

Questions for the Record from Rep. Hageman for  
Mr. Mark Chenoweth, Ms. Jennifer Mascott, and Mr. Robert Alt  
“Reining in the Administrative State: Agency Adjudication and Other Agency Action”  
March 20, 2024

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1. Reports differ as to the scope of the administrative judiciary, as well as the roles of Administrative Law Judges.
  - a. What is the exact scope of the Administrative judiciary? For this, please explain how many agencies rely on administrative law judges, the types of adjudication they address, and whether they can impose fines and sanctions.
  - b. Please describe instances where, in your opinion, agency reliance on an ALJ is not Constitutional, and please explain why. Please provide examples if applicable.
  - c. Please describe instances where, in your opinion, agency reliance on an ALJ is Constitutional, and please explain why. Please provide examples if applicable.
2. Many agencies act as prosecutors when suing the parties they investigate in their own courts, and then act as adjudicators when the parties appeal ALJ decisions. This can lead to issues of bias and prejudgment by agency heads, such as when FTC Chair Lina Khan ignored the ethical advice of the FTC’s Designated Agency Ethics Official, and then sought to keep her ethical misconduct hidden.<sup>1</sup> Situations like this erode confidence in such government tribunals.
  - a. Please provide examples of other instances where agency adjudicators have proceeded to oversee cases where they may be ethically compromised by bias or prejudgment.
  - b. What legislative steps would you recommend Congress take to hold agency heads accountable for their ethics when they act as a prosecutor or adjudicator?
3. Even though it was not a topic on the agenda for the March 20, 2024, hearing, several members raised concerns over “Chevron Deference,” and potential Supreme Court rulings later in this term. To the extent you have studied the issue, please explain how “Chevron Deference” impacts litigation today, and how changing the status quo on “Chevron Deference” by limiting its scope or eliminating it entirely, will impact existing federal law and federal agencies. Further, please explain whether such changes may impact Congress.

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<sup>1</sup> See *Oversight of the Federal Trade Commission: Hearing Before the H. Comm. on the Judic.*, 118<sup>th</sup> Cong. (2023) (Questions for the Record of Rep. Harriet Hageman) (Responses to the Questions for the Record of Hon. Lina Khan, Chair, Fed. Trade Comm’n), at 25-28 (Questions seeking clarity as to why Chair Khan ignored the ethics advice, and Khan’s continued persistence in refusing to answer) (attached).



# THE BUCKEYE INSTITUTE

## **Reining in the Administrative State: Agency Adjudication and Other Agency Action**

Responses to Questions for the Record from Rep. Hageman

Robert Alt  
President & CEO  
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May 17, 2024

1. Reports differ as to the scope of the administrative judiciary, as well as the roles of Administrative Law Judges.
  - a. What is the exact scope of the Administrative judiciary? For this, please explain how many agencies rely on administrative law judges, the types of adjudication they address, and whether they can impose fines and sanctions.

**Response:** “There are more than 1900 administrative law judges (“ALJs”) in the federal administrative judiciary, plus more than 10,000 non-ALJ agency adjudicators who conduct evidentiary hearings that are required by statute or regulation. And these adjudicators do not engage in the hundreds of thousands of less-formal adjudications in countless regulatory contexts, conducted by tens of thousands of other agency officials.”<sup>1</sup> As of March 2017, 27 federal agencies relied on the 1,900 ALJs.<sup>2</sup>

The types of adjudication addressed by ALJs vary depending on the agency. For example, the ALJs at the Social Security Administration, which has the largest number of ALJs and oversees the most cases, adjudicate issues including eligibility for social security benefits, or issues that may have caused an overpayment.<sup>3</sup> On the other hand, ALJs “conduct hearings and render decisions in proceedings between the EPA and persons, businesses, government entities, and other organizations that are, or are alleged to be, regulated under environmental laws.”<sup>4</sup> EPA ALJs “preside in enforcement and permit proceedings,” and “[m]ost enforcement actions initiated by the EPA are for the assessment of civil penalties.”<sup>5</sup> Other agencies with ALJs who are authorized to impose fines include but are not limited to the Securities and Exchange Commission,<sup>6</sup> the Federal Aviation Administration,<sup>7</sup> the Department of Health and Human Services,<sup>8</sup> the Department of Homeland Security,<sup>9</sup> the Department of Labor,<sup>10</sup> the Employee Benefits Security Administration,<sup>11</sup> and the Executive Office for Immigration Review.<sup>12</sup>

<sup>1</sup> Christopher J. Walker, *Charting the New Landscape of Administrative Adjudication*, 69 Duke L.J. 1687, 1688 (2020).

<sup>2</sup> *Administrative Law Judges*, U.S. Office of Personnel Management,

<https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=By-Agency>.

<sup>3</sup> U.S. Social Security Administration, *Hearings and Appeals*, Social Security,

[https://www.ssa.gov/appeals/hearing\\_process.html](https://www.ssa.gov/appeals/hearing_process.html).

<sup>4</sup> *About the Office of Administrative Law Judges (OALJ)*, U.S. Environmental Protection Agency,

<https://www.epa.gov/aboutepa/about-office-administrative-law-judges-oalj>.

<sup>5</sup> *Id.*

<sup>6</sup> See *SEC v. Jarkey* No. 22-859,

<https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-859.html>

(case argued before the Supreme Court of the United States on November 29, 2023, in which one of the questions presented was whether the Securities and Exchange Commission’s use of administrative judges to enforce securities fraud penalties without a jury is a violation of the 7<sup>th</sup> Amendment).

<sup>7</sup> 14 C.F.R. § 406.167.

<sup>8</sup> 42 C.F.R. § 3.546.

<sup>9</sup> *E.g.*, 49 C.F.R. § 1503.655.

<sup>10</sup> 29 C.F.R. § 580.12.

<sup>11</sup> See, *e.g.*, 29 C.F.R. § 2570.98.

<sup>12</sup> 28 C.F.R. § 68.52.

- b. Please describe instances where, in your opinion, agency reliance on an ALJ is not Constitutional, and please explain why. Please provide examples if applicable.

**Response:** Although there are numerous circumstances in which agency reliance on an ALJ raises serious constitutional concerns by usurping what is appropriately Article III authority, I will focus on agency reliance on ALJs to decide enforcement cases and impose fines and fees without the use of a jury. Using ALJs to impose fines and fees deprives defendants of the right to juries under the 7<sup>th</sup> Amendment. The right to a jury in defense of common law claims for money damages is firmly embedded in English and colonial American history, dating back to the Magna Carta’s provision that “[n]o free man shall be . . . stripped of his rights or possessions . . . except by the lawful judgment of his equals . . . .”<sup>13</sup> The Founders were cognizant of England’s use of admiralty courts to deprive colonists of their right to a jury trial in order to impose fines and fees. “As to the trial by jury,” one Anti-Federalist wrote that

[i]n all actions for penalties, forfeitures and public debts, as well as many others, the government is a party and the whole weight of government is thrown into the scale of the prosecution yet these are all of them civil causes.—These penalties forfeitures and demands of public debts may be multiplied at the will and pleasure of government.—These modes of harassing the subject have perhaps been more effectual than direct criminal prosecutions.<sup>14</sup>

This fear of administrations imposing fines and fees without a jury is the foundation of the 7<sup>th</sup> Amendment.

- c. Please describe instances where, in your opinion, agency reliance on an ALJ is Constitutional, and please explain why. Please provide examples if applicable.

**Response:** Early historical practice in the United States supports the use of administrative adjudication to resolve internal executive branch issues or to allocate government benefits or resources.<sup>15</sup> Thus, a modern example of constitutional agency reliance on an ALJ would be a Social Security Administration ALJ’s decision regarding an individual’s eligibility for social security benefits—a determination of eligibility that does not involve the imposition of civil fines and fees.

2. Many agencies act as prosecutors when suing the parties they investigate in their own courts, and then act as adjudicators when the parties appeal ALJ decisions. This can lead to issues of bias and prejudgment by agency heads, such as when FTC Chair Lina Khan ignored the ethical

<sup>13</sup> *Magna Carta*, 1215, The Nat’l Archives,

<https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede> (last visited Mar. 17, 2024).

<sup>14</sup> An Old Whig III, *Phila. Indep. Gazetteer* (Oct. 20, 1787), *reprinted in* 13 *The Documentary History of the Ratification of the Constitution* 425 (John P. Kaminski et al. eds. 1981).

<sup>15</sup> *See, e.g., Reining in the Administrative State: Agency Adjudication & Other Agency Action: Hearing Before the Subcomm. on the Admin. State, Regulatory Reform, and Antitrust of the H. Comm. on the Judiciary*, 118th Cong. (2024) (Statement of Professor Jennifer L. Mascott at 2).

advice of the FTC’s Designated Agency Ethics Official, and then sought to keep her ethical misconduct hidden. Situations like this erode confidence in such government tribunals.

- a. Please provide examples of other instances where agency adjudicators have proceeded to oversee cases where they may be ethically compromised by bias or prejudgment.

**Response:** According to a study by the Administrative Conference of the United States (ACUS), of the 17 non-ALJ types surveyed that preside over hearings in which their agencies are parties, more than one-third have no separation of functions.<sup>16</sup> This ill-advised situation means that the non-ALJs may act as judge, investigator, and prosecutor in cases involving their agency. It is the agency to whom the adjudicators are beholden for both performance evaluations and compensation.

The same ACUS study also found that “agencies conduct [performance] appraisals on 71% of non-ALJ types that hear proceedings in which agencies are a party (and for 89% of non-ALJ types that hear enforcement matters).”<sup>17</sup> The ACUS study’s authors observed that “[t]he appraisals could serve as a subtle (or not so subtle) method of influencing non-ALJ decision-making.”<sup>18</sup> The most common factor judged was case-processing goals—*i.e.*, whether the adjudicator is processing cases with sufficient speed. By contrast, factors that indicate quality and independence—*i.e.*, reversal rates, litigant input, and peer review were rarely utilized.<sup>19</sup> These performance appraisals (unsurprisingly) are important to the non-ALJs. “Of the 17 [surveyed] non-ALJ types that preside over matters in which their agencies are parties, twelve of those types are subject to performance appraisals, and ten of those twelve are *eligible for bonuses*.”<sup>20</sup> The ACUS study concluded that the percentage of non-ALJ performance appraisals is “substantial and indicates that agencies are using what the APA regards as a suspect tool on judges who conduct proceedings for which concerns over impartiality are most sensitive.”<sup>21</sup>

A key data point in assessing adjudicator independence is whether agency adjudicators rule for their own agencies at a higher rate than Article III courts. Unsurprisingly, of course, agency adjudicators are much more likely to rule for the agencies. For example, The *Wall Street Journal* reported that “the SEC enjoys a 90% success rate in its own hearings but has only a 69% success rate ‘against defendants in federal court.’”<sup>22</sup> The *New York Times* reported similar statistics

<sup>16</sup> Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 Ga. L. Rev. 1, 62 (2018) (republishing in substantially similar form the authors’ 2018 report to the Administrative Conference of the United States (ACUS)).

<sup>17</sup> *Id.* at 75.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 76.

<sup>20</sup> *Id.* at 78 (emphasis added).

<sup>21</sup> *Id.* at 75.

<sup>22</sup> Drew Thornley & Justin Blount, *SEC In-House Tribunals: A Call for Reform*, 62 Vill. L. Rev. 261, 286 n.153 (2017) (citing 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> (“The SEC won against 90% of defendants before its own judges in contested cases from October 2010 through March of [2015], according to the Journal analysis. That was markedly higher than the 69% success the agency obtained against defendants in federal

reflecting a higher win percentage in SEC administrative hearings than in federal court.<sup>23</sup> At the time of the report, “the S.E.C. ha[d] a better record in federal court . . . and over the longer term the S.E.C. wins more often in its home courts. From 2012 through June 25, 2015, it succeeded on average in 92.7 percent of matters heard by its internal judges, versus a 77 percent success rate in federal courts.”<sup>24</sup> There is an undeniable home court advantage to in-house adjudication.

- b. What legislative steps would you recommend Congress take to hold agency heads accountable for their ethics when they act as a prosecutor or adjudicator?

**Response:** First, no one should be a judge in his or her own case. Congress should remove the authority of agencies to adjudicate claims when constitutional rights are implicated (*i.e.*, when fines or fees may be imposed without a jury). There is no way to address the ethical issues associated with adjudication by an agency (or agency head) without addressing the self-interest inherent in such a system, and the lack of independence in the agency adjudicator.

By contrast, the prosecutorial function is quintessentially executive. Legislative steps that Congress may take to hold agency heads accountable for their ethics as prosecutor include: legislating ethical requirements for agency prosecutors; holding hearings concerning potential ethical abuses and subpoenaing the agency head to provide testimony as to his or her actions; legislating to withhold funding from the agency, including withholding funds necessary to enforce the unethical prosecution; and, if unethical conduct rises to the appropriate level, impeachment of the agency head.

3. Even though it was not a topic on the agenda for the March 20, 2024, hearing, several members raised concerns over “Chevron Deference,” and potential Supreme Court rulings later in this term. To the extent you have studied the issue, please explain how “Chevron Deference” impacts litigation today, and how changing the status quo on “Chevron Deference” by limiting its scope or eliminating it entirely, will impact existing federal law and federal agencies. Further, please explain whether such changes may impact Congress.

**Response:** *Chevron* deference introduces a “systemic judicial bias” in favor of the government.<sup>25</sup> When regulated parties challenge agency regulations implementing statutes, courts must decide if the regulators’ interpretation of the law is valid. *Chevron* deference directs courts to defer to formal agency interpretations of putatively ambiguous statutes so long as the agency’s interpretation is reasonable. In a review of “every published circuit court decision that cite[d] *Chevron* deference from 2003 to 2013,” Professor Christopher Walker found that when courts

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court over the same period, based on SEC data. Going back to October 2004, the SEC has won against at least four of five defendants in front of its own judges every fiscal year.”).

<sup>23</sup> *Id.* (citing Gretchen Morgenson, *Crying Foul on Plans to Expand the S.E.C.’s In-House Court System*, N.Y. Times (June 26, 2015), <http://www.nytimes.com/2015/06/28/business/secs-in-house-justice-raises-questions.html> [https://perma.cc/EZS6-TQ66]).

<sup>24</sup> *Id.* at 262 n.6 (citing Morgenson, *supra*).

<sup>25</sup> Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1188 (2016).

consider *Chevron* deference in the context of an ambiguous statute, the agencies won a whopping 93.8% of the time.<sup>26</sup>

Limiting the scope of *Chevron* deference or eliminating it entirely will curtail federal agencies' reliance on putatively ambiguous statutes to augment their regulatory authority. In a post-*Chevron* world, an agency promulgating regulations concerning an ambiguous statute would need to prove that its interpretation of the statute is the best interpretation and do so on an even playing field with any challengers.

Whether *Chevron* deference is eliminated or not, Congress should be more explicit in its delegation of authority to agencies to avoid interpretive issues that arise from implicit delegations or congressional ambiguity. In some sense, the elimination of *Chevron* deference does not require anything from Congress: a ruling eliminating *Chevron* deference would simply revert to the courts their proper Article III role of interpreting acts of Congress rather than deferring to agency interpretations. With or without *Chevron* deference, Congress has an incentive to legislate and to delegate authority clearly in order to ensure that the law is interpreted consistently with the enacted text.

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<sup>26</sup> Christopher J. Walker, *Lawmaking Within Federal Agencies and Without Judicial Review*, 32 J. Land Use & Env't L. 551, 554 (2017).



### ***About The Buckeye Institute***

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