agency’s abolition.

## II. BLACK-TIE OPTIONAL: CHOOSING ALJS OR AJS

Agencies have significant discretion to determine when to use hearings with all of the APA’s formal-adjudication trappings and thus ALJs. The APA requires “formal adjudication” — which provides certain rights for parties and limitations on the agency — whenever the adjudication is “required by statute to be made on the record after opportunity for an agency hearing.”<sup>126</sup> Agencies, except in rare circumstances, must use ALJs for formal adjudication.<sup>127</sup> Agencies may use AJs for informal adjudication. In the absence of express “on the record” language, courts generally find Congress’s directive ambiguous and defer to an agency’s reasonable interpretation of whether the hearing must be “on the record” under *Chevron U.S.A., Inc. v. NRDC, Inc.*’s well-known two-step deference regime.<sup>128</sup> For

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<sup>120</sup> See Frye, *supra* note 3, at 344.

<sup>121</sup> See *id.*

<sup>122</sup> See *id.* at 284 (discussing regulations that limit Coast Guard AJs from serving as prosecutors, but not prohibiting ex parte communications).

<sup>123</sup> See *id.* at 270-71.

<sup>124</sup> See Verkuil, *Informal Adjudication*, *supra* note 35, at 787 (discussing the Department of the Interior’s Office of Hearings and Appeals).

<sup>125</sup> VERKUIL ET AL., *supra* note 3, at 1054 (noting that “our empirical survey shows that AJs consider themselves just as independent as ALJs”).

<sup>126</sup> See 5 U.S.C. § 553(c) (2012); see also *id.* § 554(a) (2012) (differing, albeit immaterially, from § 553 by stating that the adjudication must be “required by statute to be *determined* on the record” (emphasis added)).

<sup>127</sup> See *id.* §§ 554(a), 556 (2012).

<sup>128</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). At the first step, the Court asks whether the statute clearly expresses Congress’s intent. If so, the court enforces that intent. See *id.* at 842-43. But if Congress has left a gap or

instance, the First Circuit held that the term “public hearing” was ambiguous and upheld the reasonableness of the agency’s interpretation via informal rulemaking that formal adjudication was not required for certain permitting.<sup>129</sup> Aside from the Ninth Circuit, all circuits give agencies a wide berth to decide whether adjudication must be formal.<sup>130</sup>

Contrary to popular impression,<sup>131</sup> agencies do not always use their discretion to choose informal proceedings with AJs. For example, the FTC uses formal adjudication, despite the absence of on-the-record language in the FTC Act. The FTC Act permits the FTC to adjudicate via an administrative “proceeding” when it has “reason to believe that . . . any unfair method of competition or unfair or deceptive act or practice” has occurred.<sup>132</sup> In what appears to have gone unnoticed, the FTC Act never requires that the proceedings be “on the record,” although it mandates that testimony “be reduced to writing” and otherwise describes the administrative “hearing” for issuing a cease-and-desist order.<sup>133</sup> The reduction-to-writing requirement for testimony seems, at best, ambiguous. It requires a transcription of testimony, but it does not otherwise require that the entirety of the hearing — motions or other nontestimonial evidence — be included in a record, nor does it require an oral hearing for the taking of

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ambiguity in the statute for the agency to fill, the Court merely asks at step two whether the agency’s interpretation is reasonable. *See id.* at 843.

<sup>129</sup> *See* Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 17-18 (1st Cir. 2006).

<sup>130</sup> *See* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 8.2, at 710-11 (5th ed. 2010) (noting that a D.C. Circuit decision after *Chevron* that gave agencies the ability to decide whether formal adjudication is required “has been followed by a veritable flood of similar opinions from many circuits in many contexts”); JOHN M. ROGERS ET AL., ADMINISTRATIVE LAW 122 (3d ed. 2012) (“The *Dominion Energy* decision leaves the . . . Ninth Circuit as the only remaining U.S. Court of Appeals that adheres to the *Seacoast* presumption that a hearing requirement, in the context of an adjudicatory proceeding, triggers [the APA’s formal protections].”).

<sup>131</sup> *See* Funk, Wong Yang Sung, *supra* note 35, at 892 (“Agencies never choose to have adjudication under the APA.”).

<sup>132</sup> 15 U.S.C. § 45(b) (2012).

<sup>133</sup> *Id.*

evidence.<sup>134</sup> Despite the lack of formal adjudication's triggering language, the FTC has chosen formal adjudication with ALJs.<sup>135</sup>

Similarly, the SSA has chosen to use ALJs in the absence of any "on the record" language.<sup>136</sup> A 1977 amendment to the Act concerning the appointment of temporary ALJs converted those temporary ALJs into "career-absolute positions as [ALJs]."<sup>137</sup> This amendment and significant legislative history around the time of the amendment suggest that Congress intended the SSA to use ALJs.<sup>138</sup> But after *Chevron* and the judiciary's broad deference to agencies on the formality question, it is far from clear that the SSA is required to use ALJs or formal adjudication under the APA. After all, legislative history to statutory amendments in 1994 states that although the SSA uses ALJs, the use of ALJs and formal APA proceedings are "not required by law."<sup>139</sup> The SSA's use of ALJs is all the more striking because the ALJs "departed from their traditional association with the trial-type process that had been contemplated by APA formal adjudication procedures" by presiding over nonadversarial,

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<sup>134</sup> Cf. Michael A. Lawrence, *Bias in the International Trade Administration: The Need for Impartial Decisionmakers in United States Antidumping Proceedings*, 26 CASE W. RES. J. INT'L L. 1, 24 n.110 (1994) (noting that similar language in the 1930 Tariff Act was amended by the Trade Act of 1974 — after *United States v. Florida East Coast Railway*, 410 U.S. 224 (1973) — to require "on the record" proceedings).

<sup>135</sup> See Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 837 (2010) ("The [FTC] implements these provisions through rulemaking and formal adjudication."). The FTC is not required to use ALJs, even if the implementing Congress was likely to have formal proceedings in mind. In *Florida East Coast Railway*, the Supreme Court rejected the lower court's reasoning that the 1917 Congress that enacted the Esch Act (the statute at issue in that case) would have likely considered a "hearing" a more formal affair based on the Court's roughly contemporaneous precedent. See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 236-37 (1973). The Court held that such an interpretation was inconsistent with the APA's on-the-record requirement, and it noted that Congress did not add an on-the-record requirement to the statute when it amended it after the APA's enactment. See *id.* at 235-37. Likewise, the FTC Act was also enacted during the 1910s, and it has been amended after the APA's passage without adding an on-the-record requirement.

<sup>136</sup> See Verkuil, *Reflections*, *supra* note 3, at 1349.

<sup>137</sup> See Social Security Amendments of 1977, Pub. L. No. 95-216, § 371, 91 Stat. 1509, 1559 (1977).

<sup>138</sup> See Jeffrey Scott Wolfe, *Are You Willing to Make the Commitment in Writing? The APA, ALJs, and SSA*, 55 OKLA. L. REV. 203, 235-42 (2002) (discussing the legislative history of the SSA and how the 1977 amendments clarified uncertainty as to whether ALJs were required).

<sup>139</sup> See 140 Cong. Rec. H6843 (daily ed. Aug. 4, 1994), cited in Arzt, *Adjudications*, *supra* note 64, at 305 (arguing that the statement in the legislative history was "erroneous" and "unresearched gratuitous dictum").

nonlawyer-based hearings in which the ALJs were representing the government, the claimant, and serving as impartial decider.<sup>140</sup>

The FTC and SSA's choice to use ALJs under their enabling acts is consistent with their separate, but extensive (though not unlimited), statutory authority to appoint ALJs. Congress has provided that "[e]ach agency shall appoint as many [ALJs] as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of [title 5]."<sup>141</sup> This provision gives the agencies broad discretion to determine how many ALJs to appoint, but it also limits those appointments to proceedings "required to be" formal. That limitation suggests that an agency's power to appoint ALJs extends only to instances in which the statute or agency requires formal adjudication, whether Congress unambiguously requires it or the agency has found it reasonable under the statute (via *Chevron*) to do so in light of congressional ambiguity or silence on procedure.<sup>142</sup> It would not extend to instances in which Congress has clearly indicated that formal proceedings should not apply, such as with immigration proceedings.<sup>143</sup>

This often-overlooked agency discretion, even if limited to when formality is permitted under an ambiguous statute, is important. Others, including the Administrative Conference of the United States ("ACUS"), have called for Congress to require agencies, based on fairness and administrative uniformity, to use ALJs in more

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<sup>140</sup> Verkuil, *Reflections*, *supra* note 3, at 1349.

<sup>141</sup> 5 U.S.C. § 3105 (2012).

<sup>142</sup> As another example, an agency may reasonably decide that adjudications should be formal, despite the lack of on-the-record language, when Congress uses a substantial-evidence standard of review over certain "hearings," see 20 U.S.C. § 1234a(c)–(d)(1) (2012), and requires the agency to appoint ALJs to preside over those determinations, see *id.* § 1234(b) (requiring the Secretary of Education to appoint ALJs under 5 U.S.C. § 3105 and preside over certain hearings, including those under § 1234a, which does not specifically require on-the-record hearings).

<sup>143</sup> The predecessor agency to the OPM initially refused to create a register of SSA ALJs because it did not think that SSA hearings had to be formal. See Wolfe, *supra* note 138, at 213 (citing STAFF OF COMM. ON WAYS & MEANS, 93D CONG., REPORT ON THE DISABILITY INSURANCE PROGRAM 55 (1974), *microfilmed* on CIS No. H782-29 (Cong. Info. Serv.)). The Administrative Conference of the United States, citing its informal communications with lawyers at OPM, indicated in a report that the OPM takes the position that either the statute or regulation must require formal adjudication before it will create a register of ALJ candidates for an agency. See ADMIN. CONFERENCE OF THE U.S., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EVALUATING THE STATUS AND PLACEMENT OF ADJUDICATORS IN THE FEDERAL SECTOR HEARING PROGRAM 13, 27-29 (2014) [hereinafter ACUS EEOC RPT.], *available at* <https://www.acus.gov/sites/default/files/documents/FINAL%20EEOC%20Final%20Report%20%5B3-31-14%5D.pdf>.



proceedings.<sup>144</sup> Congress, much to my chagrin, has shown little interest in doing so, even as it chastises agencies when abuses come to light.<sup>145</sup> Instead, one may be more successful in having *agencies themselves* decide — with their broad statutory discretion — to use ALJs for formal hearings. This Article seeks to identify first why agencies are generally thought to prefer AJs and why their preference may not be as beneficial as presupposed.

### III. THE CONVENTIONAL VIEW OF AJS' BENEFITS

Agencies nearly always choose AJs over ALJs. As Paul Verkuil concisely explained, “[T]hey are opting for a decider who has less decisional independence, lower pay and benefits, and less job security.”<sup>146</sup> Notably, these characteristics (as well as agencies’ freedom to appoint AJs<sup>147</sup>) all point to the same benefit for agencies — control.<sup>148</sup> From agencies’ viewpoint, control permits them to influence agency policy and render proceedings, guided by employees

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<sup>144</sup> ACUS had recommended that Congress require formal adjudication for cases concerning “substantial impact on personal liberties or freedom,” “criminal-like culpability,” “sanctions with substantial economic effect,” or findings of discrimination. 1992 ACUS RPT., *supra* note 49, at 12; *see also* VERKUIL ET AL., *supra* note 3, at 1058 (“Congress should consider expanding the category of cases where ALJs are required . . .”); McCarthy, *Blowing in the Wind*, *supra* note 52, at 226 (“One way around biased administrative judges would be to adopt the recommendation of the ACUS Report in letter as well as spirit, and mandate the use of independent federal administrative law judges, rather than administrative judges or hearing examiners, in any case where there is a substantial risk of deprivation of life, liberty, or property (including job tenure), and also for non-tenured whistleblower removals.”).

<sup>145</sup> *See* Asimow, *supra* note 25, at 1008-09 (“It is unlikely, however, that Congress will be persuaded to [require agencies to use ALJs] in the foreseeable future. The reason is that agencies strongly resist being required to utilize ALJs, whether in newly adopted or existing hearing schemes.”); Verkuil, *Reflections*, *supra* note 3, at 1351 (writing contemporaneously with the 1992 ACUS Report, calling for congressional action). Congress did respond with hearings when the IJs were hired on partisan grounds. *See supra* notes 111–12 and accompanying text.

<sup>146</sup> Verkuil, *Reflections*, *supra* note 3, at 1347.

<sup>147</sup> *See id.*; *see also* Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 72 (1996) [hereinafter *APA-Adjudication*] (arguing that AJs have become more populous than ALJs “because of a perception that, compared to non-ALJ adjudicators, ALJs are less desirable because of their cost, restrictions on their selection, and their effective immunity from performance management”).

<sup>148</sup> *See* Asimow, *supra* note 25, at 1020 (“Agencies understandably wish to avoid the numerous statutory provisions relating to the hiring, compensation, rotation, evaluation, and tenure of ALJs.”).

with technical expertise and more interaction with others in the agency, more efficient.

This subsection presents the case for AJs from agencies' vantage point. Part IV responds to AJs' putative benefits by first identifying the overlooked costs of controlling AJs (and concomitantly the benefits of choosing independent ALJs) and then contending that AJs' remaining benefits are overstated.

#### A. Control, Expertise, and Efficiency

Control allows agencies to appoint AJs with technical expertise. One of the key criticisms of the ALJ-selection process is that agencies have little ability to hire ALJs with subject-matter expertise and that the ALJs on the OPM's hiring list frequently have no background in the regulatory program for which they will adjudicate.<sup>149</sup> But with AJ hiring, agencies generally have full authority over deciding who is hired,<sup>150</sup> and those AJs often come from the agency's own employee ranks.<sup>151</sup> Not only is the agency likely to have more information on a hired AJ's suitability for adjudication, but — perhaps most importantly — the agency is also better able to ensure that the AJ has expertise in the applicable regulatory program.<sup>152</sup> To obtain AJs with expertise, certain agencies have reported that, at least for those AJs without other responsibilities, they provide some form of competitive appointment that considers case-management ability, technical expertise, and legal knowledge.<sup>153</sup>

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<sup>149</sup> See 1992 ACUS RPT., *supra* note 49, at 5-7 (discussing agencies' limited selection options); Asimow, *supra* note 25, 1009 ("The [ALJ-selection] process allows little room for judgment and discretion, and affords agencies virtually no choice in which ALJs to hire. It does not take account of whether a new ALJ has specialized experience in the regulatory or beneficiary scheme administered by the agency."). But see Jean Eaglesham, *U.S. Chamber of Commerce Criticizes SEC's In-House Court*, WALL ST. J., July 15, 2015 [hereinafter *In-House Court*] (quoting Erin Wirth, president of the Federal Administrative Law Judges Conference, as arguing that ALJs are generalists who do not need expertise in their fields).

<sup>150</sup> See Verkuil, *Reflections*, *supra* note 3, at 1347 ("The selection and appointment procedures for administrative judges are controlled by the agencies themselves.").

<sup>151</sup> Of the 2,692 AJs reported in the 1992 Frye Survey, more than 2,000 (including those who do not work for agencies) perform other tasks for the agency. See Frye, *supra* note 3, app. B.

<sup>152</sup> See Benjamin Kapnik, *Affirming the Status Quo?: The FCC, ALJs, and Agency Adjudications*, 80 GEO. WASH. L. REV. 1527, 1545 (2012) (noting that if the FCC turned to AJs, instead of ALJs, to improve adjudications, "[t]he FCC would be free, however, to hire AJs with subject matter experience, something that ALJs may not have").

<sup>153</sup> See Frye, *supra* note 3, at 272; see also *id.* at 285 (discussing how Coast Guard

Relatedly, agency control over proceedings encourages more efficient decision-making by influencing the ongoing proceeding. First and perhaps more importantly for agencies, AJs' informal hearings permit agencies to influence decisions. Because AJs almost always preside over hearings that are not "on the record," the agency is neither prohibited by the APA from engaging in *ex parte* communications with the AJ to clarify issues related to a factual dispute nor prohibited from having its prosecutorial or investigative staff advise the AJ on legal issues,<sup>154</sup> unless the Due Process Clause limits these interactions in particular scenarios. In other words, from the agency's perspective, the integration of the AJ into the agency permits the agency to further its policy goals more efficiently by forgoing the usual trappings of independence found in judicial or ALJ hearings and rendering less necessary appellate proceedings in which the agency overturns the initial decision. Second, AJs are subject to performance appraisals that may affect their salaries<sup>155</sup> and may permit agencies to reward an AJ based on productivity and perhaps cooperation with furthering policy objectives. Finally, agencies can also remove inefficient or inexperienced AJs more easily than ALJs. Unlike with ALJs, agencies do not have to obtain the MSPB's prior consent before terminating an AJ's employment.<sup>156</sup>

Aside from separation of functions and *ex parte* prohibitions, AJ proceedings allow procedural innovation and simplicity.<sup>157</sup> Agencies argue that informality furthers flexibility and efficiency goals.<sup>158</sup> Indeed, Paul Verkuil's noteworthy study nearly forty years ago revealed that agency adjudication varies tremendously in the procedures that are followed, even within one agency.<sup>159</sup> For instance, he noted that the Department of Agriculture has some of the most and

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focuses on a hearing officer's technical knowledge and less on the ability to preside over hearings because few hearings occur).

<sup>154</sup> At least one agency, the MSPB, has sought to create some protection from appraisals that overtly or covertly depend on the AJs' decisions and compliance with agency goals by having ALJs conduct the appraisals. See McCarthy, *Blowing in the Wind*, *supra* note 52, at 216. But this mitigating measure is not universal.

<sup>155</sup> See *supra* notes 115–16 and accompanying text.

<sup>156</sup> See 5 U.S.C. § 7521(a) (2012).

<sup>157</sup> There are limited exceptions in which non-ALJs can preside over formal adjudication. See A GUIDE TO FEDERAL AGENCY ADJUDICATION 199–200 (Jeffrey B. Litwak ed., 2012).

<sup>158</sup> See Frye, *supra* note 3, at 268 (discussing agencies' view that informality improves agency control and efficiency of achieving policy goals that Congress has set for the agency).

<sup>159</sup> See generally Verkuil, *Informal Adjudication*, *supra* note 35.

least formal proceedings — as measured by ten characteristics mentioned by the Supreme Court in a leading due process decision, *Goldberg v. Kelly*<sup>160</sup> — out of four agencies and 42 programs that he studied.<sup>161</sup> Other agencies' use of AJs and informal proceedings, as compared to formal adjudication under the APA, permit agencies to reduce the costs of adjudication and tailor the adjudication to the importance of the dispute at hand.<sup>162</sup>

### B. Purported Lower Costs

What is more, AJs are purportedly cheaper.<sup>163</sup> ALJs' salaries are set by statute and OPM regulations.<sup>164</sup> Their current, somewhat complex salary system accounts for administrative responsibilities, length of federal service, and various exceptional circumstances.<sup>165</sup> New ALJs' salary, before any locality or other adjustments,<sup>166</sup> is approximately, for ease of reference, \$106,000.<sup>167</sup> ALJs without significant managerial

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<sup>160</sup> See *id.* at 760 & n.80.

<sup>161</sup> See *id.* at 775.

<sup>162</sup> See Asimow, *supra* note 25, 1009 (“[Formal adjudication with ALJs] interferes with an agency’s ability to manage its adjudicatory function and increases an agency’s costs of conducting adjudication.”).

<sup>163</sup> See, e.g., *id.* (“ALJs are also more highly compensated than most [AJs].”); Robert J. McCarthy, *Why MSPB Judges Reject 98 Percent of Whistleblower Appeals*, FED. LAW., Mar. 2013, at 37 [hereinafter *MSPB Judges*] (“Presumably, the board opted to replace ALJs with ‘attorney-examiners’ at least partly to save money, since the more highly qualified ALJs make higher salaries than do the board’s attorneys.”).

<sup>164</sup> See 5 U.S.C. § 5372 (2012); *Pay & Leave, Pay Administration, Fact Sheet: Administrative Law Judge Pay System*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/administrative-law-judge-pay-system> (last visited Mar. 24, 2016) [hereinafter *ALJ Pay Fact Sheet*].

<sup>165</sup> See *ALJ Pay Fact Sheet*, *supra* note 164 (“The ALJ pay system has three levels of basic pay: AL-1, AL-2, and AL-3. Pay level AL-3 is the basic pay level for ALJ positions filled through competitive examination. Pay level AL-3 has six rates of basic pay: A, B, C, D, E, and F. . . . ALJ positions are placed at levels AL-2 and AL-1 when they involve significant administrative and managerial responsibilities. . . . [ALJs] must serve at least one year in each AL pay level, or in an equivalent or higher level in positions in the Federal service, before advancing to the next higher level.”).

<sup>166</sup> See *Pay & Leave, Salaries & Wages, 2015 Locality Rates of Pay*, OPM.GOV, [https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/15Tables/exec/html/ALJ\\_LOC.aspx](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/15Tables/exec/html/ALJ_LOC.aspx) (last visited Mar. 24, 2016). The locality adjustments can lead to salary increases of more than \$30,000 but reach a ceiling of \$168,700, at all pay levels. See *id.*

<sup>167</sup> See *Pay & Leave: Salaries & Wages, Salary Table No. 2015-ALJ*, OPM.gov, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/15Tables/exec/html/ALJ.aspx> (last visited Mar. 24, 2016) [hereinafter *2015-ALJ Table*].

responsibilities can earn up to approximately \$147,000 based on 2015 salary tables.<sup>168</sup>

In comparison, most AJs' starting salaries can be significantly lower than ALJs', although the data often fail to provide sufficient specific information. The 1992 Frye Survey reported that approximately 91% of government-employed AJs were paid according to the general service salary table from Grades 9 to 15 (i.e., GS-9 through GS-15).<sup>169</sup> The 2015 starting basic pay rates for these employees vary from approximately \$42,000 to \$102,000 before locality, seniority, or other adjustments — all lower than ALJs' basic starting salaries.<sup>170</sup> Likewise, the Limon Updated Survey reported that, aside from unique pay schedules for certain AJs, pay grades ranged from GS-7 to SES.<sup>171</sup> Nevertheless, as I explain in Part IV.B.1, these savings are not as significant as they first appear.

#### IV. RULING AGAINST AJS

This Part critically examines the putative benefits of choosing AJs and concludes that, on balance, agencies should choose ALJs over AJs to further their own interests. First, it considers the often-overlooked benefits of using ALJs that agencies relinquish when prioritizing control of AJs over other values. It then considers how AJs' remaining benefits are exaggerated, especially in light of the benefits that ALJs provide agencies. Finally, it considers how the administrative state can work to give agencies the key benefit of technical expertise from AJs that the ALJ-selection process cannot currently guarantee. Ultimately, as I discuss, agencies should choose ALJs over AJs in nearly all circumstances and seek congressional permission to do so when necessary.

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<sup>168</sup> See *id.* ALJs are eligible for the highest pay after seven years of service. See *ALJ Pay Fact Sheet*, *supra* note 164 ("Required Waiting Periods").

<sup>169</sup> See Frye, *supra* note 3, app. B ("2,228 [AJs] are in grades 9 through 15"). Frye uncovered a total of 2,692 AJs. See *id.* Of that group, 237 were not government employees, leaving 2,455 government-employed AJs. See *id.* He reports that 2,228 AJs were in pay grades GS-9 through GS-15, see *id.*, which is approximately 91% of the 2,455 government-employed AJs.

<sup>170</sup> See *Pay & Leave Salaries & Wages, Salary Table 2015-GS*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/15Tables/html/GS.aspx> (last visited Mar. 24, 2016) [hereinafter *2015-GS Table*].

<sup>171</sup> See LIMON, *supra* note 13, at 3. Limon's more limited data does not reveal the number of AJs who work in the General Service. See *id.* app. C at 1-6 (not differentiating which AJs within an agency receive different pay grades).

A. *Benefits of Ceding Some Agency Control*

The most important benefit that agencies receive from using ALJs is improved appearances of impartiality. This appearance is important in two ways: (1) to preclude a successful due-process challenge to AJs based on two of the Supreme Court's most recent due process and separation-of-powers decisions (*Caperton v. A.T. Massey Coal Co.*<sup>172</sup> and *Free Enterprise Fund v. PCAOB*,<sup>173</sup> respectively), and (2) to limit a public-relations embarrassment, which would very likely exceed the SEC fiasco and potentially influence numerous audiences that agencies care about. Agencies' use of ALJs in formal adjudication under the APA also provides other, more limited benefits, including a greater likelihood of receiving deference on judicial review and absolute official immunity for agency adjudicators. To be sure, these more limited benefits may be of marginal significance for some agencies, but they should still be included in agencies' formality calculus.

1. *Improving the Appearance of Impartiality*

The key problem with AJs is that agency control over them creates an appearance of partiality. This appearance presents two problems — a constitutional one and a practical one.

a. *Avoiding a Substantial Due Process Question*

For good reason, the mere appearance of impartiality is as salient as actual bias.<sup>174</sup> By prohibiting the appearance of partiality, one primarily seeks to protect the integrity of the adjudicating body and validate the process.<sup>175</sup> Notably, these attributes inure primarily to the benefit of the agency itself, as opposed to the litigants, because a valid process helps to validate final agency action with litigants, reviewing courts, Congress, and the public.<sup>176</sup> Moreover, policing for

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<sup>172</sup> 556 U.S. 868 (2009).

<sup>173</sup> *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010).

<sup>174</sup> See Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 967 (discussing how recusal standards in American jurisdictions center around appearances of impartiality).

<sup>175</sup> See *id.* at 968.

<sup>176</sup> Cf. *Free Enter. Fund*, 561 U.S. at 522 (Breyer, J., dissenting) ("If the President seeks to regulate through impartial adjudication, then insulation of the adjudicator from removal at will can help him achieve that goal. And to free a technical decisionmaker from the fear of removal without cause can similarly help create legitimacy with respect to that official's regulatory actions by helping to insulate his technical decisions from nontechnical political pressure.").

appearances of partiality serves as a prophylaxis for ferreting out unconscious bias or bias that professional norms render difficult to admit.<sup>177</sup> For this reason, as the Supreme Court has recognized, adjudicators' declarations that they lack actual bias are not determinative (or even relevant).<sup>178</sup> Because of the difficulty in determining an adjudicator's subjective state of mind, due process mostly concerns itself with appearances of partiality.<sup>179</sup>

The Supreme Court appeared, in the past, to limit its appearance-of-partiality inquiries only to instances in which the adjudicator had a pecuniary interest in the outcome. For instance, the Court in *Tumey v. Ohio* required a mayor to recuse from deciding certain prohibition-related fines because, for every guilty verdict, a portion of the fine supplemented the mayor's salary and a portion went into the town's general treasury.<sup>180</sup> The Court, in *Ward v. Monroeville*, expanded mandated recusal to scenarios where fines from a mayor's court went only into the town's general treasury.<sup>181</sup>

In the context of AJs, the inquiry seemed even more limited. The Court's key decision is *Schweiker v. McClure*, in which it upheld the use of insurance-carrier AJs from, among other things, a partiality challenge.<sup>182</sup> After noting the AJs' functional equivalence to ALJs' quasi-judicial capacity, the Court noted that due process applied.<sup>183</sup> The moving parties had not overcome the presumption of an adjudicator's impartiality because "generalized assumptions of possible interest" were insufficient.<sup>184</sup> The AJs' connection to insurers was not meaningful because the federal government, not the carriers, paid the claims and the AJs' salaries.<sup>185</sup> In footnotes, the Court mentioned that the challenging parties had not brought any evidence "to support their assertion that, for reasons of psychology, institutional loyalty, or carrier coercion, [AJs] would be reluctant to differ with carrier determinations."<sup>186</sup> It also noted that the AJs' former or current

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<sup>177</sup> See Bam, *supra* note 174, at 967.

<sup>178</sup> See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882, 886-87 (2009) (before finding a due process violation based on the appearance of partiality, noting that the judge at issue declared that he had no actual bias and stating that the Court would not determine whether actual bias existed).

<sup>179</sup> See Bam, *supra* note 174, at 967.

<sup>180</sup> See *Tumey v. Ohio*, 273 U.S. 510, 520, 535 (1927).

<sup>181</sup> See *Ward v. Monroeville*, 409 U.S. 57, 60-62 (1972).

<sup>182</sup> See *Schweiker v. McClure*, 456 U.S. 188, 196-97, 200 (1982).

<sup>183</sup> *Id.* at 195.

<sup>184</sup> See *id.* at 196.

<sup>185</sup> See *id.*

<sup>186</sup> See *id.* at 196 n.10.

employment relationship with the carrier did not create the same partiality concerns as “professional relationship[s] between a judge and a former partner or associate.”<sup>187</sup> *McClure* was but one decision from the 1950s until 1990 in which the Court batted away due process challenges to agency procedures and structures.<sup>188</sup>

The Court’s reasoning in its latest impartiality decision — focusing on appointment and removal, unlike prior decisions — strongly disrupts the longstanding narrative that, after *McClure*, AJs do not offend due process.<sup>189</sup> In *Caperton v. A.T. Massey Coal Co.*, a corporate defendant was appealing an unfavorable verdict when its president contributed \$3 million to have Justice Benjamin elected to the West Virginia Supreme Court of Appeals.<sup>190</sup> Only \$1,000 went directly to the campaign committee; the remaining amount went to a political organization and other independent organizations that supported Justice Benjamin.<sup>191</sup> After defeating the incumbent by fewer than 50,000 votes,<sup>192</sup> Justice Benjamin refused to recuse from *Caperton* because he denied having actual bias.<sup>193</sup>

The Supreme Court held that due process required his recusal.<sup>194</sup> No quid pro quo or actual bias was necessary.<sup>195</sup> Instead, the Court was “concerned with a more general concept of interests that tempt adjudicators to disregard neutrality.”<sup>196</sup> The Court merely looked for an “unconstitutional ‘potential for bias.’”<sup>197</sup> Such “fears of bias can

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<sup>187</sup> See *id.* at 197 n.11.

<sup>188</sup> See Verkuil, *Reflections*, *supra* note 3, at 1349-51, for an excellent discussion of how the court has approved of SSA ALJs’ “three hat” role as judge and counsel for both parties, agency adjudicators’ combined investigatory and adjudicatory functions, the minimal procedural requirements of APA § 555 for informal proceedings, privately employed AJs, and limited appeal options.

<sup>189</sup> See, e.g., Kapnik, *supra* note 152, at 1544-45 (citing VERKUIL ET AL., *supra* note 3, at 978-79) (“AJs meet the constitutional requirement for due process . . .”); Krent, *supra* note 74, at 1091 & n.38 (citing Supreme Court decisions from the 1930s and 1970s for the proposition that “[i]ndividuals enjoyed no Due Process rights to an independent judicial officer insulated from presidential supervision”); Verkuil, *Reflections*, *supra* note 3, at 1350 (“For due process purposes the Court seems willing to narrow the bias or conflict of interest inquiry into one involving only pecuniary interests.”).

<sup>190</sup> See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873 (2009).

<sup>191</sup> See *id.*

<sup>192</sup> See *id.*

<sup>193</sup> See *id.* at 873-76.

<sup>194</sup> *Id.* at 886.

<sup>195</sup> See *id.*

<sup>196</sup> See *id.* at 878, 881.

<sup>197</sup> See *id.* at 881 (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971)).



arise when — without the other parties' consent — a man chooses the judge in his own cause.”<sup>198</sup> Applying this standard, the Court noted that the defendant's president knew that the appeal from the unfavorable verdict was pending, fewer than 50,000 votes decided the election, and the president's disproportionate contributions had a substantial impact on the election, even if voters ultimately selected Justice Benjamin.<sup>199</sup> The Court found, accordingly, “a serious, objective risk of actual bias that required Justice Benjamin's recusal” because it appeared that the defendant “[chose] the judge in [its] own case.”<sup>200</sup> Ultimately, these circumstances presented (as the Court's opinion repeated four times) “a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.”<sup>201</sup> To be sure, the Court's decision concerned extreme circumstances in the judicial-election context. But impartiality under the Due Process Clause is required for administrative adjudication,<sup>202</sup> and *Caperton's* due-process reasoning is even more compelling and requires no extension when applied to AJs.

First and most importantly, the Court considers whether one of the parties had a “significant and disproportionate influence” on the appointment process.<sup>203</sup> For AJs', the agency's role in the appointment process is much more prominent than the corporate president's. There, the corporate president only indirectly impacted the election with disproportionate contributions; voters directly chose Justice Benjamin. But the agency directly chooses its AJs.<sup>204</sup> The agency, even more so than the defendant in *Caperton*, is frequently a party to proceedings before the AJ whom it hired, such as in government-contract disputes, immigration proceedings, and numerous other appellate and enforcement proceedings. The agency directly and literally “chooses the judge in [its] own case,” without, as in the case of federal judges, any check from another branch or, as in the case of ALJs, any approval from another agency.<sup>205</sup> This appointment

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<sup>198</sup> *Id.* at 886.

<sup>199</sup> *See id.* at 884-86.

<sup>200</sup> *Id.* at 886.

<sup>201</sup> *See id.* at 878-79, 885-86.

<sup>202</sup> *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982). I accept this premise for my purposes here, but I plan in future work to consider the role of impartiality generally in due process.

<sup>203</sup> *See Caperton*, 556 U.S. at 884.

<sup>204</sup> *See supra* notes 106-10 and accompanying text.

<sup>205</sup> Some concerns may exist for ALJs, too. When agencies other than the SSA hire ALJs, they often hire current SSA ALJs to avoid the OPM hiring process. *See A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra* note 157, at 203. This ability to hire SSA

reinforces the “common perception [that] administrative adjudicators are likely to be too committed to the agency’s positions” and “imbued with the agency’s culture.”<sup>206</sup> For a key example, one needs only turn to the George W. Bush Administration’s hiring of immigration judges, when “[a]ll the judges appointed during this period who arrived with experience in immigration law were prosecutors or held other immigration enforcement jobs.”<sup>207</sup>

Second, in what appears contrary to *McClure*, the Court relied only on the circumstances of Justice Benjamin’s election to find an appearance of partiality.<sup>208</sup> This suggests that evidence concerning adjudicators’ appointment and removal can adequately demonstrate the “psychological tendencies and human weaknesses” that create bias. Importantly, the appointment and removal of privately employed AJs in *McClure* is distinguishable from government-employed AJs, with the latter creating easily understood bias concerns. Government-employed AJs receive their salaries from the agencies that may appear before them and that seek to pursue certain policy and enforcement objectives, unlike the insurer in *McClure* that did not pay the AJs, have any of its money at issue, or have any policy goals to further through the adjudications.

Third, the Court discounted a judge’s denials of bias. In one survey from the early 1990s, AJs reported having less anxiety over their impartiality than more independent ALJs,<sup>209</sup> leading one prominent scholar to conclude that the relationship between structural protections and impartiality for AJs is overstated.<sup>210</sup> Yet that report is of little weight because due process concerns itself with not only conscious but also, much more frequently, unconscious bias and circumstances that could create it.

In addition to these express considerations concerning appointment, the Court also likely implicitly contemplated the appointing party’s related power to help later remove the judge. After all, the President appoints federal judges, and he or she may soon thereafter appear

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ALJs permits the hiring agency more control over hiring ALJs than the OPM process, but these ALJs had to comply originally with the OPM-approved process to be hired by the SSA.

<sup>206</sup> Koch, *Policymaking*, *supra* note 3, at 702-03.

<sup>207</sup> See Goldstein & Eggen, *supra* note 23.

<sup>208</sup> The Court did mention a public-opinion poll and certain other West Virginia Justices’ views that recusal was required in the background in its opinion, but it did not mention these “facts” in its analysis. See *Caperton*, 556 U.S. at 874-75, 886-87.

<sup>209</sup> See Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 279 (1994).

<sup>210</sup> See *id.*

frequently as a party before them. But the mere appointment does not create an appearance of partiality because the President — having no role in the impeachment process<sup>211</sup> — has no meaningful way to discipline or remove the judge for ruling against him or her. The difference in *Caperton* is that the donor had the wherewithal to fund Justice Benjamin's opponent in the next election if Justice Benjamin did not reward his benefactor. For AJs, the appointing agency has a much more direct way in which to remove the AJ. That agency can directly remove the AJ without, as with ALJs or federal judges, another agency's or branch's signoff. The President or a supervising officer could, despite potential political backlash, have the AJ find facts or apply law in certain ways or discipline or remove those who are not "cooperative." AJs, similar to the mayor in *Tumey*, can have their pay affected depending on what decision they make; they are literally on one of the parties' payroll. Performance reviews and ex parte communications, the vehicles for effecting discipline and pushing agency positions, are not public, thereby concealing agency influence. With this direct agency control over appointment and removal, it is difficult to see how *Caperton*'s "unconstitutional potential for bias" would not exist with AJs.

A second recent decision — specifically focusing on the link between removal and control<sup>212</sup> — buttresses this conclusion. In *Free Enterprise Fund v. PCAOB*, the Court precluded Congress from cocooning the Public Company Accounting Oversight Board ("PCAOB") within two layers of protection from the President's at-will removal.<sup>213</sup> The SEC Commissioners, whom the President could not remove at will (the first layer), could appoint PCAOB members and remove them only for cause (the second layer).<sup>214</sup> Together, these layers unconstitutionally impinged the President's supervisory power by preventing him from holding the SEC responsible for PCAOB's actions in the same manner as he could hold the SEC accountable for its other responsibilities.<sup>215</sup> Importantly for our purposes here, the Court reaffirmed that the power to remove officials is key for

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<sup>211</sup> See Barnett, *Resolving the ALJ Quandary*, *supra* note 3, at 831 & n.220 (arguing that proposals to provide ALJs the same protections as Article III judges would likely violate the President's supervisory powers over executive officials because the President has no role in impeachment).

<sup>212</sup> See Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 3-4 (2013) (questioning *Free Enterprise Fund*'s conclusion that removal gives control).

<sup>213</sup> See *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483-84 (2010).

<sup>214</sup> See *id.* at 486-87.

<sup>215</sup> See *id.* at 495-96.

establishing control because “one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will.”<sup>216</sup> AJs, of course, work at the pleasure of the agency, which also generally assesses performance reviews that can affect their pay.<sup>217</sup> *Free Enterprise Fund* establishes the following: (1) the agency’s power to remove (or transfer) and affect AJs’ pay gives agencies control, and (2) that control impacts impartiality. Indeed, the majority went out of its way to indicate that ALJs, with their two layers of protection, were a special case because of their adjudicative function<sup>218</sup> and, presumptively, need to be free from policymakers’ interference.

These relationships among removal, control, and impartiality were not lost on the APA drafters and early implementers. The perceived bias of adjudicators was the impetus for establishing the APA’s formal adjudication with protections concerning ALJs’ appointment, performance review, and removal.<sup>219</sup> Hearings were intended to be heard by independent ALJs to ensure that “whoever presides . . . must conduct the hearing in a strictly impartial manner, rather than as the representative of an investigative or prosecuting authority.”<sup>220</sup> Indeed, speaking against performance reviews for adjudicators shortly after the APA’s enactment and striking down agencies’ ability to promote ALJs to higher pay grades, U.S. Attorney General J. Howard McGrath stated that “[i]f salaries and promotions are subject to agency control, there is always danger that a subtle influence will be exerted upon the examiners to decide in accordance with agency wishes.”<sup>221</sup> Notably, the Attorney General made these comments when all oral hearings required by statute were presumed to be subject to the APA’s formality requirements.<sup>222</sup> The fact that courts have altered the presumption and allowed AJs to “sprout[] faster than tulips in Holland”<sup>223</sup> does not

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<sup>216</sup> See *id.* at 493 (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935)).

<sup>217</sup> See *supra* notes 114–17 and accompanying text.

<sup>218</sup> See *Free Enter. Fund*, 561 U.S. at 507 n.10.

<sup>219</sup> See Verkuil, *Reflections*, *supra* note 3, at 1353 & n.51 (citing Justice Scalia for the proposition that hearing examiners before the APA were perceived as biased); see also Scalia, *supra* note 43, at 65–66 (describing the history of the ALJ-promotion system).

<sup>220</sup> S. REP. NO. 752 at 207 (1946), reprinted in COMM. ON THE JUDICIARY, 79TH CONG., LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 268 (1946).

<sup>221</sup> See Wolfe, *supra* note 138, at 223 (quoting Administrative Procedure Act, Promotion of Hearing Examiners, 41 Op. Att’y Gen. 74, 78 (1951)).

<sup>222</sup> See Funk, Wong Yang Sung, *supra* note 35, at 884 (quoting *Wong Yang Sung v. Clark*, 339 U.S. 33, 50 (1950)).

<sup>223</sup> See Lubbers, *APA-Adjudication*, *supra* note 147, at 70.

undermine the link between control and agency influence. Moreover, the link has not been lost on legal commenters,<sup>224</sup> including a former AJ and ALJ.<sup>225</sup> Together, *Caperton* and *Free Enterprise Fund* establish a compelling basis for holding that agencies' use of AJs violates due process.<sup>226</sup>

Let me conclude by addressing five possible objections:

*First.* Aside from IJ hiring and firing, might the absence of any public outcry over AJs provide some ground for concluding that no objective appearance of partiality exists?<sup>227</sup> The emphatic answer, especially for AJs, is no. One of AJs' key attributes is that they are a "hidden judiciary," toiling away largely unnoticed. If they are noticed, they are likely to be confused with ALJs because of their similar titles. It would be perverse to create a principle under which the government could preclude appearances of partiality by creating an opaque adjudicatory system and similar titles for judges with and without independence. Administrative adjudication does not become fairer by becoming harder to understand.

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<sup>224</sup> See Dobkin, *supra* note 23, at 381 ("Because agencies sometimes base hiring — and firing — practices on the outcomes they expect to receive from administrative judges, these judges are under enormous pressure to keep their employers happy."); McCarthy, *Blowing in the Wind*, *supra* note 52, at 210 ("Most observers agree that a lack of independence from the agencies they serve is the main reason for the seemingly uniform bias of administrative judges in favor of those agencies."); Wolfe, *supra* note 138, at 245 ("Adjudication by non-APA hearing officers, who are subject to the control, direction, performance rating, promotion, and discipline of their employing agency poses the risk of the potential curtailment of a [claimant's] due process rights.").

<sup>225</sup> See Frye, *supra* note 3, at 261, 268 ("It is self-evident that, to the extent that the agencies use informal means to control the process and its substantive results, they detract from the impartiality of the presiding officer, the fairness of the proceeding, and the satisfaction of the public with the results.").

<sup>226</sup> The agency's ability to overrule AJs on fact and law does not mean that their decisions are meaningless. Their credibility findings (like ALJs') can be very significant, affecting whether the record supports an agency's contrary decision on administrative appeal. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (considering findings by an ALJ); see also VERKUIL ET AL., *supra* note 3, at 1036 (noting that ALJ findings are particularly influential on courts when based on inferences from testimonial demeanor). Indeed, appellate courts review with a more careful eye agency findings that are contrary to initial findings. See *Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1078 (9th Cir. 1977) (referring to *NLRB v. Tom Johnson, Inc.*, 378 F.2d 342, 344 (9th Cir. 1967), and *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 499 (2d Cir. 1967)).

<sup>227</sup> See Verkuil, *Reflections*, *supra* note 3, at 1347 ("Despite these differences, it appears that litigants and the public do not object to the process by which administrative judges are selected.").

*Second.* Isn't it sufficient that many AJs are required by statute, regulation, or manual to be impartial<sup>228</sup> or that the agency has certain de facto understandings that discourage interfering with AJ decisional independence?<sup>229</sup> No. These requirements or understandings may mean well, but they do not answer the impartiality question. After all, federal and state judges are required to be impartial under the Code of Judicial Conduct,<sup>230</sup> but — even if they believe subjectively that they are impartial — they can, as *Caperton* itself demonstrates, still create an appearance of partiality. More fundamentally, the statutory requirement for impartiality is not a structural prophylaxis against bias like regulating the appointment, performance-review, and removal processes. The litigants are also not in a position to know the AJs' performance reviews, express or implicit threats of removal or reassignment, or the agency culture that may reduce impartiality. De facto norms also do not address the ease of their breach or how AJs may feel pressure to minimize the breadth of these understandings when those who may have a say in their retention and pay have contrary "understandings."

*Third.* Doesn't AJs' due process problem prove too much because it implicates all administrative adjudication? After all, will agency heads — nominated by the President and often removable at will — not be similarly pressured to abide by the President's wishes when reviewing and (very rarely) presiding over hearings? This argument has some force, but the due process problem can be justifiably confined to AJs based on differences in agency heads' function, their method of appointment, salience of removal, and necessity. First, agency heads are much more likely to be deciding policy matters finally for the agency, and that policy discretion will be limited by the hearing record. Although AJs and ALJs can make policy in the first instance, their policy decisions are subject to reversal by the agency heads and deputies. The President probably is entitled to oversee the policies via

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<sup>228</sup> For example, the Supreme Court pointed to such a requirement in the manual that the government drafted to advise insurance-carrier AJs. See *Schweiker v. McClure*, 456 U.S. 188, 197 n.11 (1982).

<sup>229</sup> See, e.g., Frye, *supra* note 3, at 344 (discussing de facto understandings of separation of functions for AJs with no other duties and ex parte prohibitions).

<sup>230</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2011) ("A judge shall . . . perform [the] duties of judicial office . . . impartially."). Whether the Code of Judicial Conduct or similar ethical code should apply to state and federal ALJs is a perennially contested issue. See generally Steven A. Glazer, *Toward a Model Code of Judicial Conduct for Federal Administrative Law Judges*, 64 ADMIN. L. REV. 337 (2012); Patricia E. Salkin, *Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Judicial Conduct for the Administrative Judiciary*, 11 WIDENER J. PUB. L. 7 (2002).

at-will removal authority for matters that are related to core executive power, such as foreign affairs and defense.<sup>231</sup> Second, the President's nomination of agency heads may be less troubling than AJs because the Senate must confirm the nomination,<sup>232</sup> and the agency head may balance the views of the President with those of the confirming Senate that may differ.<sup>233</sup> Similarly, agency heads' at-will removal<sup>234</sup> may be less troubling than AJs because their removal has a much stronger salience than low-level agency employees like AJs.<sup>235</sup> Agency heads likely have their own political capital and relationships on Capitol Hill and in the press, which permit them to create political backlash for the President for questionable removals. The third distinction may be the most important: agency heads' appointment and removal (and any accompanying downsides) are required<sup>236</sup> by the Appointment and the Take Care Clauses. If executive agencies' ability to adjudicate is beyond peradventure despite these constraints, then agencies heads' appointment and removal cannot alone create a constitutional defect. The same kind of necessity or compulsion does not apply to AJs, who can be appointed in other ways (such as ALJs are or, as I have suggested elsewhere, should be<sup>237</sup>) and removed only for cause (as ALJs are).

*Fourth.* Should agencies really be worried that the Court will apply *Caperton* — an opinion that refers to its narrow holding in the judicial-election context — to agencies? Although the Court could, of

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<sup>231</sup> See Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1404 n.215 (2013).

<sup>232</sup> See U.S. CONST. art. II, § 2, cl. 2 (requiring presidential nomination and senatorial confirmation for "principal officers").

<sup>233</sup> See David C. Nixon, *Separation of Powers and Appointee Ideology*, 20 J.L. ECON. & ORG. 438, 439 (2004) ("[P]residents must anticipate the preferences of the Senate in order to get their nominees confirmed, and a potential nominee's policy preferences are central to explaining the appointment outcome.").

<sup>234</sup> See Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2490 (2011) (noting that President has "ability to remove non-independent agency heads at will").

<sup>235</sup> See Kent H. Barnett, *Standing for (and up to) Separation of Powers*, 91 IND. L.J., at \*31 (forthcoming 2016), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2573216](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2573216) (discussing the salience of removing senior executive officials); Percival, *supra* note 234, *passim* (discussing the substantial costs of removal to effect policy ends).

<sup>236</sup> Congress's power to limit the President's ability to remove executive officers at will — especially in core departments, such as State and Defense — is beyond the scope of this Article.

<sup>237</sup> See Barnett, *Resolving the ALJ Quandary*, *supra* note 3, at 832-35 (advocating that the D.C. Circuit appoint and remove ALJs to avoid appointment, removal, and due process concerns).

course, leave *Caperton* as an outlier of its due process jurisprudence, two considerations counsel agency caution. First, my analysis here requires no extension of *Caperton*'s reasoning; it requires only an extension of the contextual setting. The reasoning in *Caperton* is even more compelling in the agency context because the agency's role in hiring and firing is more direct than in the judicial-donor context. AJs are even better candidates than state supreme courts for federal judicial scrutiny because of AJs' lack of comparative transparency, salience, federalism complications, and factual variations surrounding their systemic protections. Relatedly, heightened concern over AJs' partiality makes sense because of courts' limited oversight of AJ decision-making. Not only do courts have little interest in what they perceive as AJs' low-prestige docket,<sup>238</sup> but their review of AJ factual findings — generally under the APA's arbitrary-and-capricious-review standard — is often deemed the most deferential in all of administrative law.<sup>239</sup> Second, the ramifications for the agency if it loses are huge. Based on *Caperton*, the courts would likely require a new proceeding for the litigant. But unlike *Caperton* where one justice could simply recuse himself in the new proceeding, a due process violation to AJs is systemic and would require regulatory or statutory changes to AJ hiring, removal, and oversight. These changes would be difficult to implement quickly, and they may require slow-moving congressional action. Instead of reacting to a decision that requires agencies to abandon AJs, agencies have the ability to recognize the due process problem now, choose ALJs where possible, and seek congressional permission when necessary.<sup>240</sup>

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<sup>238</sup> See Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 68 (2015) (noting that federal courts' creation of an appellate review model over agency action are an example of federal courts seeking to "mitigate[] [the] caseload demands created by the new federal regulatory state" and to remove "[p]etty" cases from their docket).

<sup>239</sup> See *AFL-CIO v. OSHA*, 965 F.2d 962, 970 (11th Cir. 1992) (holding that arbitrary-and-capricious review is "more deferential" to agencies than the substantial evidence standard); see also *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683-84 (D.C. Cir. 1984) (Scalia, J.) (finding no difference between "arbitrary, capricious" and "substantial evidence" standards for judicial review of agency findings of fact).

<sup>240</sup> Agencies concerned about congressional lethargy may be able to create sufficiently independent AJs through their own initiatives (if the underlying statutes otherwise permit). They could, by rule, enact the same procedural protections for parties as under the APA, limit the hiring of AJs to those who prevail in a merits-based application process, limit the removal of AJs for only "good cause" as determined by the MSPB, and prohibit performance reviews and bonuses.



*Fifth.* Might the Court avoid applying *Caperton* to agencies because of its general dislike for systemic, facial challenges? The Court, in the racial-discrimination context, has indicated its distaste for inferring bias in a particular case based on systemic bias,<sup>241</sup> and it has indicated its distaste for facial statutory challenges.<sup>242</sup> In the administrative context, the Court's refusal to find a due process problem in *Withrow v. Larkin* — based on a state agency's ability to hold investigative and merits hearings — may indicate the Court would be unwilling to find a systemic due process problem when it implicates common features of administrative process.<sup>243</sup> *Caperton*, in fact, could be understood as consistent with this understanding because it addressed one very specific and extreme case concerning one judge without a broad, disruptive holding.<sup>244</sup> These are significant rebuttals, but they should not preclude *Caperton*'s application here.

Courts routinely consider systemic protections or the lack thereof in partiality challenges, and their holdings concerning one judge or system would necessarily impact other tribunals. For instance, the Court's partiality decisions concerning mayors' courts specifically addressed only two small-town mayors. But the holding that saw danger in remuneration to the mayor or his town would likewise affect all mayors' courts across the country, and it would be far from clear that any other judge could preside, at least without legislative intervention, to remedy the partiality problem. Likewise, albeit rejecting the challenge, the Court considered the structural impartiality challenge to the private hearing officers in *McClure*, and, notably, that challenge did not focus on any particular adjudicator. Moreover, a facial challenge in this context makes sense, at least for similarly situated AJs. For AJs that share all key traits (no for-cause protection from removal, appointment by their agencies, eligible for performance-review bonuses, etc.), the matter requires little to no discovery and the partiality problem would exist in all cases (not just the litigated one). As a final matter, *Withrow* concerned heads of an

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<sup>241</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (refusing to infer bias in a capital defendant's case based on studies indicating that black defendants in Georgia received the death penalty more than white defendants). My thanks to Aziz Huq for this insight.

<sup>242</sup> See Caitlin Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTINGS CONST. L.Q. 563, 574-88 (2009).

<sup>243</sup> See *Withrow v. Larkin*, 421 U.S. 35, 57-58 (1975).

<sup>244</sup> Indeed, the majority and the dissent in *Caperton* argued over the breadth of the Court's decision and its potentially disruptive impacts. Compare *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887-90 (2009), with *id.* at 893-902 (Roberts, C.J., dissenting).

agency, not adjudicators, and the propriety of combined functions of investigation and adjudication in one agency, not the appearance of partiality of administrative adjudicators. Although *Withrow* may show some hesitation for the courts to limit agency powers, it does not foreclose *Caperton* and *Free Enterprise Fund*'s application to AJs.

*b. Avoiding Practical Distractions*

Even in the absence of the Due Process Clause, the SEC's very recent experiences with ALJs highlight why agencies have a significant practical interest in providing adjudications with the appearance of impartiality. First, agencies have to worry about winning lawsuits. The SEC, instead of spending its time investigating and enforcing securities laws, is currently distracted by trying to win lawsuits that seek to upend the SEC's (and sometimes the entire federal administrative state's) administrative-adjudicative apparatus. Those lawsuits allege, among other things, constitutional infirmity with all SEC ALJs' appointments and/or all ALJs' removal (at any agency) under Article II.<sup>245</sup> Two federal district courts have preliminarily enjoined the SEC's use of ALJs based on how they are appointed.<sup>246</sup>

But what do these appointment and removal challenges have to do with impartiality? Nothing, as far as establishing the elements of those causes of action. Nor do any of the parties assert a due process challenge concerning impartiality. And that is what is fascinating. The complaints use partiality, instead, to "color" — for courts, the press,

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<sup>245</sup> Complaint at 21-23, *Timbervest v. SEC*, (No. 1:15-cv-02106-LMM), 2015 WL 7597428 (N.D. Ga. June 12, 2015) [hereinafter *Timbervest Complaint*] (asserting appointment and removal claims); Amended Complaint at 32-36, *Hill v. SEC*, (No. 1:15-cv-01801-LMM), 2015 WL 4307088 (N.D. Ga. May 29, 2015) [hereinafter *Hill Amended Complaint*] (asserting removal claims); Complaint at 16-21, *Tilton v. SEC*, No. 1:15-cv-02472-RA (S.D.N.Y. Apr. 1, 2015) [hereinafter *Tilton Complaint*] (asserting appointment and removal claims); Complaint at 13-15, *Stilwell v. SEC*, No. 1:14-cv-07931 (S.D.N.Y. Mar. 16, 2015) [hereinafter *Stilwell Complaint*] (asserting removal claim); Second Amended Complaint at 23-29, *Gray Fin. Group, Inc. v. SEC*, No. 1:15-cv-00492-CAP (N.D. Ga. Feb. 19, 2015); Amended Complaint at 11-14, *Duka v. SEC*, No. 1:15-cv-00357 (S.D.N.Y. Jan. 16, 2015) (asserting removal claim).

<sup>246</sup> See, e.g., *Hill v. SEC*, 114 F. Supp. 3d 1297, 1316, 1320 (2015); Decision and Order at 3-6, *Duka v. SEC*, No. 1:15-cv-00357 (S.D.N.Y. Aug. 3, 2015) (holding that the ALJs were "inferior officers" and appointed improperly under the Appointments Clause, and giving the SEC seven days to decide whether to cure the defect). Another of the cases was dismissed for lack of subject-matter jurisdiction. See Opinion and Order at 1-2, *Tilton v. SEC*, No. 1:15-cv-02472-RA (S.D.N.Y. June 30, 2015). Another was voluntarily dismissed by agreement of the parties. See Notice of Voluntary Dismissal, *Stilwell v. SEC*, No. 1:14-cv-07931 (S.D.N.Y. Mar. 16, 2015).

and perhaps Congress — what might be understood as technical, formal constitutional failings.

For instance, in *Tilton v. SEC*, the plaintiffs referred to one of the SEC Commissioner's concerns over how the SEC appears to bring "tougher cases" in administrative adjudication where the parties have limited discovery rights, instead of Article III courts.<sup>247</sup> More pointedly, the complaint (along with several others<sup>248</sup>) referred to a 2013 *New York Times* article that highlighted the SEC's higher success rate in administrative, as opposed to judicial, proceedings.<sup>249</sup> Likewise, the complaint in *Hill v. SEC* referred to the *Wall Street Journal's* empirical report that the SEC won in 95% of its proceedings between January 2010 and March 2015, a prominent federal judge's (U.S. District Judge Jed Rakoff's) remark that the SEC had won 100% of its administrative actions in 2014 as compared to 61% in court, and a former SEC ALJ's public statements that the proceedings were not impartial and that the Chief ALJ for the SEC had questioned her "loyalty to the SEC" because of her decisions against the agency.<sup>250</sup> As a final example, the latest complaint (in *Timbervest v. SEC*), aside from mentioning everything above, more directly addressed the partiality concern. It noted how the presiding ALJ at issue "ha[d] yet to rule against the agency" since his hiring in 2011,<sup>251</sup> how the plaintiff sought discovery on partiality issues in administrative proceedings,<sup>252</sup> and how the presiding ALJ declined to submit an affidavit (in response to the SEC's request) affirming that he did not feel pressured to rule for the agency.<sup>253</sup>

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<sup>247</sup> Hill Amended Complaint, *supra* note 245, at 21 (referring to Commissioner's statement concerning the perception surrounding how "tougher cases" are adjudicated); Tilton Complaint, *supra* note 245, at 8-10 (citing Michael S. Piwowar, Comm'r, SEC, Remarks at the "SEC Speaks" Conference 2015: A Fair, Orderly and Efficient SEC (Feb. 20, 2015)). A recent empirical study has concluded that "the SEC [is] shifting more marginal cases from court to administrative proceedings or bringing actions as administrative proceedings that would not have been brought at all pre-Dodd Frank." Stephen J. Choi & A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment* 37 (N.Y. Univ. Law & Econ. Research Paper Series, Working Paper No. 16-10, 2016), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2737105](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2737105).

<sup>248</sup> Stilwell Complaint, *supra* note 245, at 7.

<sup>249</sup> *Id.* (citing Gretchen Morgenson).

<sup>250</sup> Hill Amended Complaint, *supra* note 245, at 19-20. Other ALJs have made similar complaints about other agencies, too. See McCarthy, *Blowing in the Wind*, *supra* note 52, at 213 (collecting cases).

<sup>251</sup> Timbervest Complaint, *supra* note 245, at 6.

<sup>252</sup> *Id.* at 8.

<sup>253</sup> *Id.* at 9-10.

The parties' ability to control the partiality narrative appears successful. They have caught the notice of Judge Rakoff, national media, regulated parties, powerful interest groups,<sup>254</sup> and may have even colored one district court's Appointments Clause holding, which it recognized as seeming "unduly technical."<sup>255</sup> And congressional oversight, in light of corporate interest groups, may not be far off. After all, Congress and the public were keenly interested in the partisan hiring of IJs.<sup>256</sup> In short, the failure to create the appearance of impartiality has led to significant distraction and cost for the SEC in attempting to fulfill its securities-enforcement mission. The SEC's curious public request that its own ALJ submit an affidavit concerning his partiality further demonstrates that the SEC understands the seriousness of the partiality narrative. After its clumsy affidavit request and several losses in the federal litigation concerning the ALJs' appointments, the SEC responded by indicating that it would "modernize [its] rules of practice for administrative proceedings" by, most importantly, extending discovery rights.<sup>257</sup>

For agencies with AJs, the partiality narrative — once it comes to light — is likely to be much worse for reasons that should feel familiar by now. Aside from invoking agency win rates in particular in-house proceedings,<sup>258</sup> parties can point to AJs' proceedings, which are typically less formal than ALJs'. They can point to the differences between AJs' appointment process, where the agency generally has *carte blanche* in hiring those whom it thinks may be most "cooperative" with the agency mission, and the OPM-limiting ALJ-hiring process. This hiring authority in and of itself may not be too troubling because, after all, federal judges are selected, in part, based

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<sup>254</sup> See Eaglesham, *In-House Court*, *supra* note 149.

<sup>255</sup> See *Hill v. SEC*, 114 F. Supp. 3d 1297, 1320 (N.D. Ga. 2015).

<sup>256</sup> U.S. DEP'T OF JUSTICE, *supra* note 111, at 1 (noting that Goodling testified before the House of Representatives); Eric Lichtblau, *Report Faults Aides in Hiring at Justice Dept.*, N.Y. TIMES (July 29, 2008), <http://www.nytimes.com/2008/07/29/washington/29justice.html>.

<sup>257</sup> Press Release, SEC, SEC Proposes to Amend Rules Governing Administrative Proceedings (Sept. 24, 2015), *available at* <http://www.sec.gov/news/pressrelease/2015-209.html>.

<sup>258</sup> See, e.g., McCarthy, *Blowing in the Wind*, *supra* note 52, at 205-11 (reviewing statistics concerning agency win rates in federal-employee whistleblower actions before MSPB AJs, determining that agencies win in 95% of the cases, and concluding that they are "astoundingly biased in favor of [agencies]"); see also McCarthy, *MSPB Judges*, *supra* note 163, at 37, 40 (contrasting agency win rates in whistleblower actions before AJs and ALJs, the latter of whom decide for employees in approximately 33% of cases).

on how they are likely to rule.<sup>259</sup> But then, they can point to how a supermajority of AJs receives performance reviews (and potentially bonuses) from the agencies that often appear before them, while agencies are prohibited from reviewing (and giving bonuses) to ALJs. They can point to how agencies can remove AJs at will or assign them different duties, but those same agencies cannot do the same with ALJs. In the end, the benefits that agencies garner from controlling AJs exacerbate the appearance of AJs being in the agency's pocket, and this appearance creates costs for the agency by distracting it from executing its mission. And the larger number of AJs would likely only exacerbate those costs as compared to those of the SEC's ALJ proceedings.

This threat is not merely hypothetical. Federal courts of appeals lost faith in IJs around the time of the Bush-era hiring and firing scandals. Indeed, as one commenter put it, these courts "lambasted the work of immigration judges."<sup>260</sup> The Seventh Circuit, in particular, led by the eminent Judge Richard Posner reversed "a staggering 40 percent" of orders from the Board of Immigration Appeals in 2005.<sup>261</sup> The Second, Third, and Ninth Circuits also noted their concern over IJ agency adjudication.<sup>262</sup> And most of the courts' concerns related to the IJs' bias and lack of professionalism.<sup>263</sup> Agencies, in short, ignore ALJs at their peril in seeking to accomplish their regulatory missions.

## 2. Increasing Likelihood of Judicial Deference

Aside from improving appearances of impartiality, using ALJs and formal adjudication increases the likelihood of courts giving agencies interpretive primacy over ambiguous statutes and thus faring better on judicial review. To obtain interpretive primacy, agencies must receive *Chevron*, as opposed to *Skidmore*, deference. *Chevron* deference is

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<sup>259</sup> See Jackson, *supra* note 26, at 977-79 (2007) (arguing that the appointment of Article III judges is, by design, political and discussing role of ideology in appointments).

<sup>260</sup> Katherine E. Mello, Note, *Telling Truths: How the Real ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 663-64 (2007) (discussing those courts' impatience with IJs).

<sup>261</sup> *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005) (Posner, J.); *see also id.* ("Our criticisms of the Board and of the immigration judges have frequently been severe.").

<sup>262</sup> *See id.* (collecting cases).

<sup>263</sup> *See id.* (citing *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005)) ("[T]he [IJs'] assessment of Petitioner's credibility was skewed by prejudice, personal speculation, bias, and conjecture . . .").

generally understood to be more deferential to agencies because it recognizes their authority to interpret reasonably ambiguous statutes that they administer.<sup>264</sup> With *Skidmore* deference, in contrast, courts retain interpretive primacy, deferring to agencies' views only when the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade" convince it to do so.<sup>265</sup> The Supreme Court, in *United States v. Mead Corp.*, has identified two key matters, as relevant here, to determine generally whether agencies have acted with the "force of law" and are thus eligible for *Chevron* deference: whether Congress has bestowed rulemaking or formal adjudication authority upon the agency, and whether the agency has used that authority in promulgating the interpretation at issue.<sup>266</sup> Although some have criticized the Court's focus on procedural formality as a criterion for deference, procedural formality is consistent with the view that administrative procedures further congressional monitoring of agencies. Formal procedures usually provide more visibility, transparency, and opportunities for Congress to assert subtle pressure on agencies as to policy questions than informal actions.<sup>267</sup> In evaluating formality's role in *Chevron* eligibility, commenters and courts have generally focused on whether agencies' interpretations have the "force of law" when promulgated

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<sup>264</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974))); Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 79 (2011) [hereinafter *Studies of Judicial Review*] ("Since 2001, the Justices have engaged in a lively debate about the circumstances in which [*Chevron* or *Skidmore*] applies. That debate indicates that all Justices believe that the doctrines differ and that the *Chevron* doctrine is more deferential . . .").

<sup>265</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>266</sup> *United States v. Mead Corp.*, 533 U.S. 218, 230-32 (2001) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law [to which *Chevron* applies] when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. Thus, the overwhelming number of our cases applying *Chevron* deference [has] reviewed the fruits of notice-and-comment rulemaking or formal adjudication." (internal citations omitted)).

<sup>267</sup> See Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2043-44 (2011).

through less formal “guidance” documents, such as agency manuals, enforcement guidelines, or interpretive rules.<sup>268</sup>

But another, often-ignored issue lurks in the *Chevron* eligibility analysis: whether agencies choose formal or informal adjudicatory hearings. When agencies act through formal adjudication under the APA and thus almost always use an ALJ, *Mead* provides that they are generally eligible for *Chevron* deference. But the same is not true of informal adjudication. In *Mead* itself, the Court refused, after determining that *Chevron* did not apply, to defer to statutory interpretations arising from informal adjudication.<sup>269</sup> Instead, courts must engage in an indeterminate inquiry as to whether the informal interpretation at issue is *Chevron*-eligible.<sup>270</sup> Thus, agencies can obtain heightened judicial review more easily for issues of law by choosing ALJs.

With all of this said, one should not overstate the importance of formal adjudication as a talisman for *Chevron* deference. It is, instead, a useful tool for improving agencies’ chances of receiving *Chevron* deference. First, formal adjudication is not necessary for *Chevron* deference. *Chevron* can apply to certain relatively formalized hearings presided over by AJs, even if they do not constitute “formal adjudication.” For instance, courts apply *Chevron* deference to decisions from the Board of Immigration Appeals (“BIA”), whose members are AJs.<sup>271</sup> Relatedly, formal adjudication may not be sufficient for *Chevron* deference because not all courts extend *Chevron* deference to ALJ decisions that did not undergo administrative

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<sup>268</sup> See, e.g., Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 56-57 (2015) [hereinafter *Codifying Chevmore*] (discussing courts’ confusion over which agency actions have the force of law); Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1444-45 (2005) [hereinafter *Muddled Judicial Review*] (focusing on how courts of appeals have implemented *Mead* when agencies do not proceed through notice-and-comment rulemaking or formal adjudication); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 468-70 (2013) (concentrating generally on whether IRS guidance documents have force of law).

<sup>269</sup> See *Mead*, 533 U.S. at 231-33.

<sup>270</sup> See generally Bressman, *Muddled Judicial Review*, *supra* note 268, *passim* (discussing the confusion that *Mead* has caused lower courts in determining when informal action receives *Chevron* deference).

<sup>271</sup> See Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 530 (2003). An IJ’s determination without BIA review may receive only *Skidmore* deference. See, e.g., *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 920-24 (9th Cir. 2006); *Lin v. U.S. Dep’t of Justice*, 416 F.3d 184, 189-90 (2d Cir. 2005) (refusing to apply *Chevron* deference to an IJ decision that the BIA summarily affirmed).

review.<sup>272</sup> Formal adjudication, accordingly, is not necessary or sufficient for *Chevron* review, but it increases the likelihood of an agency winning the “deference lottery.”<sup>273</sup>

Second, because empirical studies have found that agency win rates under *Chevron* and *Skidmore* overlap, *Chevron* deference may not be as important for agencies as other concerns in its cost-benefit calculus. Dick Pierce, after summarizing several studies, noted that courts affirmed agency action from 60% to 81.3% of the time under *Chevron*, while they affirmed from 55.1% to 73.5% of the time under *Skidmore*.<sup>274</sup> But, as I have argued elsewhere, there are significant reasons to evaluate the studies that create that overlap.<sup>275</sup> For instance, one should discount studies that found a lower win rate (64% or 65.2%) for agencies than other studies under *Chevron* (and thus made *Chevron* look less useful to agencies) because they expressly considered, respectively, only two “politically contentious” agencies<sup>276</sup> or one court.<sup>277</sup> And one should place a premium on a study that found a lower agency win rate (60.4%) under *Skidmore* (and thus suggested that *Chevron* is more beneficial to agencies) because, as it was the only study to consider *Skidmore* cases after *Mead* reinvigorated the dormant *Skidmore* doctrine in 2001, it is more probative of current judicial practice.<sup>278</sup> With these qualifications in mind, the differences between *Chevron* and *Skidmore* deference become more meaningful and demonstrate that choosing formality provides a greater likelihood of receiving deference on judicial review.

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<sup>272</sup> See Brendan C. Selby, *Internal Agency Review, Authoritativeness, and Mead*, 37 HARV. ENVTL. L. REV. 539, 575 n.248 (2013) (“The law on the extent to which such lower-level actors may receive *Chevron* deference for decisions conducted through formal adjudication is unsettled.”).

<sup>273</sup> See Christopher J. Walker, Response, *How to Win the Deference Lottery*, 91 TEX. L. REV. SEE ALSO 73, 79 (2013) (discussing when agencies should invest in formalities to obtain deference).

<sup>274</sup> Pierce, *Studies of Judicial Review*, *supra* note 264, at 85.

<sup>275</sup> See Barnett, *Codifying Chevmore*, *supra* note 268, at 67.

<sup>276</sup> See *id.* (citing Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 848 (2006) (focusing study on “two important agencies known for producing politically contentious decisions: the EPA and the NLRB”)).

<sup>277</sup> See Pierce, *Studies of Judicial Review*, *supra* note 264, at 84 (citing Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2168, 2182 tbl.3 (1998) (considering D.C. Circuit decisions)).

<sup>278</sup> See *id.* (citing Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1275 (2007)).



### 3. Increasing Likelihood of Absolute Official Immunity

Choosing ALJs can also bestow on agencies another limited benefit: increasing the likelihood of obtaining official immunity for administrative adjudicators. Losing litigants in administrative proceedings may assert constitutional or statutory claims against administrative adjudicators based on, among other things, due process (bias), the First Amendment, or the Fourth Amendment.<sup>279</sup> To keep agency adjudicators focused on deciding cases and able to avoid discovery, agencies should prefer that their adjudicators have absolute immunity, as opposed to qualified immunity. The former protects adjudicators from even bad faith, intentional, or malicious legal violations, while the latter only extends to good faith misconduct that does not violate a clearly established right.<sup>280</sup> Aside from scienter concerns, the key difference between these two immunities is that absolute immunity allows an immune defendant to escape the lawsuit before discovery, while qualified immunity permits disputes over issues of fact.<sup>281</sup> For agencies, absolute immunity shields their adjudicators from having to worry about collateral litigation at all, even if those adjudicators are extremely likely to prevail on the merits.

ALJs have absolute immunity. In a lawsuit against an ALJ in the Department of Agriculture, the Supreme Court in *Butz v. Economou* held that ALJs are entitled to absolute immunity from suit.<sup>282</sup> They were so entitled because of ALJs' quasi-judicial function, the procedures required for formal adjudication, and, "more importantly," the APA's structure that assures ALJs' "independent judgment on the evidence before [them], free from pressures by the parties or other officials within the agency."<sup>283</sup> Those structures are the ones that are familiar by now: separation of functions, absence of agency supervision, prohibitions on ex parte contacts, limits on removing ALJs, and another agency's control over ALJs' pay.<sup>284</sup>

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<sup>279</sup> See, e.g., *Butz v. Economou*, 438 U.S. 478, 483 (1978) (discussing causes of action brought against agency officials, including an ALJ).

<sup>280</sup> Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 54.

<sup>281</sup> See Andrew Horowitz, *Taking the Cop out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1314 (1998) (discussing the key difference between absolute and qualified immunity, as noted by the Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409, 424-26 (1976)).

<sup>282</sup> *Butz*, 438 U.S. at 512-13.

<sup>283</sup> *Id.* at 513.

<sup>284</sup> See *id.* at 513-14.

But whether AJs receive absolute immunity is far from certain. Notably, of course, AJs do not share with ALJs the attributes that the Court found “most important.” The Supreme Court in *Cleavinger v. Saxner* refused to grant absolute immunity to prison officials who adjudicated inmate infractions because the hearings provided fewer procedural safeguards than in *Butz* and because of the officers’ lack of independence.<sup>285</sup> The Court distinguished these officials from those who are “professional hearing officers, as are [ALJs].”<sup>286</sup> Although the term “professional hearing officers” could include federal AJs, the Court’s distinctions suggest that the term does not always do so. The Court noted that the prison officials at issue were, “albeit no longer of the rank and file, temporarily diverted from their usual duties,” subordinate to the warden who reviewed the decisions, and colleagues with the officer who lodges the charge and who will often provide testimony that the presiding official must review for credibility.<sup>287</sup> Many federal AJs have a similar hue. “[A]lbeit no longer part of the rank and file,” many AJs are not full-time hearing officers, they are subordinate to those more senior in the agency, and agency colleagues file charges and may serve as witnesses. On the other hand, absolute immunity may be available for AJs who have no other agency duties, who are supervised by those who do not enforce the matter or review the decision, and who preside over nonenforcement hearings that are unlikely to have colleagues bring charges or serve as witnesses.

This immunity issue may have largely escaped agencies’ attention because, in the few cases to address the issue, courts ignore the “independence” inquiry. Some federal district courts have held that IJs are entitled to absolute immunity.<sup>288</sup> But they have done so after quickly concluding only that the executive official acts in a quasi-judicial function. They do not consider the “more important” inquiry, the IJs’ independence.<sup>289</sup> Likewise, numerous courts have granted

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<sup>285</sup> See generally *Cleavinger v. Saxner*, 474 U.S. 193 (1985).

<sup>286</sup> *Id.* at 203-04.

<sup>287</sup> *Id.* at 204.

<sup>288</sup> See, e.g., *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1290 (M.D. Ga. 2012) (“An immigration judge is protected by absolute immunity.” (citing *Butz*)); *Alyshah v. Hunter*, No. 1:06-cv-0931-TWT, 2006 WL 2644910, at \*4 (N.D. Ga. Sept. 13, 2006); *Hernandez-Ortez v. Godinez*, No. 88 C 5925, 1988 WL 129997, at \*2 (N.D. Ill. Nov. 30, 1988). One decision stated without any analysis in dicta that “it is settled law that administrative judges and agency prosecutors are shielded by absolute immunity from claims arising from quasi-judicial administrative proceedings.” See *Herbst v. U.S. Immigration & Naturalization Serv.*, No. 98-civ-5533(LMM), 1999 WL 1052461, at \*6 (S.D.N.Y. Nov. 19, 1999).

<sup>289</sup> See *Butz*, 438 U.S. at 483.

parole-board members absolute immunity,<sup>290</sup> but, once again, without considering the “more important” inquiry.<sup>291</sup>

This judicial preterition may be coming to an end. A recent challenge to the immunity of the U.S. Parole Commissioners led one prominent judge to call for denying them absolute immunity. In a concurring opinion in *Taylor v. Reilly*, D.C. Circuit Judge Brett Kavanaugh argued that absolute immunity was not available because the Parole Commissioners, as adjudicators who were removable at will by the President, were not independent.<sup>292</sup> Other litigants have noticed Judge Kavanaugh’s opinion and are attempting to return the “more important” independence inquiry to the immunity analysis.<sup>293</sup> A larger point for agencies is that they should carefully consider the power to remove executive officials at will as a useful tool for control; with control comes not only due process but also perhaps immunity concerns. Moreover, focusing on adjudicatory independence makes sense. To the extent that absolute immunity should be rare because of its power to immunize public actors who cause private harms, focusing on indicia of an impartial and fair adjudicatory process make agencies earn their great privilege by attempting to limit the instances in which the adjudicator would have incentive to harm private parties.

As with judicial deference, one should not overstate the significance of absolute immunity for agencies. Immunity for agency adjudicators may be of marginal significance for many agencies. First, many agencies — unlike prisons — may be unlikely to encounter parties whose litigiousness renders absolute immunity especially valuable. Second, even if adjudicators have absolute immunity, the agency itself may still face discovery burdens because agency heads generally have only qualified immunity.<sup>294</sup> That said, with the judicial reconsideration of which adjudicators should be absolutely immune and regulated parties’ interest in collateral lawsuits (perhaps especially in enforcement proceedings, where independence is especially

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<sup>290</sup> See, e.g., *Cleavinger*, 474 U.S. at 200-01 (collecting appellate decisions).

<sup>291</sup> See, e.g., *Evans v. Dillahunty*, 711 F.2d 828, 830-31 (8th Cir. 1983); *Sellers v. Procunier*, 641 F.2d 1295, 1303 (9th Cir. 1981). See generally *United States ex rel. Powell v. Irving*, 684 F.2d 494 (7th Cir. 1982) (ignoring independence in immunity analysis of parole board).

<sup>292</sup> See *Taylor v. Reilly*, 685 F.3d 1110, 1117-18 (D.C. Cir. 2012) (Kavanaugh, J., concurring).

<sup>293</sup> See, e.g., *Johnson v. Dist. of Columbia*, 67 F. Supp. 3d 157, 165 (D.D.C. 2014) (noting the argument); Brief for Erica Hashimoto et al. as Amicus Curiae Supporting Appellant, *Harris v. Fulwood*, No. 13-5343 (D.C. Cir. Oct. 8, 2014) (arguing, based on *Taylor*, that parole hearing officers are not entitled to absolute immunity).

<sup>294</sup> See *Butz v. Economou*, 438 U.S. 478, 496-508 (1978).

valuable<sup>295</sup>),<sup>296</sup> the use of ALJs allows agencies to limit disruptive litigation.

### B. Exaggerated Benefits of Choosing AJs

Subpart A demonstrated that agencies give up benefits when they choose AJs to control agency proceedings. This subpart B argues that the remaining benefits of choosing AJs over ALJs are overstated. Not only are these benefits — cost savings, informality, and expertise — not as beneficial as they may first appear, but they lose their luster when compared to the benefits that ALJs provide. Nevertheless, where AJs provide benefits that ALJs do not, this subpart considers how the administrative state can bestow these benefits on agencies, even without congressional intervention.

#### 1. Overstated Cost Savings

Perhaps most surprisingly, contrary to common perception, AJs are not always less expensive or, at least, significantly less expensive than ALJs.<sup>297</sup> Three examples make the point.

First, the 1992 Frye Survey reported that approximately 7% of all government-employed AJs (165) were paid either “supergrades” (i.e., GS-16 through GS-18) or were part of the Senior Executive Service (“SES”),<sup>298</sup> which provide higher starting and capped salaries than ALJs receive.<sup>299</sup> Ten years later, the Limon Updated Survey reported that SES pay grades are common throughout the administrative state,

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<sup>295</sup> VERKUIL ET AL., *supra* note 3, at 1048-50 (arguing that independence is especially important in enforcement actions).

<sup>296</sup> One commenter has expressly called for biased AJs to receive no immunity at all. See McCarthy, *Blowing in the Wind*, *supra* note 52, at 227 (“The ability of biased administrative judges to shape and distort the record must be curbed. Administrative judges found guilty of abusing their offices should enjoy no judicial immunity.”).

<sup>297</sup> See, e.g., Kapnik, *supra* note 152, at 1544-45 (“AJs can cost significantly less than ALJs . . .”); McCarthy, *Blowing in the Wind*, *supra* note 52, at 215 (“Because administrative judges are paid far less than administrative law judges, agencies prefer them . . .”); Verkuil, *Reflections*, *supra* note 3, at 1345 (“As a result, whereas the ALJs as a group rival the federal trial judiciary and adjuncts in both number and compensation, . . . [AJs] decide[] more cases, but do[] so with less prestige, compensation and job security.”).

<sup>298</sup> See Frye, *supra* note 3, app. B. Some agencies did not report pay grades or the number of AJs who were paid at each grade. See *id.* at 349-51.

<sup>299</sup> Pay & Leave, Salaries & Wages, Salary Table 2015-ES, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/15Tables/exec/html/ES.aspx> (last visited Mar. 29, 2016).

although it failed to indicate the number of AJs receiving SES pay.<sup>300</sup> Eleven of 36 agencies that conduct oral hearings with AJs (as listed in the Limon Updated Survey chart) reported having at least some AJs receiving SES pay.<sup>301</sup>

Second, even of General Service AJs, at least approximately 8% were identified in the 1992 Frye Survey as GS-15 employees (the highest regular GS grade),<sup>302</sup> whose salaries were only slightly lower than ALJs'.<sup>303</sup> The Limon Updated Survey reveals that GS-15 pay is also common, although again without identifying the precise number of AJs at this grade. But importantly, the largest number of reported AJs from one agency on the Limon Updated Survey — 1,000 patent examiners that work in the Commerce Department — were GS-15,<sup>304</sup> constituting nearly one-third of all 3,370 reported AJs.

Third, as leading scholars noted generally in the early 1990s,<sup>305</sup> a growing number of AJs are paid on unique pay scales with pay that is commensurate to or better than ALJs'.<sup>306</sup> For instance, Administrative Appeals Judges' basic pay ("AA") is identical to ALJs'.<sup>307</sup> The more than 250 IJs<sup>308</sup> have higher base salaries ("IJ") than ALJs'.<sup>309</sup> Likewise, AJs with "Senior-Level and Scientific or Professional Positions" ("SL/ST")<sup>310</sup> or AJs who serve as Administrative Patent Judges ("APJs")

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<sup>300</sup> See LIMON, *supra* note 13, app. C at 1-6.

<sup>301</sup> See *id.*

<sup>302</sup> See Frye, *supra* note 3, app. B. Agencies reported 185 AJs as GS-15 employees (or approximately 8% of the 2,228 GS employees). Several other agencies submitted information indicating that their AJs were paid between various levels; three of those reporting agencies indicated that some unreported number of their AJs were GS-15.

<sup>303</sup> GS-15 employees' starting salaries are approximately \$102,000, as compared to ALJs' starting salaries of approximately \$106,000. *Compare 2015-GS Table, supra* note 170, with *2015-ALJ Table, supra* note 167 (listing starting basic pay at \$105,900).

<sup>304</sup> See LIMON, *supra* note 13, app. C at 1 (under "U.S. Department of Commerce" entry).

<sup>305</sup> VERKUIL ET AL., *supra* note 3, at 1055-56.

<sup>306</sup> See LIMON, *supra* note 13, at 3.

<sup>307</sup> *Compare Salary Table No. 2015-AAJ*, OPM.GOV, <http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2015/AAJ.pdf> (last visited Mar. 29, 2016), with *2015-ALJ Table, supra* note 167.

<sup>308</sup> *Office of the Chief Immigration Judge*, JUSTICE.GOV, <http://www.justice.gov/eoir/office-of-the-chief-immigration-judge> (last visited Mar. 29, 2016) ("The Office of the Chief Immigration Judge . . . provides overall program direction . . . for approximately 250 immigration judges in 57 immigration courts . . .").

<sup>309</sup> *Executive Office for Immigration Review, 2014 Immigration Judge Pay Rates*, JUSTICE.GOV, <http://www.justice.gov/sites/default/files/eoir/legacy/2014/05/28/2014IJPayTable.pdf> (last visited Mar. 29, 2016).

<sup>310</sup> See LIMON, *supra* note 13, app. C at 1-6 (listing, for example, positions in the Department of the Interior and Health and Human Services).

receive basic pay that is significantly higher than ALJs'.<sup>311</sup> But perhaps even more surprising, AJs on the Board of Contract Appeals — used in several agencies<sup>312</sup> — and for OSHA<sup>313</sup> have basic *starting* pay (CA-1-3 and Executive Schedule (“EX”), respectively) that exceeds ALJs’ *highest possible* basic pay.<sup>314</sup>

After accounting for AJs under the AA, APJ, CA, EX, GS-15<sup>315</sup> or higher, IJ, SES, and SL/ST pay scales (in all of their bureaucratic, abbreviated glory), the cost-savings narrative surrounding AJs begins to lose force. For example, 1,618 of the 3,370 reported AJs — or 48% — are paid at levels better than, the same as, or only slightly lower than new ALJs.<sup>316</sup> Moreover, this number only includes those AJs whom the agency identified as being paid at these grades. It does not include the numerous instances — more than 250 potentially affected AJs — in which the agency reported that some indefinite number of AJs was paid at these rates (and some indefinite number at lower rates).<sup>317</sup> Accordingly, this data suggest that AJs may be meaningfully cheaper than ALJs only, at best, approximately half the time.

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<sup>311</sup> Compare *Salary Table No. 2014-SL/ST*, OPM.GOV, <http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2014/SLST.pdf> (last visited Mar. 29, 2016) (listing basic pay minimum as \$120,749 for SL/ST positions), and *USPTO 2014 AD Pay Plan*, COMMERCE.GOV, [http://hr.commerce.gov/Employees/Compensation/PROD01\\_010302](http://hr.commerce.gov/Employees/Compensation/PROD01_010302) (last visited Mar. 29, 2016) (listing minimum salary for Administrative Patent Judges as \$135,842), with *2015-ALJ Table*, *supra* note 167 (listing starting basic pay at approximately \$106,000).

<sup>312</sup> See LIMON, *supra* note 13, app. C at 1-6 (listing Board of Contract Appeals under Departments of Agriculture, Defense, Housing & Urban Development, Interior, Justice, Transportation, and Veterans Affairs; the General Service Administration; U.S. Government Printing Office; NASA; and U.S. Postal Service).

<sup>313</sup> See LIMON, *supra* note 13, app. C at 5.

<sup>314</sup> See *Pay & Leave, Salaries & Wages, Salary Table No. 2015-BCA*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/15Tables/exec/html/BCA.aspx> (last visited Mar. 29, 2016) (listing lowest basic pay for other Board of Contract Appeals members as \$149,178); *Pay & Leave, Salaries & Wages, Salary Table No. 2015-EX*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/15Tables/exec/html/EX.aspx> (last visited July 22, 2015) (listing lowest basic pay as \$148,700).

<sup>315</sup> This account includes 25 AJs for the General Accounting Office’s Office of the General Counsel. The GAO reported “25-30” AJs who were paid at the “SG-15 Equivalent.” See LIMON, *supra* note 13, app. C at 2.

<sup>316</sup> See *infra* App. A (organizing data from Limon Updated Survey by pay grades described above).

<sup>317</sup> See *infra* App. B (organizing data from Limon Updated Survey to isolate instances when agencies did not report indefinite number of AJs at high rates described above and calculating 268 relevant AJ positions (and 10 part-time positions)).

There's more. The cost savings from paying the remaining 1,755 AJs — approximately half of all reported AJs — is not as significant as it may first appear. Of those remaining AJs, the reporting agencies identified the pay scale for 603 fulltime or “contract” AJs (as opposed to simply identifying that an AJ was part of the general service).<sup>318</sup> Assuming that each of the 603 AJs is paid at the lowest identified grade at 2015 rates (and thus assuming the largest possible — although unlikely — difference in cost between AJs and ALJs), the salary savings comes to less than \$30 million or less than 1/37,000 of the 2015 \$1.1 trillion discretionary budget.<sup>319</sup> For some agencies, the increase is an infinitesimal fraction of their budgets. For instance, the Energy Department would pay less than \$400,000 to convert its 19 AJs into ALJs or approximately 0.0015 of 1% of its 2014 budget of more than \$27 billion.<sup>320</sup> Even Veterans Affairs, which would have the largest additional costs of approximately \$15,500,000 by converting to ALJs, would have to allocate only approximately 0.025 of 1% of its 2014 budget of approximately \$63 billion to increased salary costs. The only other agency with more than \$3 million in additional costs in converting AJs to ALJs is the EEOC, with approximately \$6 million.<sup>321</sup> Notably, many agencies — such as U.S. Railroad Retirement Board,

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<sup>318</sup> See *infra* App. C (organizing data from Limon Updated Survey by agencies with AJs at identifiable GS grades). I did not include those AJs for which the agencies simply identified them as being part of the General Service because it was too unclear what the AJs' salaries were.

<sup>319</sup> See *Federal Spending: Where Does the Money Go, Discretionary Spending*, NATIONALPRIORITIES.ORG, <https://www.nationalpriorities.org/budget-basics/federal-budget-101/spending> (last visited Mar. 29, 2016).

<sup>320</sup> *Office of Management and Budget, Historical tables, Table 5.4*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/omb/budget/Historicals> (last visited Mar. 29, 2016). When calculating the cost savings, I used the starting base salary for ALJs of \$105,900, as opposed to the approximate figure of \$106,000 that I used throughout this article for ease of reference. See *infra* App. C.

<sup>321</sup> A more recent budget analysis for the EEOC suggests that my figure for the EEOC is significantly larger than a more realistic projection. I arrived at this approximately \$6 million figure based on the EEOC having 111 AJs and presuming that they were paid on the GS-11 scale. See *infra* App. C. The Administrative Conference of the United States considered in 2014 the likely budgetary effect if the EEOC converted its 95 AJs who hear certain federal-employee discrimination claims to ALJs. It predicted that “the agency’s annual personnel costs—in terms of salaries, benefits, and other related costs—would likely rise between \$1.1 million and \$2.5 million in a given year over a ten-year period. Similarly, on an annualized basis, personnel costs increases from use of ALJs would likely be \$2.1 million per year under the primary (baseline) scenario.” ACUS EEOC RPT., *supra* note 143, at 4. The report noted that almost all of the EEOC AJs were paid on the GS-14 scale. See *id.* at 43.

the Federal Maritime Commission, the EPA, and the Department of Energy — would have additional salary costs under \$1 million.<sup>322</sup>

This is not to say that cost savings are irrelevant. To paraphrase the late Senator Dirksen, “Twenty-nine million dollars here, twenty-nine million dollars there — pretty soon it adds up to real money.”<sup>323</sup> But one must put this salary savings into perspective, not only with agency and federal discretionary spending but also with the benefits that ALJs bring to agencies. Likewise, this is not to say that the total savings could not be more than I indicate here once seniority and locality pay and benefits are accounted for, but, to my knowledge, this kind of granular data is not available. Moreover, this is not to say that AJs are always cheaper than ALJs; they’re not. The point is, instead, that one should not exaggerate the cost savings of AJs, especially in light of the benefits of converting, when possible, to ALJs.

To be sure, the money for ALJ salaries would have to come from often-overtaxed agency budgets, meaning that money now spent on other things must instead be directed to ALJ salaries. Although cost is often relevant to due process, expense is not a trump card.<sup>324</sup> Even if expense is germane to impartiality analysis,<sup>325</sup> the amount of money at issue is comparatively small, as discussed above, and the expenditure furthers the compelling goals of protecting the agency forum from the unconstitutional appearance of partiality and ameliorating the agency’s ability to further its own agenda with less distraction. In other words, this movement of a comparatively modest amount of money to ALJs is not an empty expenditure. Moreover, I take no position on how high ALJ salaries should be. Perhaps, contrary to longstanding calls from ALJs,<sup>326</sup> they should be lower. But Congress’s increased reliance on separate pay scales that exceed ALJ salaries for certain AJs and on GS-15 salaries that are commensurate to ALJs’ salaries suggest that Congress has set appropriate salaries to attract qualified ALJs.

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<sup>322</sup> See App. C (organizing data from Limon Updated Survey by agencies with AJs at identifiable GS grades).

<sup>323</sup> Scalia, *supra* note 43, at 69-70 (arguing that savings under prior ALJ-pay scheme, even if relatively modest, still supported adhering to it).

<sup>324</sup> See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970).

<sup>325</sup> Although the court frequently considers costs when determining the extent of procedure that are due, see, e.g., *id.*, I am not aware of the Court relying upon notions of cost when determining whether unconstitutional appearances of partiality exist.

<sup>326</sup> See, e.g., Robin J. Arzt et al., *Advancing the Judicial Independence and Efficiency of the Administrative Judiciary: A Report to the President-Elect of the United States*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 93, 107-10 (2009).



## 2. Overstated Informality and Efficiency

Agencies may also not gain as much informality and efficiency as it first appears by eschewing ALJs and formal adjudication under the APA. Formal adjudication generally requires an ALJ to preside over hearings<sup>327</sup> and provides independence for the ALJ from *ex parte* comments, agency oversight, and the obligation to perform other agency duties.<sup>328</sup> Participants are entitled to the following: notice of the proceedings,<sup>329</sup> briefing,<sup>330</sup> legal counsel,<sup>331</sup> presentation of their case orally or in writing (except that agencies can require written submissions in certain benefits and licensing matters), cross-examination as necessary,<sup>332</sup> submission of findings of fact and law, submission of exceptions to findings, and a reasoned decision with findings of material facts and legal issues supported by substantial evidence in the record as a whole.<sup>333</sup> For three key reasons, these attributes of formal adjudication are unlikely to interfere significantly with agency efficiency.

*First.* Because many agency hearings are already formalized, additional APA requirements for formal adjudication may minimally affect efficiency. As a starting point, oral hearings, by their nature, are very likely to include many characteristics of formal adjudication, including notice, written and oral presentation of one's case, legal counsel, and reasoned, written opinions. Indeed, Frye noted more than twenty years ago that agencies have moved to more formalized proceedings in federal-employment and enforcement matters that incorporate numerous formal-adjudication procedures,<sup>334</sup> and ACUS noted in 1992, when attempting to convince Congress to require formal adjudication in more proceedings,<sup>335</sup> that "informal hearings

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<sup>327</sup> 5 U.S.C. § 556(b) (2012).

<sup>328</sup> *Id.* §§ 554(d), 557(d) (2012).

<sup>329</sup> *Id.* § 554(b).

<sup>330</sup> *Id.* § 554(c).

<sup>331</sup> *Id.* § 555(b) (2012).

<sup>332</sup> *Id.* § 556(d).

<sup>333</sup> *Id.* §§ 557(c), 556(d), 706(2)(E) (2012).

<sup>334</sup> See Frye, *supra* note 3, at 333 (discussing increased formality in federal-employment disputes); *id.* at 275 ("All [immigration, passport-and-nationality, and security-clearance cases] incorporate a substantial number of the procedural protections of sections 556 and 557.").

<sup>335</sup> VERKUIL ET AL., *supra* note 3, at 1058-59 ("Congress should consider expanding the category of cases where ALJs are required . . . Congress should focus on the following factors: (1) Whether the cases heard and decided by the AJs involve potentially serious curtailment of individual interests ('Serious curtailment of individual interests' should be defined to include those cases that include penalties,

contain most of the ingredients of an APA formal hearing.”<sup>336</sup> As one of many examples, immigration proceedings had adopted “most of [formal adjudication’s] procedures,” including even separation of functions to provide IJs some independence.<sup>337</sup> Likewise, the Department of Interior’s Office of Hearings and Appeals decades ago recognized the value of giving their AJs separate space and separated functions from others in the agency,<sup>338</sup> and agencies have moved to give more independence and sole-adjudicative function to AJs with high caseloads.<sup>339</sup> In other examples, the Department of Defense provides nearly formal adjudication for those facing the denial of security clearance,<sup>340</sup> and the Department of Agriculture uses very formal proceedings (satisfying all or nearly all of the ingredients mentioned in *Goldberg v. Kelly*, and essentially the same as formal adjudication) in several adjudications.<sup>341</sup>

Relatedly, using ALJs with more indicia of impartiality can also increase efficiency and cost-reducing efforts. Providing a more impartial tribunal “may reduce . . . the demand . . . for additional procedural ingredients such as confrontation, a transcript, and oral presentation.”<sup>342</sup> Parties, too, may be less likely to seek appeal of adverse decisions when the decision is reasoned, addresses material arguments, and comes from an impartial decision-maker.

To be sure, the transition would not be nearly costless in every instance. As other studies have demonstrated,<sup>343</sup> the administrative state is balkanized with numerous varieties of hearings, although the trend is towards increased formality. Some adjudications may have exceptional need to exploit certain values that are anathema to formal adjudication, such as the need for ex parte contacts in matters of

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sanctions, or other significant restrictions on personal freedom.’”). ACUS had recommended that Congress require cases concerning “substantial impact on personal liberties or freedom,” “criminal-like culpability,” “sanctions with substantial economic effect,” or findings of discrimination use formal adjudication. 1992 ACUS RPT., *supra* note 49, at 12.

<sup>336</sup> VERKUIL ET AL., *supra* note 3, at 1053-54.

<sup>337</sup> Frye, *supra* note 3, at 276 (listing procedures created by statute and regulation).

<sup>338</sup> See Verkuil, *Informal Adjudication*, *supra* note 35, at 787 (citing interviews with Interior’s Office of Hearings and Appeals).

<sup>339</sup> See Frye, *supra* note 3, at 271.

<sup>340</sup> See *id.* at 279.

<sup>341</sup> See Verkuil, *Informal Adjudication*, *supra* note 35, at 760-65.

<sup>342</sup> *Id.* at 751 (citing Henry J. Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267, 1279, 1289 (1975)).

<sup>343</sup> See generally Frye, *supra* note 3 (discussing in significant detail the kinds of AJ adjudication); see also VERKUIL ET AL., *supra* note 3, at 843-75; Verkuil, *Informal Adjudication*, *supra* note 35, at 757-79.

national security or much more limited oral-hearing rights when matters of high volume and low complexity can be handled equally as fairly in writing (and do not otherwise fall under the APA's written-hearing exception for benefits and licensing). (Yet, even here, agencies can work to provide these necessary AJs with independence with protection from at-will removal and separation of functions.) Or Congress may, in extremely rare circumstances, already provide certain AJs, such as the judges on the Civilian Board of Contract Appeals, with similar accoutrements of independence that ALJs have, significantly reducing any lingering concerns over limits on other APA on-the-record protections.<sup>344</sup> Or certain, rare agency hearings for which parties can seek completely de novo judicial proceedings may gain little from formalized proceedings.<sup>345</sup> Likewise, some agencies may not have the discretion under their enabling acts to choose formal adjudication and ALJs, such as when Congress has created a unique adjudicatory process and named adjudicators like "Immigration Judges" or "Administrative Patent Judges." Those agencies would need to not only consider the benefits of formal adjudication and ALJs, but also seek congressional authorization to hire ALJs. And moving to formal adjudication will certainly have some limited transition costs, but these are short-term and unlikely to prove onerous for agencies that have already moved towards formalized proceedings. My point here is not that agencies should or can choose formal adjudication in every case. Instead, my point is that in numerous cases, the move to formal adjudication — as others have previously requested, to no avail, that Congress require<sup>346</sup> — is not as onerous or inefficient as agencies may reactively contend.

*Second.* Formal adjudication is not as strict as it sounds. As Bill Funk has pointed out, despite agencies' protestations that formal adjudication is "too costly and time consuming, . . . no empirical support [exists for] . . . such an indictment of APA adjudication."<sup>347</sup>

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<sup>344</sup> See, e.g., 41 U.S.C. § 7105(b) (2012) (providing judges on the Civilian Board of Contract Appeals the same appointment and removal protections as ALJs). Although these judges must be "selected and appointed to serve in the same manner" as ALJs, *id.*, agencies have interpreted this statutory language as to permit them (not the OPM) to use procedures similar to those of the OPM to select ALJs. See VERKUIL ET AL., *supra* note 3, at 950-51. The OPM, for its part, has indicated that it does not have authority to appoint these judges.

<sup>345</sup> See, e.g., ACUS EEOC RPT., *supra* note 143, at 13-14 (considering certain EEOC hearings for federal employees that are subject to de novo judicial proceedings and noting the APA's exception from formal adjudication for de novo proceedings).

<sup>346</sup> See VERKUIL ET AL., *supra* note 3, at 1058-59.

<sup>347</sup> Funk, Wong Yang Sung, *supra* note 35, at 892.

The APA permits flexibility in formal adjudication.<sup>348</sup> For instance, agencies generally can set pleading rules,<sup>349</sup> regulate amici,<sup>350</sup> enter consent decrees,<sup>351</sup> grant summary judgment,<sup>352</sup> limit depositions,<sup>353</sup> compel meaningful settlement conferences,<sup>354</sup> grant ALJs other authority to assist with case management,<sup>355</sup> exclude “irrelevant, immaterial, or unduly repetitious evidence,”<sup>356</sup> limit cross-examination, engage in ex parte contacts for certain matters,<sup>357</sup> limit hearings to written submissions in certain high-volume matters (claims for money or benefits, and applications for initial licenses),<sup>358</sup> and even forgo adversarial (as opposed to inquisitorial) hearings with lawyers for both private parties and the government.<sup>359</sup> Frye — who served as both an AJ and an ALJ — opined that the only significant power that agencies surrender is the ability to compile the formal record that must support the final agency order.<sup>360</sup> At legislative hearings concerning SSA adjudication, law professor Victor Rosenblum testified on a point that agencies (and perhaps courts) have forgotten: “[t]he focus of the APA was not on judicialization but on fairness and impartiality in wielding administrative skills and responsibilities.”<sup>361</sup>

*Third.* Transferring hearing duties from AJs with other duties to ALJs with no other duties does not mean that the ALJs will be underutilized. Recall that some AJs have other duties, suggesting that

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<sup>348</sup> See *id.*

<sup>349</sup> 5 U.S.C. § 554(b)(3) (2012).

<sup>350</sup> See *id.* § 554(c).

<sup>351</sup> See *id.* § 554(c)(2).

<sup>352</sup> See *id.* § 554(e); see also William Funk, *Close Enough for Government Work? — Using Informal Procedures for Imposing Administrative Penalties*, 24 SETON HALL L. REV. 1, 65 (1993).

<sup>353</sup> See 5 U.S.C. § 556(c)(4) (2012).

<sup>354</sup> See *id.* § 556(c)(6), (c)(8).

<sup>355</sup> See *id.* § 556(c)(11).

<sup>356</sup> See *id.* § 556(d).

<sup>357</sup> See *id.* § 554(d)(2).

<sup>358</sup> See *id.* § 556(d).

<sup>359</sup> See Wolfe, *supra* note 138, at 218 (citing SUBCOMM. ON SOC. SEC. OF THE COMM. ON WAYS & MEANS, 96TH CONG., SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES: SURVEY AND ISSUE PAPER 8 (Comm. Print 1979)) (discussing views of then-Director of the Bureau of Hearings and Appeals (for social-security claims), Robert Trachtenberg, that APA does not require adversarial hearings or “highly ‘judicialized’ hearing[s]”).

<sup>360</sup> Frye, *supra* note 3, at 268 n.14.

<sup>361</sup> Wolfe, *supra* note 138, at 218 (citing SUBCOMM. ON SOC. SEC. OF THE COMM. ON WAYS & MEANS, 96TH CONG., SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES: SURVEY AND ISSUE PAPER 8-9 (Comm. Print 1979)).

the agency does not have a sufficient number of hearings to keep them occupied with hearings alone. But this concern can be largely addressed in two ways. For agencies that have more than one employee with shared duties, agencies can consolidate the hearing responsibilities so that fewer employees have hearing duties. Swapping those employees with ALJs would lead to only whatever additional costs arise from pay costs, if any, and any additional or new costs associated with reimbursing the OPM for administering the ALJ exam (which are not otherwise offset by the agency's cost savings in having the OPM handle hiring).<sup>362</sup> For agencies whose low number of hearings warrants only a part-time ALJ,<sup>363</sup> Congress permits those agencies to share ALJs for occasional or temporary use.<sup>364</sup>

Accordingly, the case for informality and inefficiency is not as strong as may be supposed. With the already formalized nature of many agency proceedings, the APA's flexibility, and strategies for hiring only as many ALJs as necessary, formal adjudication is not agencies' *bête noir*.

### 3. Overstated Expertise

Although agencies' reliance on expertise to justify AJs is, like other agency arguments, overwrought, it provides their best argument. As to the overwrought point, ALJs are not as inexperienced as agencies may think. ALJs gain expertise on the job. The idea of committing ALJs to particular agencies (instead of creating an ALJ Corps, as some states have) is to permit them to gain expertise in a particular agency's regulatory regime.<sup>365</sup> Learning statutory and regulatory schemes

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<sup>362</sup> See 5 C.F.R. § 930.203 (2015) ("Each agency employing [ALJs] must reimburse OPM for the cost of developing and administering the [ALJ] examination. Each agency is charged a pro rata share of the examination cost, based on the actual number of [ALJs] the agency employs."). In 2012, the OPM assessed agencies a fee of \$1,633 per ALJ employed. See OFFICE OF THE INSPECTOR GEN. OF THE SOC. SEC. ADMIN., CONG. RESPONSE RPT., INTERAGENCY AGREEMENTS WITH THE OFFICE OF PERSONNEL MANAGEMENT FOR ADMINISTRATIVE LAW JUDGE SERVICES 6 (2013), *available at* <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-12-22144.pdf>.

<sup>363</sup> Frye noted in his study that, with the exception of certain Veteran Affairs officers who were not included in the Limon Updated Survey, "while the caseload of presiding officers with other duties is significant, the tendency to limit their responsibilities to case types with a low caseload is pronounced." Frye, *supra* note 3, at 270. The Limon Updated Survey, contrary to the 1992 Frye Survey, did not identify the number of AJs with other duties.

<sup>364</sup> 5 U.S.C. § 3344 (2012).

<sup>365</sup> See VERKUIL ET AL., *supra* note 3, at 1042-44 (discussing virtues and vices of the ALJ-corps model).

relatively quickly is not new for lawyers and judges, and generalist ALJs can rely on lawyers (who very likely appear in most oral hearings and file most briefings) to guide them. Recall, too, that ALJs are evaluated based on their legal experience and must pass an examination to qualify for the list of three, indicating that they are intelligent, seasoned lawyers who can learn a regulatory regime quickly.<sup>366</sup> In fact, in one of the recent challenges to SEC ALJs, the district court noted that the ALJ at issue has a “distinguished biography,” including earning his undergraduate degree in physics from Yale, earning his law degree from Harvard Law School, serving as a federal law clerk, serving as an Assistant United States Attorney, and working in an intellectual-property private practice.<sup>367</sup> This ALJ may not be atypical because others have noted, decades ago, that the ALJ corps “in education, training, and experience . . . [is] no less qualified than bankruptcy judges and magistrates, if not members of the federal bench.”<sup>368</sup>

Not all agency adjudications, moreover, would appear to require significant technical expertise that cannot be learned on the job. For instance, agriculture, employment and labor, education, social-security, and veterans cases do not seem to require significant technical expertise that a successful lawyer could not acquire relatively quickly. Indeed, the SSA and HHS have noted that they have generally been pleased with their ALJ candidates.<sup>369</sup> To the extent that limited technical expertise is necessary, the APA provides numerous ways of providing it to the ALJ: oral hearings, expert witnesses, and party agreement and proposed factual findings. If additional regulatory expertise is needed, lawyers can assist the ALJ in framing the issues and providing technical background.

Nonetheless, some agency adjudications will greatly benefit from adjudicators with significant technical or regulatory expertise. For instance, patent and tax matters — two of the areas that had the

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<sup>366</sup> See *id.* at 1044 (“After a few years’ experience, [ALJs] are well-positioned to understand and to apply the complicated maze of statutes, regulations, and agency policies that govern the disputes they adjudicate.”).

<sup>367</sup> *Duka v. SEC*, 103 F. Supp. 3d 382, 387 n.6 (S.D.N.Y. 2015).

<sup>368</sup> Verkuil, *Reflections*, *supra* note 3, at 1344.

<sup>369</sup> See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-14, RESULTS-ORIENTED CULTURES: OFFICE OF PERSONNEL MANAGEMENT SHOULD REVIEW ADMINISTRATIVE LAW JUDGE PROGRAM TO IMPROVE HIRING AND PERFORMANCE MANAGEMENT 8-10 (2010) [hereinafter GAO-10-14] (reporting that SSA and Health and Human Services (“HHS”) were pleased with quality of ALJ candidates, although they sought changes — such as by awarding bonus points to eligible candidates — to ensure that the appointment considered specialized knowledge).

largest number of AJs in Limon's Updated Survey — are not for the uninitiated or even for those without certain hard-science undergraduate degrees. The problem for agencies that need expert adjudicators is that the OPM's current ALJ-hiring model does not account for subject-matter expertise.<sup>370</sup> For decades, OPM routinely permitted "selective certification," which allowed agencies to hire candidates with technical expertise who qualified as eligible but were not within the top-three scoring candidates.<sup>371</sup> But it has refused to do so since the early 1980s, likely because of concerns that agencies were seeking to hire ALJs with a more "pro-enforcement attitude."<sup>372</sup> The result of selective certification's desuetude is that it unintentionally furthered concerns of adjudicator bias: agencies were further incentivized to turn away from generalist ALJs in favor of technically expert AJs, groomed as part of the agency's own staff and within the agency's continued control.<sup>373</sup>

Certain agencies continue to request selective certification — from the OPM or Congress — in vain.<sup>374</sup> ALJs, for their part, have

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<sup>370</sup> See Asimow, *supra* note 25, at 1009 ("[The ALJ-hiring process] does not [account for] whether a new ALJ has specialized experience in the regulatory or beneficiary scheme administered by the agency."); Eaglesham, *In-House Court*, *supra* note 149 (quoting report stating that the SEC "has not hired a single [ALJ] who had directly relevant experience or expertise related to the federal securities laws" in thirty years); Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 484 (2007) (noting that agencies cannot seek out candidates with experience).

<sup>371</sup> See BURROWS, *supra* note 56, at 5; Lubbers, *Federal Administrative Law Judges*, *supra* note 58, at 117.

<sup>372</sup> OPM, EXAMINATION ANNOUNCEMENT NO. 318 at 8 (1984); *see also* 5 C.F.R. § 332.404 (2015) (requiring agency to select from the "highest three eligibles"). The concern of agencies stacking their ALJ corps with former staffers was very real. A 1969 ACUS report found that during one five-year period, "52 of 66 ALJs appointed by the agencies utilizing selective certification had been previously employed on the staffs of those agencies." Christopher E. Austin, Note, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U. L. REV. 768, 785 n.103 (1982) (quoting ADMIN. CONFERENCE OF THE U.S., FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS: STATISTICAL REPORT FOR 1976-1978, at 12 (1980)).

<sup>373</sup> Cf. Lubbers, *APA-Adjudication*, *supra* note 147, at 75-76 (arguing that agencies would be even more likely to avoid ALJs if the ALJ-corps model were adopted because ALJs would not be assigned to particular agencies).

<sup>374</sup> See BURROWS, *supra* note 56, at 6 (noting that International Trade Commission ("ITC") and the SSA have sought selective certification); Arzt et al., *supra* note 326, at 101-02 (noting that the ITC and the Federal Trade Commission both sought legislative permission to certify selectively). *But see* GAO-10-14, *supra* note 369, at 8-10 (reporting that SSA and HHS were pleased with the quality of ALJ candidates, although they sought changes — such as by awarding bonus points to eligible candidates — to ensure that the appointment considered specialized knowledge); *Social Security Testimony Before*

continued to oppose selective certification and sought to retain their generalist hue.<sup>375</sup> But this stalemate over selective certification is not inevitable. A more limited form of selective certification can adequately address both sides' concerns.

To account for necessary technical expertise, the OPM should first permit selective certification if the agency can make a showing that technical expertise (meaning expertise in the industry, science, or comparatively complicated regulatory regime) is necessary for ALJs. A good starting place would be those instances in which Congress has itself generally indicated some form of specialized expertise in hiring<sup>376</sup> or specialized adjudication for the subject matter at issue outside of the agencies themselves: tax (Article I Tax Court), government contracts (Article I Court of Federal Claims and Federal Circuit jurisdiction), patent (Federal Circuit jurisdiction), military matters (United States Court of Appeals for the Armed Services), and Trade (Article III Court of International Trade). This congressional confirmation provides an objective, clear basis for determining whether expertise is a compelling value in the particular subject area at issue, and thus it should limit OPM and ALJs' concerns of agencies seeking biased ALJs when expertise is not necessary for the adjudications at issue.

To account for fears of agency in-house hiring, OPM should limit the selective registers to require balance among the agency's ALJ force. OPM, for example, could require that no more than, say, 25% of the agency's ALJ corps have previously worked within the agency. Such a balancing requirement is similar to the partisan balancing requirements that are ubiquitous throughout the federal administrative state<sup>377</sup> and that apply to European constitutional courts.<sup>378</sup> This balancing

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*Congress: Hearing Before the H. Comm. on Ways & Means, Subcomm. on Soc. Sec., & the H. Comm. on the Judiciary Subcomm. on the Courts, Commercial and Administrative Law*, 114th Cong. (July 11, 2011) (statement of Michael J. Astrue, Comm'r, Soc. Sec. Admin.), available at [http://www.ssa.gov/legislation/testimony\\_071111.html](http://www.ssa.gov/legislation/testimony_071111.html) (noting SSA's "positive working relationship with OPM" and the improved quality of hiring, but still seeking "agency-specific selection criteria").

<sup>375</sup> See Arzt et al., *supra* note 326, at 103; Eaglesham, *In-House Court*, *supra* note 149 (quoting Erin Wirth, president of the Fed. Admin. Law Judges Conference, as arguing that ALJs are generalists who do not need expertise in their fields).

<sup>376</sup> See 41 U.S.C. § 7105(a)(2) (2012) (requiring that certain members of the Board of Contract Appeals have "at least 5 years of experience in public contract law").

<sup>377</sup> See, e.g., Ronald J. Krotoszynski, Jr. et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 962-72 (2015).

<sup>378</sup> See Mary L. Volvansek, *Appointing Judges the European Way*, 34 FORDHAM URB. L.J. 363, 384 (2007) ("European constitutional courts, whose judges are named through shared appointments and a balance of partisan quotas, were created in



requirement recognizes that agency employees have useful expertise and experience, that they may be extremely able neutrals, and that agency service should not disincentivize those with expertise and adjudicatory aspirations from working for agencies. The other ALJs can come from lawyers that regularly appear before the agency and lawyers from other agencies.<sup>379</sup> If agencies still eschew ALJ hiring under such a balancing regime, it only causes their argument for expertise to look like subterfuge for bias.

To be sure, some employee-nepotism may remain, but the concern should be mitigated. The in-house employees must still qualify through their test scores as “eligible,”<sup>380</sup> although they must no longer be within the top three scores.<sup>381</sup> Likewise, a balancing requirement may be most effective with multimember bodies, where members exchange views and vote on policy matters, instead of single-judge proceedings. But a balancing requirement can have a salutary effect on agency culture and nonbinding ALJ precedent. The supermajority of ALJs from outside of the agency can be expected to create an impartial judicial culture in which the former in-house employees (now with protection from at-will removal) are integrated, much as it is within the judicial branch when former prosecutors, public defenders, plaintiff’s lawyers, and defense attorneys become neutrals.<sup>382</sup> Moreover, the ALJs from outside of the agency should have an outsized effect on agency precedent. Even if that precedent is not binding on other ALJs,<sup>383</sup> it provides persuasive precedent that other ALJs will either attempt to remain consistent with or attempt to distinguish — all similar to how federal district judges within the same district interact with one another and consider each other’s nonbinding decisions.

This proposal does not require congressional intervention. Like most agencies’ discretion under *Chevron* to choose ALJs and formal adjudication, the OPM can reinstate selective certification on its own.

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recognition of the fact that politics and judicial decision-making may not be wholly divorced.”).

<sup>379</sup> See VERKUIL ET AL., *supra* note 3, at 880 (noting that in a 1992 ALJ survey 36.8% of respondents classified their “primary professional experience as private practice”).

<sup>380</sup> See Lubbers, *Federal Administrative Law Judges*, *supra* note 58, at 114 (discussing eligibility requirements to be placed on candidate register).

<sup>381</sup> See *id.* at 117-18.

<sup>382</sup> See Ranier Knopff, *The Politics of Reforming Judicial Appointments*, 58 U.N.B. L.J. 44, 49 (2008).

<sup>383</sup> See Isaac D. Benkin & Jason Schlosberg, *Practice in FAA Civil Penalty Proceedings*, 21 AIR & SPACE L. 10, 13 (2006) (noting that one ALJ’s decision is not binding on colleagues but may prove persuasive).

The OPM has statutory authority to “prescribe regulations” related to, among other things, ALJ hiring.<sup>384</sup> The agency’s past, longstanding use of selective certification strongly suggests its propriety, and I am not aware of any challenge to that authority. Thus, unlike prior proposals for selective certification, this compromise proposal should largely address both sides’ concerns.<sup>385</sup> OPM, for its part, should gain power by giving up some selection criteria to certain agencies for certain adjudications. If agencies increasingly choose ALJs, the OPM gains a meaningful role in the hiring of more ALJs.

But the return to a modified selective certification is merely a beginning. Congress and the OPM have too long ignored other problems with ALJ hiring<sup>386</sup> that must be fixed if agencies are to view OPM-led hiring as a worthwhile price for improved adjudication. First, Congress should repeal or substantially limit the Veterans’ Preference for ALJ candidates, which significantly increases the odds of veterans’ inclusion in the list of three candidates from which agencies must choose.<sup>387</sup> As others have noted for decades, it limits diversity within the ALJ corps and can lead to a less-experienced and less qualified corps.<sup>388</sup> Second, Congress should provide the OPM more guidance on its responsiveness to agencies’ requests for additional ALJs and provide a faster hiring process that is more receptive to agency requests for ALJ hiring. One way to help this is for the OPM to reopen and adequately staff its ALJ Office, which it closed in 2003.<sup>389</sup> The Federal Administrative Law Judges Conference also has a significant — and self-interested — role to play in recommending improvements to the ALJ-hiring process to render it more attractive to agencies, even if these improvements may affect the perceived prestige of the corps. Ultimately, with the benefits that ALJs

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<sup>384</sup> 5 U.S.C. § 1305 (2012).

<sup>385</sup> See, e.g., VERKUIL ET AL., *supra* note 3, at 1061-62.

<sup>386</sup> See, e.g., 1992 ACUS RPT., *supra* note 49 (listing recommendations to ALJ-hiring and the ALJ-evaluation processes).

<sup>387</sup> ALJs and agencies dislike the preference because adding additional points based on veteran status can significantly affect the final list of candidates. See Lubbers, *Federal Administrative Law Judges*, *supra* note 58, 115-16 (“Since there is only a 20-point spread on scores among all ALJ eligibles (from 80 to 100), the addition of 5 to 10 veterans preference points to any score can change by many places an eligible’s ranking on the register.”).

<sup>388</sup> See, e.g., *id.* (describing how preference (1) substantially impacts eligible candidates’ ordering because the scores have only a twenty-point range and (2) limits the number of women candidates).

<sup>389</sup> See Arzt et al., *supra* note 326, at 105-06 (criticizing OPM’s closure of its ALJ office).

provide, the focus should be on increasing the political pressure for Congress and the OPM to make these changes, not further limiting the appointment of ALJs.

#### CONCLUSION

The time for agencies to reconsider their use of AJs is now. Forty percent of IJs — one of the most controversial groups of AJs — are nearing retirement this year.<sup>390</sup> The high number of retirements provides a meaningful opportunity to reconsider the problems with immigration proceedings and the AJs who oversee these hearings. The SEC has provided a cautionary tale of the legal and public-relations fallout that occurs when agencies are caught flat-footed responding to fairness concerns in their administrative proceedings. Nevertheless, agencies continue to prefer AJs, as the SSA's very recent call to transfer certain administrative appeals from ALJs to AJs demonstrates.<sup>391</sup>

As agencies move to formal adjudication with ALJs, they further a collateral virtue. They reduce the “unfortunate balkanization of hearing procedures [that] defeats the purpose of the drafters of the APA who wished to achieve greater uniformity and to prescribe basic fair hearing norms across the federal administrative establishment.”<sup>392</sup> This last point is important. Contrary to earlier focus on congressional action to improve administrative adjudication, this Article has demonstrated that agencies themselves can help create those fair, more uniform proceedings in most cases. And this Article demonstrates that a fair hearing is not only in the interest of regulated parties. It is in agencies' interest, too.

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<sup>390</sup> See Rachel Glickhouse, *Immigration Judges Are Burning Out Faster than Prison Wardens and Hospital Doctors*, QZ.COM (Aug. 3, 2015), <http://qz.com/469923/there-are-only-250-immigration-judges-in-the-united-states/> (“But there are only 250 immigration judges in the US, and this year, 100 judges are up for retirement.”).

<sup>391</sup> Telephone Interview with Admin. Law Judge William A. Wenzel, Vice President of Ass'n of Admin. Law Judges (Mar. 17, 2016). The Association of Administrative Law Judges contends that the SSA's own regulations require ALJs to preside over these appeals.

<sup>392</sup> Asimow, *supra* note 25, at 1006 (citing ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947)); see also Funk, Wong Yang Sung, *supra* note 35, at 892 (“The elimination of any unified concept of a hearing on the record has resulted in each agency crafting its own adjudicatory procedure ‘good for this day and train only.’” (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting))).

## APPENDIX A. GRADES GS-15 OR ABOVE

Agency	Office	Number of Hearing Officials	Title of Position	GS, SES or Other Pay Plan	2015 Lowest GS Level Basic Pay	Total Cost based on 2002 Numbers with 2015 Salaries
U.S. Department of Labor	Benefits Review Board	5	Administrative Appeals Judge	AA	105,900	
Social Security Administration	Appeals Counsel	25	Administrative Appeals Judge	AA	105,900	
U.S. Department of Energy	Energy Board of Contract Appeals	3	Administrative Judge	CA	149,178	
U.S. Department of the Interior	Board of Contract Appeals	1	Contract Board Chair	CA-01	158,700	
U.S. Government Printing Office	Board of Contract Appeals	1	Administrative Judge	CA-1	149,178	
U.S. Department of Agriculture	Board of Contract Appeals	4	Administrative Judge	CA-1-3	149,178	
U.S. Department of Defense	Armed Services Board of Contract Appeals	30	Administrative Judge	CA-1-3	149,178	
U.S. General Services Administration	Board of Contract Appeals	8	Board Judge	CA-1-3	149,178	

Agency	Office	Number of Hearing Officials	Title of Position	GS, SES or Other Pay Plan	2015 Lowest GS Level Basic Pay	Total Cost based on 2002 Numbers with 2015 Salaries
U.S. Department of Housing & Urban Develop- ment	Board of Contract Appeals	3	Admini- strative Judge	CA-1-3	149,178	
U.S. Depart- ment of Transport -ation	Board of Contract Appeals	3	Admini- strative Judge	CA-1-3	149,178	
U.S. Depart- ment of Veterans Affairs	Board of Contract Appeals	6	Admini- strative Judge	CA-1-3	149,178	
U.S. Depart- ment of the Interior	Board of Contract Appeals	1	Contract Board Vice Chair	CA-02	153,939	
U.S. Occupa- tional Safety & Health Review Commis- sion	Office of the Chairman and Office of the Commis- sioner	3	Member	EX	148,700	
U.S. Depart- ment of Com- merce	Board or Patent Appeals and Interfer- ences	20	Legal Exami- ner	GS-15	101,630	2,032,600
U.S. Depart- ment of Com- merce	Board or Patent Appeals and Interfer- ences	1,000	Patent Examin- er	GS-15	101,630	101,630,000

Agency	Office	Number of Hearing Officials	Title of Position	GS, SES or Other Pay Plan	2015 Lowest GS Level Basic Pay	Total Cost based on 2002 Numbers with 2015 Salaries
U.S. Commod- ity Futures Trading Commis- sion	Office of Proceed- ings	2	Judg- ment Officer	GS-15	101,630	203,260
U.S. Depart- ment of Defense	Defense Legal Services Office	17	Admin- istrative Judge	GS-15	101,630	1,727,710
U.S. Depart- ment of Defense	Defense Office of Hearings and Appeals	16	Admini- strative Judge	GS-15	101,630	1,626,080
Environ- mental Protec- tion Agency	Office of Enforce- ment and Compli- ance Assurance	1	Hearing Officer	GS-15	101,630	101,630
U.S. Depart- ment of the Interior	Office of Hearings and Appeals	4	Indian Probate Judge	GS-15	101,630	406,520
U.S. Depart- ment of Justice	Drug Enforce- ment Admini- stration	2	Deciding Official	GS-15	101,630	203,260
U.S. Small Business Admini- stration	Office of Hearings and Appeals	2	Admini- strative Judge	GS-15	101,630	203,260
U.S. Air Force	Board for Correc- tion for Military Records	70	Panel Chair Panel Member	GS-15 and Above	101,630	7,114,100

Agency	Office	Number of Hearing Officials	Title of Position	GS, SES or Other Pay Plan	2015 Lowest GS Level Basic Pay	Total Cost based on 2002 Numbers with 2015 Salaries
U.S. Department of Commerce	Trade-mark Trial and Appeals Board	15	Administrative Trade-mark Judge	SES-4 GS-15	101,630	1,524,450
U.S. Department of Education	Office of Hearings and Appeals	3	Administrative Judge	SES-6 GS-15	101,630	304,890
U.S. Department of Labor	Employee Compensation Appeals Board	7	Chairman Members Alternates (4)	SL GS-15	101,630	711,410
U.S. Department of Justice	Board of Immigration Appeals	19	Board Member-Appellant Immigration Judge	IJ	109,970	2,089,430
U.S. Department of Justice	Executive Office for Immigration Review/ Office of the Chief Immigration Judge	228	Immigration Judge	IJ 1-4	109,970	25,073,160
U.S. Nuclear Regulatory Commission	Office of the General Counsel	8	Administrative Judge	Level A: SES-1-3 Level B: SES-3 Level C: SES-4	121,956	975,648
Environmental Protection Agency	Office of Enforcement and Compliance Assurance	4	Environmental Appeals Board Judge	SES	121,956	487,824

Agency	Office	Number of Hearing Officials	Title of Position	GS, SES or Other Pay Plan	2015 Lowest GS Level Basic Pay	Total Cost based on 2002 Numbers with 2015 Salaries
U.S. Department of Justice	Drug Enforcement Administration	1	Deputy Administration	SES	121,956	121,956
National Foundation on the Arts and Humanities	National Endowment for the Humanities	1	Chairman	SES	121,956	121,956
U.S. Department of Health & Human Services	Departmental Appeals Board	5	Board Member	SES SL	121,956	609,780
U.S. Department of the Interior	Office of Hearings and Appeals	12	Administrative Judge	SL-00	121,956	1,463,472
U.S. Department of the Interior	Office of Hearings and Appeals	1	Attorney Examiner	SL-00	121,956	121,956
General Accounting Office	Office of the General Counsel	25	Senior Attorney or Assistant General Counsel (25-30)	Pay Banding (GS-15 Equiv.)		
U.S. Department of Commerce	Board or Patent Appeals and Interferences	62	Administrative Patent Judge	Admn. Determined	135,842	8,422,204
	Sum of Hearing Officials	1,618				



## APPENDIX B. ISOLATED HIGH-PAID AJS

Agency	Office	Number of Hearing Officials	Title of Position	GS, SES or Other Pay Plan	2015 Lowest GS Level Basic Pay	Total Cost based on 2002 Numbers with 2015 Salaries
U.S. International Trade Commission	Office of the Secretary	6	Commissioner	EX SES GS		
U.S. Army	Army Board for Correction for Military Records	100	Chairperson Board Member	GS SES		
U.S. Department of Health & Human Services	Food and Drug Administration	4	Presiding Officer (Part Time)	SES GS		
Pension Benefit Guaranty Corporation	Appeals Board	4	Appeals Board Member Appeals Board Chairman	SL GS		
U.S. Railroad Retirement Board	Bureau of Hearings and Appeals	11	Hearings Officer	GS-12-15	61,486	676,346
Federal Maritime Commission	Bureau of Consumer Complaints and Licensing	3	Settlement Officer	GM-13-15	73,115	219,345

Agency	Office	Number of Hearing Officials	Title of Position	GS, SES or Other Pay Plan	2015 Lowest GS Level Basic Pay	Total Cost based on 2002 Numbers with 2015 Salaries
Department of the Navy	Board of the Correction of Naval Records	48	BCNR Board Member	SES GS-13	73,115	3,509,520
U.S. Merit System Protection Board	Office of Regional Operations	<b>62*</b> 5 5	Administrative Judge Chief Administrative Judge (50%) Regional Director (15%)	SES GS-13-15	73,115	4,533,130
Environmental Protection Agency	Office of Enforcement and Compliance Assurance	11	Regional Judicial Officer	GS-14/15	86,399	950,389
U.S. Department of Energy	Office of Hearings and Appeals	19	SES Office Director Hearing Officer-Attorney Examiner	SES GS-14/15	86,399	1,641,581
	Sum of Hearing Officials	268				

\*counted numbers in bold font only, not part-time AJs

## APPENDIX C. ISOLATED LOW-PAID AJS

Agency	Office	Number of Hearing Officials	Title of Position	GS, SES or Other Pay Plan	2015 Lowest GS Level Basic Pay	Total Cost based on 2002 Numbers with 2015 Salaries	Cost if ALJS*	Difference in Cost if ALJs
U.S. National Labor Relations Board	Office of the General Counsel	Any Professional Employee of the Regional Offices can serve as a Hearing Official	Field Examiner	GS-7-13	34,662			
U.S. Department of Veterans Affairs	Veterans Benefits Administration	244	Hearing Officer	GS-9-13	42,399	10,345,356	25,839,600	15,494,244
U.S. Equal Employment Opportunity Commission	Field Coordination Programs Division	99	Administrative Judge	GS-11-14	51,298	5,078,502	10,484,100	5,405,598
U.S. Equal Employment Opportunity Commission	Field Coordination Programs Division	12 (Contract)	Administrative Judge	GS-11-14	51,298	615,576	1,270,800	655,224
U.S. National Labor Relations Board	Office of the General Counsel	Any Professional Employee of the Regional Offices can serve as a Hearing Official	Attorney	GS-11-14	51,298			
U.S. Department of Labor	Office of Workers Compensation Program	24	Hearing Representatives	GS-12/13	61,486	1,475,664	2,541,600	1,065,936

Agency	Office	Number of Hearing Officials	Title of Position	GS, SES or Other Pay Plan	2015 Lowest GS Level Basic Pay	Total Cost based on 2002 Numbers with 2015 Salaries	Cost if ALJS*	Difference in Cost if ALJs
U.S. Railroad Retirement Board	Bureau of Hearings and Appeals	11	Hearings Officer	GS-12-15	61,486	676,346	1,164,900	488,554
Federal Maritime Commission	Bureau of Consumer Complaints and Licensing	3	Settlement Officer	GM-13-15	73,115	219,345	317,700	98,355
U.S. Department of Agriculture	National Appeals Division	70	Hearing Officer	GS-13	73,115	5,118,050	7,413,000	2,294,950
Department of the Navy	Board of the Correction of Naval Records	48	BCNR Board Member	SES GS-13	73,115	3,509,520	5,083,200	1,573,680
U.S. Merit System Protection Board	Office of Regional Operations	62* 5 (50% Time) 5 (15% Time)	Administrative Judge Chief Administrative Judge Regional Director	SES GS-13-15	73,115	4,533,130	6,565,800	2,032,670
Environmental Protection Agency	Office of Enforcement and Compliance Assurance	11	Regional Judicial Officer	GS-14/15	86,399	950,389	1,164,900	214,511
U.S. Department of Energy	Office of Hearings and Appeals	19	SES Office Director Hearing Officer-Attorney Examiner	SES GS-14/15	86,399	1,641,581	2,012,100	370,519

Agency	Office	Number of Hearing Officials	Title of Position	GS, SES or Other Pay Plan	2015 Lowest GS Level Basic Pay	Total Cost based on 2002 Numbers with 2015 Salaries	Cost if ALJS*	Difference in Cost if ALJs
	Sum of hearing officers (exclud- ing AJs in C7 and C16)	529				34,163,459	63,857,700	29,694,241
	(count- ed numbers in bold font, not part- time AJs)	603						
	*ALJ Basic Salary	105,900						