THE BUCKEYE INSTITUTE

Reining in the Administrative State

Agency Adjudication and Other Agency Action

Testimony Before the U.S. House
Committee on the Judiciary;
Subcommittee on the Administrative State,
Regulatory Reform, and Antitrust

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Written Testimony

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Chairman Massie, Ranking Member Correa, and Members of the Subcommittee, thank you for inviting me to testify at this important hearing.

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The Original Constitutional Design[1]

In *Federalist 47*, James Madison observed, "the accumulation of all powers, legislative, executive and judiciary, in the same hands whether of one, a few or many… may justly be pronounced the very definition of tyranny."[2] To protect against this risk, the nation's Founders drafted a constitution that divided powers, granting to Congress enumerated legislative power, to the President the executive power, and to the courts the judicial power. This constitutional system devised by the Founders was not built to promote efficiency. It was built to protect liberty.

Students of America's constitutional history face a conundrum provided by the countless administrative agencies in Washington. Take, for example, the granddaddy of federal agencies: the Federal Trade Commission (FTC). The FTC promulgates regulations that have the force of law to bind individuals—the exercise of legislative power. But members of the FTC are not elected pursuant to requirements of Article I of the Constitution, which sets the qualifications for those who exercise legislative power—i.e., members of Congress. Furthermore, the regulations issued by the FTC do not meet the Constitution's requirements for legislation—namely of bicameralism and presentment. The FTC then investigates violations of the very regulations that the FTC itself drafted and brings enforcement actions for alleged violations—quintessentially executive powers. Finally, the FTC hears complaints issued by the Commission for violations of regulations drafted by the Commission—the exercise of judicial power—even though its administrative law judges lack life tenure (or tenure during good behavior), fixed

[1] Portions of today's testimony are drawn from a previously published speech. Robert Alt, The Administrative Threat to Civil Liberties (May 15, 2018), *in* 2018 Bradley Symposium: The State of the Constitution 7–9 (2019).
[2] The Federalist No. 47, at 70 (James Madison) (Gideon ed., 2001).

compensation, or presidential nomination with the advice and consent of the Senate to a court established to exercise the judicial power under Article III of the Constitution. Thus, in one agency, we have legislative, executive, and judicial powers perilously comingled.

Although critiques of administrative law typically focus on administrative rulemaking,[3] today's hearing rightly focuses on agency adjudication, which is often overlooked, but presents its own unique threats to civil liberties and the traditional protections afforded to defendants in Article III tribunals.

Agency Adjudicators: A Critical Lack of Independence

First and unsurprisingly, administrative law judges—who fail to meet the Article III constitutional requirements of appointment by the President, confirmation by the Senate, tenure during good behavior, fixed compensation, and placement in a coequal branch of government—also lack the fundamental characteristic that these requirements were designed to ensure: judicial independence. The constitutional requirements for Article III judges are not just empty formalism, but rather these requirements are background rules that together substantively create the conditions necessary for a fair and independent system of adjudication.

This lack of independence arises not merely from constitutional deficiencies in appointment and removal,[4] but from the adjudicators inherently dependency-producing placement within the agency.

Issues of judicial independence become even more pronounced when the adjudication is conducted by non-ALJ adjudicators. There are approximately 1,900 administrative law judges, but "more than 10,000 non-ALJ (administrative law judge) 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."[5] These non-ALJs are less independent from the heads of the agencies.

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.[6] This ill-advised situation means that the non-ALJs may act as judge, investigator, and prosecutor in cases involving their agency. Whatever hat the non-ALJ adjudicator wears on a particular day, the team remains the same: the agency.

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[3] *See, e.g., National Federation of Independent Business v. Dept. of Labor, Occupational Safety & Health Admin.*, 595 U.S. 109 (2022); and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2754 (2014).

[4] *See, e.g., Lucia v. S.E.C.*, 585 U.S. 237 (2018).

[5] Christopher J. Walker, *Charting the New Landscape of Administrative Adjudication*, 69 Duke L.J. 1687, 1688 (2020).

[6] 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)).

And it is the agency to whom the adjudicators are beholden for both performance evaluations and compensation—demonstrating the importance of fixed compensation for the independence of the Article III judiciary. The same ACUS study also found that "agencies conduct [performance] appraisals on 71 percent of non-ALJ types that hear proceedings in which agencies are a party (and for 89 percent of non-ALJ types that hear enforcement matters).[7] 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."[8] 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.[9] 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*."[10] The ACUS 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."[11]

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.'"[12] *The New York Times* reported similar statistics reflecting a higher win percentage in SEC administrative hearings than in federal court.[13] 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."[14] There is an undeniable home court advantage to in-house adjudication.

We should not be surprised that individuals who one day serve as an investigator, another day serve as a prosecutor, and yet another day serve as a judge, and who are reviewed and given bonus compensation by the very agency for which they are adjudicating claims would find for

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[7] *Id.* at 75.
[8] *Id.*
[9] *Id.* at 76.
[10] *Id.* at 78 (emphasis added).
[11] *Id.* at 75.
[12] 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 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.")).
[13] *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]).
[14] *Id.* at 262 n.6 (citing Morgenson, *supra*).

the agency at a higher rate than independent Article III judges. The incentives are built into the process itself. The only surprise here is that anyone would defends this same process as being a reasonable substitute to independent Article III courts.

Administrative Adjudication Deprives Defendants of 7th Amendment Rights

Exacerbating the lack of independent decisionmakers, defendants in administrative adjudications are deprived of the right to juries under the 7th Amendment.[15] The idea that the right to a jury does not apply in some subset of tribunals with the authority to issue fines has been tried before: the British Parliament, in several acts, deprived the American Colonies of jury trials by shifting the powers to admiralty courts to enforce taxes and duties. It was against this backdrop that the Anti-Federalists demanded the 7th Amendment to safeguard this well-established right.

And the right to a jury in defense of common law claims for money damages is indeed 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 . . . ."[16] When the British Parliament imposed new taxes and duties on the Colonies and shifted trials for failure to pay to courts of admiralty, America's Founders objected.[17] John Jay argued that shifting enforcement jurisdiction to the courts of admiralty, "means the subject lost the advantage of being tried by an honest uninfluenced jury of [his peers], and was subjected to the sad necessity of being judged by a single man, a creature of the Crown . . . ."[18]

Troubled by the British Parliament's denial of the colonists' right to a jury trial, the Anti-Federalists demanded what would become the 7th Amendment. "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."[19] Without a right to a jury trial in these cases,

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[15] *See* SEC v. Jarkesy 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 7th Amendment).

[16] *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).

[17] *See* John Adams, The Bill of Rights; A List of Grievances (Oct. 14, 1774), *in* 2 The Adams Papers 159, 159-63 (Robert Taylor ed.,1977), https://founders.archives.gov/?q=Volume%3AAdams-06-02&s=1511311112&r=56.

[18] John Jay, Address to the People of Great Britain, Philadelphia (Oct. 21, 1774), *in* 1 The Selected Papers of John Jay 1760–1779 100, 100–107 (Elizabeth M. Nuxoll ed. 2010), https://founders.archives.gov/documents/Jay/01-01-02-0071.

[19] An Old Whig III, Phila. Indep. Gazetter (Oct. 20, 1787), *reprinted in* 13 The Documentary History of the Ratification of the Constitution 425 (John P. Kaminski et al. eds. 1981).

> [j]udges may sit in the United States, as they did in some instances before the war, without a jury to condemn people's property and extract money from their pockets, to be put into the pockets of the judges themselves who condemn them; and we shall be told that we are safe from the oppression of government.—No, . . . we ought not to part with the trial by jury; we ought to guard this and many other privileges by a bill of rights, which cannot be invaded.[20]

Just as the right to a jury was not so mutable during the founding era as to be extinguished by transferring matters to tribunals that did not permit jury trials, so too the right cannot be evaded today merely by the legerdemain of administrative adjudication.

Administrative Adjudication Deprives Defendants of Procedural Due Process

In addition to the failure of independence, administrative adjudication lacks the procedural safeguards that govern Article III courts. In Article III courts, trials are governed by the Federal Rules of Civil Procedure and Rules of Evidence. The rules provide due process protections for defendants, including requirements for hearings, calling witnesses, and discovery.

By contrast, in administrative adjudication, agencies

> issue summons, subpoenas, warrants, and fines without the due process of law of the courts; they deny equal discovery, as required by due process where agency proceedings are civil in nature; they impose prosecutorial discovery, which is forbidden by due process in cases that are criminal in nature; they even reverse the burdens of proof and persuasion required by due process. Agencies thereby repeatedly deprive Americans of their procedural rights.[21]

Conclusion

The constitutional requirements for Article III judges: nomination by the President with the advice and consent of the Senate, tenure during good behavior, and fixed compensation are not empty formalities, but ensure the crucial independence of the judiciary in the exercise of the judicial power. The usurpation of this authority by the administrative state has led to adjudication by decisionmakers who lack independence, and who therefore rule in favor of their own agencies at rates in keeping with that dependent status. This shortcoming is exacerbated by depriving defendants of their constitutional right to civil juries, and the failure to provide the procedural due process protections afforded by Article III tribunals.

Thank you for the opportunity to testify. I welcome any questions.

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[20] *Id.*
[21] Philip Hamburger, *The Administrative Threat to Civil Liberties*, 2018 Cato Sup. Ct. Rev. 15, 22 (2018).

About The Buckeye Institute

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