Reining in the Administrative State:

Agency Adjudication and Other Agency Action

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to the Subcommittee on the Administrative State,

Regulatory Reform, and Antitrust of the

House Committee on the Judiciary

March 20, 2024, 10:00 a.m.

2141 Rayburn House Office Building

Chairman Massie, Ranking Member Correa, and other Distinguished Members of the Subcommittee, thank you for inviting my testimony here today.

Introduction

The New Civil Liberties Alliance is a nonpartisan, nonprofit civil rights organization founded by prominent legal scholar Philip Hamburger, the Maurice and Hilda Friedman Professor of Law at Columbia Law School in New York City, to protect constitutional freedoms from violations by the Administrative State. Professor Hamburger is among the nation's foremost Constitutional Law scholars, and his brilliant scholarship informs the cases that NCLA pursues and the arguments that NCLA makes in those cases on behalf of our clients. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights. NCLA views the administrative state as an especially serious threat to constitutional freedoms. No other development in contemporary American law denies more rights to more Americans.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as freedom of speech, jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and even sometimes the courts have neglected them for so long. NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern. NCLA urges Americans to recognize the administrative threat and join our civil liberties movement against it.

From the very first brief we filed when we opened our doors, in the *Lucia v. SEC* case, the New Civil Liberties Alliance has been dismayed at the

widespread and brazen violation of Americans' civil liberties that occur in administrative adjudications—adjudications, by the way, in which the average American is ten times more likely to be enmeshed than they are to find themselves in federal district court.

We can come back to those myriad violations, which I term the "pathologies of administrative adjudication," but first we should pause and recognize the mistaken legal principle that has led to the formation of administrative adjudication bodies in the first place.

The Original Sin(s) of Administrative Adjudication

Relocating judicial power, even with Congress's authorization, runs into five obstacles. Separately, each suffices to hold SEC's administrative exercise of judicial power unconstitutional. Together, the five objections leave no room for doubt.

First, Congress cannot delegate a power it lacks. Although it is often assumed that Congress delegates power to executive agencies, congressional delegation can neither explain nor justify executive-branch exercise of judicial power, because the Constitution gives Congress only legislative powers. Congress cannot delegate a power it does not have, so it cannot delegate judicial power. Judicial power is exclusively vested in Article III; therefore, the question must be decided in terms of vesting, not "delegation." This "vesting" language separately appearing at the beginnings of Articles I, II and III properly should be the focus of attention because it avoids the inaccuracy of describing congressional shifts of power as mere "delegations." A delegated power is one that can be reclaimed by the delegator, such as when an Executive Officer delegates power to a subordinate which she can recall at her own discretion. Similarly, when Congress delegates authority to the Congressional Budget Office, it has full discretion to retrieve any of the delegated authority. But when Congress enacts a law authorizing the Executive to exercise either legislative or judicial power, Congress cannot retrieve that power easily, as it may have to overcome a Presidential veto, something not always or even usually possible. See Philip Hamburger, Nondelegation Blues, 91 Geo. Wash. L. Rev. 1083, 1086 ("At stake is not merely another judicial doctrine. The nondelegation doctrine is what justifies

the shift of regulatory power from Congress to agencies. It thus is a foundation stone of the administrative state.") The failure of delegation's analytical framework is especially severe when Congress— endowed with only legislative power—shifts judicial power from the courts to agencies. Not having that power in the first place, Congress cannot lawfully delegate it. This is not merely an initial argument against SEC's exercise of judicial power. The poverty of delegation language is a powerful reminder that the Constitution's language is different. The Constitution speaks in terms of what is vested. Congress should put aside the illusory inquiry about delegation of power and ask instead whether Congress has unconstitutionally divested the courts of their judicial power. Once the analysis focuses on the language of the Constitution—as it must—it becomes clear that Congress cannot delegate a power it does not have. One cannot intelligibly decide the constitutionality of the shift of judicial power to agency adjudicators in terms of delegation, because the Constitution places the judicial power exclusively in Article III.

Second, Article III's vesting of judicial power in the courts is mandatory. Article III of the Constitution provides: "The judicial power of the United States, shall be vested" in the courts. U.S. CONST. art. III, § 1. This phrase is significant. Had Article III recited that the judicial power "is hereby vested" in the courts, it could be argued that that power, like title to land, could be conveyed without any limitation on its subsequent transfer. Courts, leaving aside Congress, could claim a freedom to shift judicial power beyond the courts. Tellingly, however, Article III avoided this familiar language of conveyancing, instead saying that the judicial power "shall be vested." It thereby made clear that the location of that power was mandatory. The text of the Constitution specifies not merely that powers are "vested" and therefore nontransferable, but where they must be placed. The legislative powers shall be in Congress, the executive power shall be in the President, and the judicial power shall be in the courts. The principle that the Constitution unambiguously vests judicial power in courts resounds over centuries of case law, from Marbury v. Madison's recognition of this demarcation—it is "emphatically the province and duty of the judicial department to say what the law is[,]" 5 U.S. (1 Cranch) 137, 177 (1803)—to cases such as Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995), where the Court held that §

27A of the Exchange Act of 1934 violated the separation of powers. ("Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."). Nor should this mandatory assignment of powers come as a surprise. The Constitution did not vest its powers in separate branches of government merely as an initial distribution of cards, to be played and transferred as soon as the game began.

Third, Article III authorizes Congress to locate judicial power only in inferior courts, not administrative agencies. Article III begins: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. This judicial vesting clause stands apart from the other vesting clauses. They fully specify the mandatory locations of their powers: the legislative powers in Congress and executive power in the President. In contrast, Article III allows Congress to designate the location of part of the judicial power— but only in "inferior courts," not other bodies. Congress therefore cannot place judicial power in administrative agencies. See 8 Philip Hamburger, Nondelegation Blues, 91 Geo. Wash. L. Rev. 1083.

Article I empowers Congress to "constitute Tribunals inferior to the Supreme Court[,]" U.S. CONST. art. I, § 8, and it may be thought that with this power, Congress could place the judicial power in "tribunals" that are not inferior courts. But this would be to confuse the courts, which exercise the judicial power of the United States, with the host of tribunals that do not exercise that judicial power. Article I's Tribunal Clause gives Congress the power to constitute a range of tribunals, including the inferior federal courts exercising the judicial power of the United States, but also lesser tribunals, such as territorial and District of Columbia courts, which exercise the judicial power, respectively, of the territories and that district. It therefore is telling that, according to Article III, the judicial power of the United States "shall be vested" in the courts, not other sorts of tribunals. So, even with the power to constitute tribunals, Congress cannot locate the judicial power of the United States in bodies that are not inferior courts, such as executive agencies. Whatever an agency tribunal is, it is not an inferior court. The Constitution does not say that judicial power "shall be vested" in the Supreme Court and such inferior court and other tribunals as Congress may ordain and establish.

The judicial vesting clause thus spells out a double limit: the judicial power must be in the courts, and when Congress distributes the judicial power not belonging to the Supreme Court, it cannot place that power in any tribunal other than an inferior court.

The Constitution's restriction of judicial power to the courts is essential. In Stern v. Marshall, the Supreme Court stated that "Article III could neither serve its purpose … nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial power' on entities outside Article III." 564 U.S. 462, 484 (2011). Congress simply cannot shift judicial power from one branch to another—especially not to the prosecutor! That danger was expressly articulated at the Founding. "[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers." THE FEDERALIST No. 78, at 523 (Alexander Hamilton) (Cooke ed. 1961). Far from being merely an eighteenth-century concern, this danger has become alive at agencies where ALJs must worry that the Commission is looking over their shoulders and that it can alter their decisions, adjust their salaries, and even set into motion their termination.

When it is recognized that the judicial power mandatorily "shall be vested" in the courts, and that Congress may distribute that power only to inferior courts, the constitutional failing of administrative judging comes into sharp focus. The exclusive vesting of powers cannot be undone, even by Congress, because that would allow agencies to function as prosecutors, judges and juries, something the Constitution emphatically prohibited.

Fourth, the Executive is vested with only executive power. Article II vests only executive power in the President. So, executive agencies—including those that are quasi-independent, such as SEC—cannot exercise judicial power. For a branch of government to exercise a power not constitutionally vested in it is to revive the sin long ago repudiated in Hayburn's Case, 2 U.S. 409 (1792). That case—actually a series of judicial protests dating from the earliest days of the Republic— centered on the courts' refusal to exercise non-judicial power. For example, the Circuit Court for the District of Pennsylvania said that "the business directed by this act is not of a judicial nature. It forms

no part of the power vested by the Constitution in the courts of the United States; the circuit court must, consequently, have proceeded without constitutional authority." Id. at 410 (1792) (citing C.C.D. Pa.: letter April 18, 1792). This principle in Hayburn's Case did not merely concern the courts but applied equally to all of the branches. No branch could exercise a type of power other than that vested in it by the Constitution. As put by the Circuit Court for the District of North Carolina, "the legislative, executive[,] and judicial departments are each formed in a separate and independent manner," and "the ultimate basis of each is the [C]onstitution only, within the limits of which each department can alone justify any act of authority." Id. at 410 (citing C.C.D.N.C.: letter June 8, 1792). Administrative agencies, being lodged in the executive branch, cannot exercise any power that is not executive.

Finally, judicial power cannot be subject to political review. Another conclusion of Hayburn's Case was that court decisions could not be reviewable by the Executive or Congress. Other cases across the centuries have echoed this essential point—notably Gordon v. United States, 69 U.S. 561 (1864) (Supreme Court lacks jurisdiction to hear appeals from the Court of Claims, because a court could not exercise executive power and its judicial power could not be subject to review by the political branches). With respect to administrative adjudication, of course, judicial power has been displaced from the courts to the Executive. All the same, the case law holds more broadly that judicial power cannot be reviewable by political power. That is exactly what happens at these agencies, for example at independent commission like the SEC or FTC, because the decisions of ALJs there are re-examinable by the Commissioners. If judicial power really can be placed in ALJs, then it cannot be reviewable by non-judicial political commissioners. The exercise of judicial power at these agencies is therefore inconsistent with the text of the Constitution on five separate grounds. Any one of them renders their judicial power unconstitutional; taken together, they utterly doom administrative adjudications.

Pathologies of Administrative Adjudication

Having explained why Congress cannot lawfully relocate judicial power outside Article III, let's explore the staggering scope of the problem Congress

has created by doing so. By considering a number of pathologies of administrative adjudication that NCLA has encountered in our cases on behalf of clients over the past half-dozen years, you will see that this is far from a dry academic debate or theoretical problem. Instead, it is a problem with enormous practical consequences for the rights of everyday Americans.

1) Control Deficiency

Exhibit A in the case against administrative adjudication comes from an admission nearly two years ago at the Securities and Exchange Commission. In early April 2022, just hours after Michelle Cochran agreed to SEC's request for a stay, the SEC disclosed a "control deficiency" admitting that its enforcement staff had illegally accessed the files of its in-house judges in her case and George Jarkesy's case. As the Wall Street Journal put it, "It's the equivalent of a party in litigation having access to a judge's briefs from her law clerks." SEC refused to comply with prompt FOIA requests, forcing Cochran and Jarkesy to sue under FOIA. Those cases are still ongoing with no meaningful disclosure by SEC as to what transpired. Then in June 2023, just a few weeks after Cochran won her right to take SEC to court for its unconstitutional tribunals, SEC disclosed that this practice had affected dozens of open cases—AND IT DISMISSED ALL OF THEM—with Cochran's case at the top of the list. This calculated maneuver allowed SEC to use its own misconduct as a pretext for preventing anyone from taking them to court. Understand: SEC dismissed 42 open cases, some of them alleging serious violations of law, leveraging its own wrongful "control deficiency" as a pretext to shut down discovery, shut down court access, and shut down the truth. SEC also refuses to disclose how many dozens of closed or settled cases were infected by its years-long gross misconduct. This kind of internal spying on the computer files of judges could not happen at the Department of Justice, because the prosecutors and the federal judiciary do not share the same computer system. But at the SEC, at least, and possibly at other agencies, this kind of sloppy cross-contamination of functions illustrates the weakening of the separation of powers when they are combined at an agency.

2) Lack of Efficiency; The Process Is the Punishment

For years administrative adjudications have been portrayed as a faster, more efficient system of justice that sacrifices some procedural justice for

swift, economic resolution. THIS IS THE BIG LIE. People enmeshed in administrative adjudication get the worst of both worlds: they are hurried through the administrative hearing process with less time to prepare than if the same proceeding were held in district court, then forced to remain in limbo for more time than if the same action were filed in district court. The SEC, for example, notoriously gives itself a year or more to prepare a case and then gives defendants very short timelines to prepare their defenses. It also repeatedly gives itself extensions of time during the adjudication that leave powerless respondents in cruelly protracted limbo. Defendants cannot get into court and cannot get on with their life and productive business. Former SEC Commissioner Joseph Grundfest studied the data and concluded that "the overall period for completion of an administrative proceeding is likely *slower* than the time required to complete a trial in district court.'" Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and the Prospects for Reform Through Removal Legislation*, 85 Fordham L. Rev. 1143, 1164 (2016)

Both Ray Lucia and Michelle Cochran spent six years in the administrative wasteland, only to be told they would have to undergo the process *ALL OVER AGAIN*. And if they were proven right in their constitutional claims, they would have to face a third prosecution. It's always Groundhog Day for litigants in unconstitutional administrative proceedings. It took Cochran ten years of her life to vindicate her rights. Because no court would stay Ray Lucia's repeat journey that now required him again to push a Sisyphean rock up the administrative mountain, after eight, punishing, impoverishing years, he threw in the towel and settled. Shockingly, this is the norm. Christopher Gibson endured eleven (11) years in administrative purgatory until his reprieve under SEC's mass dismissal of 42 cases. Marian Young endured more than eight years in the SEC's "Hotel California" before that same reprieve mooted NCLA's mandamus action on her behalf. David Bandimere was stuck in SEC purgatory for ten years. It was seven years before George Jarkesy could even get a decision from the Commission, preceded and followed by years of attempts to vindicate his jury trial, constitutional and due process rights in court. Additional examples abound.

3) ALJs Lack Expertise or the Expertise Emperor Has No Clothes

ALJs used to be called hearing officers rather than ersatz 'judges,' and that terminology was more accurate for what their role actually is, albeit perhaps somewhat less impressive a sounding title. Defenders of agency tribunals sometimes assert that administrative-law judges have special expertise that outweighs the pathologies described herein. This is a notorious fiction. Not one of SEC's 5 ALJs had any background in securities law before their appointments. Four came from the Social Security Administration (SSA), one from the Federal Communications Commission. As NCLA told the U.S. Supreme Court in the Lucia case, the expertise emperor has no clothes. So, the trade-off of losing procedural rights in administrative hearings is not made up for by dealing with expert judges.

Besides, the "expertise" ALJs develop on the job is one-sided. It is wholly from the prosecutorial perspective under SEC's biased influence and prosecutorial self-interest. Additional bias arises from the constraints on their role: unlike district judges, they are not allowed to question the constitutionality or legality of the laws or regulations they enforce. They routinely shift the burden of proof to the respondent, as an SSA judge would do for a claimant. They are beholden to their employer for the initial promotion from the pool to be an agency ALJ and are daily beholden to them for their very continued employment. These inexperienced ALJs are totally ill-equipped to evaluate whether the Commission is charging on a far-fetched legal theory or weak case propounded by the Enforcement Division. This fact alone affects the cases SEC is willing to bring, the legal interpretations it is prepared to advance, and the extent to which it will warp the law in pursuit of enforcement.

4) NLRB Prosecutors and Judges Trade Off Hearing Each Other's Cases

In defending one case against the National Labor Relations Board, NCLA attorneys were informed that the prosecutor they were dealing with was not available for a particular meeting because he was serving as a "judge" at the agency that day. Come to find out judges and prosecutors apparently work in the same office at NLRB and take turns as prosecutor and judge in each

other's cases. It's hard to imagine a system more likely to engender favoritism toward prosecutors and lack of due process for the accused than this one.

5) **Venue Restrictions Don't Apply the Same as in District Court**

Over the past decade or so the U.S. Supreme Court, in a series of cases led by the late Justice Ginsburg, ensured that defendants can only be sued in their state of incorporation and where they have their principal place of business. This fairness revolution has not yet crossed over to administrative adjudications. In a case called NLRB v. FDRLST Media, NCLA discovered that an agency based in DC (the NLRB) could sue an entity with offices of a sort in DC (FDRLST Media) could nonetheless sue FDRLST in New York City, where NLRB had a regional office but FDRLST had no offices.

It might make some sense to allow federal agencies to be sued anywhere, or at least in any district to which their jurisdiction extends, but it makes no sense to allow them to drag enforcement targets hither and yon. Congress is not typically keen on forcing constituents to have to travel to DC just to enforce their rights. But federal agencies fight tooth and nail in federal court to avoid venue in the home region of entities that are suing them. Meanwhile, agencies are all too happy to drag those whom they are suing into foreign venues for reasons of administrative convenience. When NCLA objected and tried to get the venue moved to a place where witnesses would be able to appear and testify (without incurring substantial costs for traveling to NYC), we were rebuffed. The agency's adjudicator informed us when making a special appearance that this was our chance to argue the merits and if we passed it up we ddwouldn't get another one. When appealing that case to federal court, however, we did NOT appeal it to the Second Circuit that covers NYC. Instead, we appealed the matter to the Third Circuit, which covers the place where FDRLST is incorporated, a decision that the Third Circuit allowed before upholding our First Amendment defense against the government's absurd charges.

6) **Witness Intimidation and a Made-Up Infraction in Ray Lucia's Case**

The Wall Street Journal's influential reporting noted that ALJs have been reprimanded for showing insufficient "loyalty" to the agency that employed

them if they did not rule in the SEC's favor, with one ALJ noting that these biased courts erased the presumption of innocence and routinely operated to shift the burden to the charged person to show why the SEC was wrong. ALJ Cameron Elliot told parties considering settlement they should know that he had *never* ruled except in favor of the agency, and he further admitted that he always levied the maximum penalties against respondents who had the temerity to contest the SEC's charges. A federal judge who issued such threats would be subject to discipline for such flagrantly biased conduct before parties they take an oath to judge with impartiality.

Two aspects of Ray Lucia's administrative prosecution deserve special mention. Ray Lucia tried to call as witnesses clients who would testify that they had never been misled or defrauded by him or his use of the term "backtest." Before they could testify, the SEC served those witnesses with last-minute subpoenas that required them to turn over all of their financial records for the last 5 years from any source whatever, on penalty of perjury. Ray of course told his loyal clients that they did not have to put themselves to such an onerous and privacy- and security-destroying task on his behalf and withdrew them from his witness list. He thus proceeded to judgment before this ALJ without a single client witness to speak in his defense. Such witness intimidation would never be countenanced in a real federal court, and in fact the Sixth Amendment guarantees the right to "have compulsory process for obtaining witnesses in [one's] favor" but that right to secure witnesses not only does not obtain in administrative adjudications as it does in federal court, but apparently witnesses who have agreed to testify can be excluded by dirty tricks on the agency's part.

Cameron Elliot went on to rule that because Ray's use of "backtest" did not "meet[] the definition of 'backtest' that *I have adopted,*" ALJ Elliot held it was "fraud" because it did not conform to his newly adopted definition. For this retroactive, unlegislated and unenacted regulatory crime, he barred Ray Lucia for life from the securities industry, slammed him and his company with $300,000 in fines, and prohibited him from associating with anyone in the financial field, even Ray's own son. All for use of a word still widely used in the financial planning world, and a word that had caused no harm to anyone. ALJ Elliot admitted in his 2013 decision that no clients had suffered any losses. On

appeal to the SEC, two Commissioners (Piwowar and Gallagher) dissented noting that ALJ Elliot had made up this rule "out of whole cloth." Yet the deferential standard of review allowed this travesty of a decision to stand in a later appeal that resulted in a 5-5 tie at the D.C. Circuit.

7) Rules of Procedure and Rules of Evidence Do Not Apply

Administrative agency proceedings scrap the Federal Rules of Civil Procedure and the Federal Rules of Evidence, typically substituting the agency's own rules or allowing the ALJs to make up certain rules as they go.

8) The Agency Controls the Administrative Record on Appeal

The ALJs' rulings are considered factual findings to which Article III courts defer when administrative cases are appealed to them. Even before reaching the Article III court, many agencies operate under a presumption that the Commission or other internal appellate authority (such as the Secretary of the cabinet department) will adopt the ALJ's ruling. So, there is often no opportunity for de novo review. A respondent's appellate rights are thus confined to a federal circuit court that must accept the necessarily constricted and flawed administrative record compiled by the agency. A defendant does not have control over what gets included in the factual record, and the defendant may not supplement the factual record on appeal.

9) Removal Protections Interfere with Art. II 'take Care' Duty

Another issue with administrative adjudication is pending at the Supreme Court right now in a case called Jarkesy. That same issue provided the background of NCLA's victory last year in the Supreme Court in the SEC v. Cochran case, and the Solicitor General asked the Supreme Court to resolve the question as far back as the Lucia case in 2018. The question is whether it violates the Article II duty of the President to 'take Care' that the laws are faithfully executed for ALJs to enjoy multiple layers of protection from removal. In other words, if ALJs are not doing their job, is it a problem that the President cannot fire them? The answer is that of course it is a problem, as it would be with any executive officer fulfilling executive functions, and the Supreme Court will almost surely say so.

The full case against removal protections is made in the Jarkesy party briefs, in NCLA's amicus brief, and elsewhere. But for today's purposes, the key takeaway is that ALJs lack genuine judicial independence, which one can see from the lopsided outcomes in favor of the agency. So any accused person appearing in front of them does not get the benefit of an independent judge. Yet they are not beholden to the President either, so it is very difficult to ensure accountability for these federal officers. Wherever ALJs are adjudicating private rights, massive fines, and the like (really anything other than admiralty and equity under the Constitution), those cases should be in Article III courts instead. For matters, like social security disability benefits decisions, that may properly be argued before ALJs, the President needs to be able to fire those adjudicators for poor performance. At most then, one layer of tenure protection between the officer and the President may exist, ensuring they may only be fired for performance defects.

10) SEC Can Choose Trial by Jury or Not, but Defendants Cannot

Federal securities law operates in a blatantly discriminatory manner: it denies enforcement targets the option of choosing a jury trial while granting that very same option to SEC. The Seventh Amendment prohibits the federal government from dispensing a valued constitutional right in such an unequal manner. Congress's decision in Dodd-Frank to give SEC the power to try some of its targets before SEC ALJs was a constitutional train wreck with disastrous real-life effects. That unconstitutional scheme lets SEC choose between judicial or administrative adjudication. It thereby transforms Jarkesy's constitutional rights—to a jury, due process, and accountability to an Executive who would "take Care"—"into mere options" chosen by the government at its discretion. Philip Hamburger, The Administrative Evasion of Procedural Rights, 11 N.Y.U. J. LAW & LIBERTY 915, 916 (2018).

Federal securities law currently authorizes SEC to choose either of two civil enforcement paths. It may seek enforcement in federal district court or in an in-house administrative enforcement proceeding. See, e.g., 15 U.S.C. §§ 78u(d) (authorizing SEC to file federal district court action to enforce Exchange Act) & 78u3 (authorizing in-house administrative enforcement proceedings for Exchange Act violations). In both types of proceedings, SEC is

entitled to seek monetary penalties for securities law violations. 15 U.S.C. §§ 78u(d) & 78u-2(a)(2). SEC possesses unlimited discretion in deciding whether to file in federal court or administratively. Jarkesy v. SEC, 803 F.3d 9, 12 (D.C. Cir. 2015) (overruled on other grounds, Axon v. FTC and SEC v. Cochran, 143 S. Ct. 890 (2023)) stating that "[n]othing in [the] Dodd-Frank [Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010)] or the securities laws explicitly constrains the SEC's discretion in choosing between a court action and an administrative proceeding when both are available"); id. at 17 (stating that "Congress granted the choice of forum to the Commission," not to defendants). This choice of fora leaves SEC discretion to decide whether to seek a jury trial on its claims. If it files in federal district court and seeks monetary penalties, it is entitled to a jury trial. Tull v. United States, 481 U.S. 412, 422 (1987). If it does not want a jury trial, it can bring an administrative proceeding, in which juries are unavailable.

The other two statutes under which Jarkesy has been charged, the Securities Act and the Investment Advisors Act of 1940, include similar provisions. See 15 U.S.C. §§ 77h-1(g)(1) (Securities Act) & 80b-3(i)(1)(B) (Investment Advisors Act). They deny that same choice to the defendant. If SEC opts for an administrative forum, the defendant is deprived of all rights to a jury trial. Indeed, state supreme courts across the country have held that laws granting defendants fewer jury-trial rights than plaintiffs are unfair to defendants and violate their jury rights under the state constitution. In SCI Management Corp. v. Sims, 101 Haw. 438 (2003), the Hawaii Supreme Court invalidated a statutory scheme that granted employment discrimination plaintiffs sole discretion to decide whether to have a jury trial (by filing in court) or a non-jury trial (by filing administratively). The court said, "If one side to a dispute has a constitutional right to a jury trial, generally the other side must have a similar right. We are dealing with a fundamental right and differing treatment of complainants and respondents in respect to the availability of that fundamental right cannot be justified." Id. at 451 (citation omitted). See also FUD's, Inc. v. Rhode Island, 727 A.2d 692, 698 (R.I. 1999) (holding that similar statutory scheme is unconstitutional because it deprives defendants of jury-selection rights granted to plaintiffs); Lavelle v. Mass. Comm'n Against Discrimination, 426 Mass. 332 (1997) (same) (overruled on

other grounds by Stonehill College v. Mass. Comm'n Against Discrimination, 441 Mass. 549 (2004)). The right to trial by jury in civil proceedings is no less fundamental under the U.S. Constitution than it is under state constitutions. If the federal government wishes to preserve jury trials for itself in SEC enforcement proceedings, the Seventh Amendment requires that it extend the same right to the targets of those proceedings.

Imagine instead how salutary it would be if ALJs only had authority to decide cases when BOTH parties opt into the arrangement. In that case ALJs would lose their caseload and their jobs if no one was picking to use them. It would create an incentive for them to behave fairly, and it would be more like magistrate judges in federal district court. It would also ensure that only cases where significant rights claims were not at stake would be shunted to these ersatz tribunals.

11) Lack of Jury Trial Rights Despite Massive Penalties

The Seventh Amendment guarantees the right to trial by jury "[i]n Suits at common law." U.S. CONST. amend. VII. It thereby applies to all civil actions, other than in equity and admiralty, including actions, as here, "brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century." Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989). Moreover, equity involved property and contract claims, not government enforcement, and SEC does not sit in admiralty. Accordingly, SEC violates defendants' Seventh Amendment rights by denying a request that SEC's enforcement proceedings be tried by a jury.

Ever since Crowell v. Benson, 285 U.S. 22 (1932), the Supreme Court has upheld the federal government's constitutional authority, in at least some instances, to adjudicate its enforcement actions before administrative tribunals rather than Article III courts—even though jury trials are unavailable in such tribunals. This is striking because Crowell was in admiralty. It thus has no precedential value at all for denying jury rights in cases outside of admiralty. In the most extreme application of Crowell's public rights doctrine, Atlas Roofing, the Court upheld juryless administrative hearings within the Occupational Safety and Health Administration (OSHA) imposing civil

penalties on employers for maintaining unsafe working conditions. 430 U.S. at 461. Federal courts have recognized, however, that this "agency-centric process is in some tension with Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment right to a jury trial in civil cases." Lorenzo v. SEC, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (citing Philip Hamburger, Is Administrative Law Unlawful? 227– 257 (2014)).

Even if one accepts Atlas Roofing's broad understanding of agencies' authority to conduct administrative proceedings, SEC still violates Seventh Amendment rights by denying jury trials. NCLA believes Atlas Roofing was wrongly decided and should be overruled. Nonetheless, the Seventh Amendment preserves the right to jury trial in all civil cases outside of equity and admiralty. Philip Hamburger, Is Administrative Law Unlawful? 247 (2014). Such cases include "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." Granfinanciera, 492 U.S. at 42. The Supreme Court has not directly addressed whether federal securities statutes involve "public rights" that Congress may constitutionally assign to administrative agencies. But relevant factors all point to the conclusion that the public rights doctrine is inapplicable to SEC enforcement actions of this sort. SEC's enforcement actions often accuse defendants of securities fraud—for example, charging someone with falsely telling investors that a prominent accounting firm served as his funds' auditor, or misrepresenting the funds' investment strategies. Actions for fraud were regularly decided by law courts in the late 18th century. So, even if the Supreme Court were to fail to recognize the breadth of the Seventh Amendment's protection for juries in all civil actions (outside equity and admiralty), it at least should recognize that SEC fraud claims are "analogous" to 18th century suits heard in law courts. Granfinanciera, 492 U.S. at 41–42. Defendants thus have a right to have those claims tried by a jury.

SEC claims the Seventh Amendment is inapplicable—notwithstanding the similarities between its enforcement actions and common-law suits alleging fraud. It argues that Congress, in adopting the securities laws,

imposed “new” statutory duties and so could assign the adjudication of violations to an administrative agency. But Granfinanciera expressly rejected that line of reasoning. It stated that “Congress’ power to block application of the Seventh Amendment to a cause of action has limits,” and warned that “Congress cannot eliminate a party’s Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.” 492 U.S. at 51, 61. Numerous Court decisions have emphasized that the Seventh Amendment applies not only to common-law forms of action “but also to causes of action created by congressional enactment.” Tull v. United States, 481 U.S. 412, 417 (1987); see Granfinanciera, 492 U.S. at 41; Chauffeurs, Teamsters and Helpers v. Terry, 494 U.S. 558, 564–65 (1990); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 348 (1998). Atlas Roofing held that OSHA’s administrative claims and proceedings did not implicate Seventh Amendment rights because they were “unknown to the common law,” and required factfinding by professionals “with special competence in the relevant field.” 430 U.S. at 461, 455. In contrast, SEC’s fraud claims were known to the common law. In the absence of any serious effort by SEC to distinguish its fraud-based statutory claims from common-law fraud claims, defendants are entitled under the Seventh Amendment to have SEC’s claims heard by a jury.

12) Bankrupting Third Parties at the Investigatory Phase

In the case of Moroney v. Consumer Financial Protection Bureau, for which cert is currently pending at the U.S. Supreme Court, NCLA learned that agencies can bankrupt people who are not even the target of the investigation. Our client, Ms. Moroney, was an attorney with a small office, not much larger than herself, devoted to helping arrange debt satisfaction. She was not a debt-collection entity, but something akin to the last stop before getting sent to debt collection. CFPB does not like the debt-collection business, and it was investigating some businesses adjacent to and clients of Ms. Moroney. CFPB insisted that she hand over the attorney-client privileged information of her clients and comb through thousands of hours of recorded phone calls to comply with the agency’s information-collection requests. As a one-woman shop, Ms. Moroney could not run her business while also complying with the

government's voluminous requests. Even setting to one side the inappropriateness of seeking attorney-client privileged material, Ms. Moroney spent nearly 40 hours/week for many weeks trying to comply with the government's requests. Ultimately, she was not able to keep her business afloat while doing so, and it folded, which might have been CFPB's illicit, unstated goal from the outset. At a minimum, the demise of her business was the byproduct of forcing third-party cooperation with an overzealous administrative investigation.

13) Seeking Settlement Terms Unavailable in Court

Just this last term at the Supreme Court in the consolidated cases of *Axon v. FTC* and *SEC v. Cochran*, Justice Gorsuch expressed grave concern about agency lawlessness when he noted that agencies can "outlast or outspend" their targets and use this power "as leverage to extract settlement terms they could not lawfully obtain any other way." See P. Hamburger, Purchasing Submission: Conditions, Power, and Freedom 223 (2021) (describing this as "regulatory extortion"); Douglas H. Ginsburg & Joshua D. Wright, Antitrust Settlement: The Culture of Consent, in 1 William E. Kovacic: An Antitrust Tribute 177 (N. Charbit et al. eds. 2013) ("Consent decrees create potential for an enforcement agency to extract from parties under investigation commitments well beyond what the agency could obtain in litigation"). This applies to the SEC's efforts to get disgorgement, as well as to its notorious and unconstitutional gags, the FTC's lawless demand that Axon surrender to a competitor its patents before it would suspend prosecution of a merger with that competitor that Axon had already abandoned, agency insistence on settlement conditions that prohibit use of insurance to pay penalties or take otherwise lawful tax deductions, and even penalties that follow a regulated person from one company to another and purport to bind a new company that was not a party to the proceeding. In the Matter of Drizly, LLC, No. C-4780, Decision & Order, 10 (F.T.C. Jan. 9, 2023). https://tinyurl.com/4hnrtwnr, the consent order provision is at PDF page 21 (consent order page 10).

Adding insult to injury, following a gag against a settling defendant, SEC still issues a press release inflicting lifelong reputational damage on the party that has purported to reach a no-admit/no-deny settlement.

14) No Statutory Support for Adjudication Structure at OFCCP

Most of what we have been discussing so far at least has the virtue of statutory backing from Congress. The Dodd-Frank Act, for example, is responsible for some of the worst abuses at the SEC. But there is another administrative adjudication apparatus that, incredibly, has been set up without the benefit of statutory support for the scheme. At the Office of Federal Contract Compliance Programs (OFCCP), NCLA learned that an entire system is set up based on an executive order (11246) from the Johnson Administration. How so many important rights can be adjudicated in a system that lacks statutory support is a mystery. Unsurprisingly, the system at OFCCP does not create the kind of due process one would expect in a robust adjudicative system. NCLA's amicus brief in the Oracle case lays the story out in greater detail.

In 1977, OFCCP created a comprehensive enforcement and adjudication apparatus. The 1977 regulations marked a significant departure from Executive Order 11246's limited enforcement mechanisms. See generally Office of Federal Contract Compliance Programs, Equal Employment Opportunity, 42 Fed. Reg. 3454 (Jan. 18, 1977) ("1977 Final Rule"). The 1977 Final Rule established for the first time an administrative adjudication process for violations of the Order and the Equal Opportunity Clause. See 41 C.F.R. § 60-1.26 (1977). It established the basis for finding violations, requirements for the "form, filing, service of pleadings and papers," and procedures for hearings (including pre- and post-hearing processes). 41 C.F.R. §§ 60-1.26(a)(1), 60-30.1–30.30 (1977). The 1977 Final Rule also established new retrospective remedies not contemplated in the Order, described as "affirmative step[s] which [are] required to eliminate discrimination or the effects of past discrimination." 42 Fed. Reg. at 3456; 41 C.F.R. § 60-1.26(a)(2) (1977) ("appropriate relief" Case 1:19-cv-03574-APM Document 26-1 Filed 05/01/20 Page 11 of 28 5 "may include affected class and back pay relief"). The Order permits a recommendation to DOJ to seek

appropriate proceedings for injunctive relief, but the 1977 Final Rule purports to permit the Department of Labor to commence enforcement proceedings and to issue Administrative Orders enjoining violations. See 42 Fed. Reg. at 3456; 41 C.F.R. §§ 60-1.26(a)(2), 60-1.26(d), 60- 30.30(a) (1977).

While DOL has amended the 1977 Final Rule several times, the core processes, procedures, and remedies established in 1977 remain in place. Under current regulations, OFCCP may institute enforcement proceedings for alleged violations of the Order or the Equal Opportunity Clause based on the results of complaint investigations and compliance reviews, the analysis of a contractor's affirmative action program, or a contractor's refusal to take certain actions. 41 C.F.R. § 60-1.26(a)(i)-(x). OFCCP may refer and recommend the matter to the Solicitor of Labor for administrative enforcement proceedings. 41 C.F.R. § 60-1.26(b)(1).4 The enforcement proceedings are "conducted under the control and supervision of the Solicitor of Labor" and are subject to the processes set forth in the regulations. Id.; 41 C.F.R. part 60-30 ("Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246"). Part 60-30's Rules of Practice designate DOL ALJs to conduct initial proceedings in matters alleging violations of the Order and delineate their authority and responsibilities. 41 C.F.R. § 60-30.14, 60–30.15.

Under these rules, DOL ALJs may "rule on motions [including motions for summary judgment], and other procedural [issues]"; "regulate the course of the hearing and conduct of the participants"; "examine and cross-examine witnesses"; introduce evidence into the record; "impose sanctions"; "issue subpoenas"; hold oral argument; and make recommended "findings, conclusions, and a decision." See, e.g., 41 C.F.R. §§ 60-30.15, 30.21, 30.23, 30.27. The regulations permit Expedited Hearing procedures in limited circumstances. 41 C.F.R. §§ 60- 30.31–30.37. Case 1:19-cv-03574-APM Document 26-1 Filed 05/01/20 Page 12 of 28 6 record are certified to DOL's Administrative Review Board ("ARB"). 41 C.F.R. § 60-30.27. Parties may submit to the ARB exceptions to the ALJ's recommendations. 41 C.F.R. § 60-30.28. The ARB "make[s] a decision, which shall be the Administrative [O]rder" on behalf of the Secretary. 41 C.F.R. § 60-30.29. 5 Under OFCCP's rules, if the ARB find violations, the ARB "shall make a decision" and issue an

"Administrative Order" that "enjoin[s] the violations and require[s] the contractor to provide whatever remedies are appropriate, and imposing whatever sanctions are appropriate, or any of the above." 41 C.F.R. § 60-30.30. "[F]ailure to comply with the Administrative Order shall result in the immediate cancellation, termination and suspension of the respondent's contracts and/or debarment." Id. Such "appropriate" sanctions include "back pay and other make whole relief." See 41 C.F.R. § 60-1.26(a)(2).

On February 21, 2020, DOL issued an order permitting the Secretary to conduct "discretionary review" of ARB decisions. See Dep't of Labor Secretary's Order No. 01-2020, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 85 Fed. Reg. 13186 (Mar. 6, 2020). Generally, if no discretionary review is undertaken, ARB decisions may become final action of DOL 28 days after the decision is issued. But if review is undertaken, then the Secretary's decision is the final agency action. See Secretary's Order 01-202, § 6. Only after a decision becomes final may a party finally seek review of the ARB or Secretary's decision in an Article III court under the Administrative Procedure Act, 5 U.S.C. § 551, et seq. 5 On March 6, 2020, the Secretary issued a direct final rule amending, inter alia, 41 C.F.R. §§ 60-30.29 and 60-30.30 to remove "references to final decisions of the ARB" to "harmonize the manner in which the ARB issues decisions on behalf of the Secretary under the Department's regulations with the scope of the final decision-making authority delegated to the ARB." Discretionary Review by Secretary, 85 Fed. Reg. 13024, 13026 (Mar. 6, 2020).

The OFCCP process can take years. After some two years of pre-hearing processes, including compliance review and attempted resolution, OFCCP initiated enforcement proceedings against Oracle for alleged violations of Executive Order 11246. See Complaint, Oracle America, Inc. v. U.S. Dep't of Labor, et al., No. 1:19-cv-03574-APM (D.D.C. Nov. 11, 2019), at ¶ 122-136 (describing the related but separate OFCCP enforcement proceedings). An administrative case followed. Id. Case 1:19-cv-03574-APM Document 26-1 Filed 05/01/20.

15) Adjudications Happen in SROs/Non-governmental Entities

How can people be fined, etc. when the entity penalizing them is not even a government agency? For example, NCLA currently represents someone facing massive fines from FINRA, but our client never belonged to FINRA. How can a private or at best quasi-governmental organization exert adjudicatory power over someone to discipline them who never belonged to the organization?

16) Hearing Officer Not Properly Appointed to Adjudicate

Frequently NCLA has discovered situations where the officers inside an agency or department who were performing adjudicative duties were never properly appointed. Adjudication is the kind of executive function that requires someone to be appointed as an officer. Even after Lucia, where this appointments issue was clarified beyond doubt, many agencies failed to follow through on the guidance the Department of Justice issued in the wake of the ruling in the case. So, for example, NCLA discovered that an officer in DOT's Pipeline and Hazardous Materials Safety Administration was never properly appointed but had issued a ruling in our client's case. Or rather, to be precise, NCLA identified another problem with that proceeding that DOT did not want to have to litigate, so DOT offered up to the Sixth Circuit the fact that the individual had never been properly appointed in order to get the court case remanded back to the agency.

17) Agencies Deceive Targets About Appointments Problems

NCLA has a cert petition pending right now at the U.S. Supreme Court in Metal Conversion Technologies, LLC v. Department of Transportation where the agency did not properly appoint the official, we fought that successfully, and they let him keep making decisions in other cases and didn't tell those other folks his appointment was defective. DOT counted on a limited 60-day statutory deadline to run out on anyone's ability to challenge his judgments. As a result, other companies were adjudicated improperly. DOT apparently planned to get away without disclosing the problem. NCLA currently has a cert petition pending at the Supreme Court to decide whether courts may toll the deadline in cases where an agency is hiding the ball in this fashion.

18) Imposing Penalties Prior to Adjudication on the Merits

Because agencies exert unilateral control over the pace of investigations and adjudications, companies and individuals can be forced to cope with the consequences of an agency cracking down on them before they have even gotten the benefit of an internal agency adjudication. For example, NCLA has a client facing action from the Consumer Product Safety Commission where that agency has impounded our client's product at the port of entry, forcing it for some time to store disputed goods near the port in very expensive facilities rather than move them inland to cheaper storage facilities. Besides which, the product was never adjudicated as an unsafe product before the impoundment occurred.

19) Sitting on Internal Appeals to Delay Article III Review

Magic deadlines is another perennial problem with agency adjudications. It's bad enough in federal court where government litigators seem to always get the extension requests they seek. In agency adjudications, woe be to any defendant who misses a deadline. However, the agency itself can blow through deadlines without consequence to the adjudication. Even at the appeal level, this is a problem. Right now at the SEC, for example, NCLA represents a client who is one of many people whose appeals have been pending for well over a year with no action by that agency. Rather than decide the cases, the Commission keeps granting itself an endless series of 90-day extensions. Of course until the agency resolves the dispute on appeal, the defendant is unable to take the case to federal court for resolution by a real independent judge, except perhaps in a mandamus posture to force the agency to act.

20) Delaying Hearings to Effectively Mete Out a Sanction

Speaking of not being able to get an agency to act, NCLA represented a client against the USDA who was accused of selling crop insurance after the relevant deadline. He disputed the charges, but the agency did not want to adjudicate the dispute, apparently because doing so would have involved either disclosing that it did not really have a witness or else having to reveal the identity of its secret witness. But our client had a right to know who was

accusing him. Eventually we sued in federal district court to force the agency to act. Even though the district court ruled against us (after agreeing with us on the law), the court did (wink and nod and) urge the agency to act promptly. The agency finally scheduled the adjudication only to cancel it and dismiss the charges a month or two after the district court judgment issued. By that time our client had already lost out on a full year's worth of crop insurance sales, effectively receiving the $1M penalty USDA wanted without ever having to prove its charges in court.

21) Agencies Overturning Adverse ALJ Decisions

Perhaps worse than the agency that delays a hearing is the agency that overrides the adverse decision of its Administrative Law Judge. NCLA represented a client in Arizona state court who was falsely accused of something by an administrative agency. The state Office of Administrative Hearings heard the case, including live witness testimony, and concluded that there was not probable cause to support the accusation. Overturning the OAH determination, the agency decided to put our client's name on a blacklist anyway. We had to sue to get that decision undone. At the federal level, FTC has frequently reversed the determinations made by the ALJ over there. In fact, NCLA is hearing that FTC has effectively demoted its ALJ by instructing him not to issue decisions anymore, just recommendations, and/or hired another ALJ more to Chair Khan's liking. When agencies demote ALJs in this fashion, it underscores the fact that ALJs are beholden to the employing agency.

22) Lawfare Through Using Adjudicatory Machinery

The machinery of agency adjudications is started too easily. Just look at NCLA's FDRLST Media case or The Daily Wire case where the same random labor lawyer in Massachusetts, who was a complete stranger to the situation but an ideological opponent of the entities, was able to get the apparatus of government investigation started against the publications. The possibility of low-cost lawfare is created by the promiscuous availability of administrative adjudications. NCLA defended FDRLST Media and The Daily Wire successfully against the NLRB in those cases, but it never should have come to that. A random guy with an ideological ax to grind should not be able to make a

federal case out of something just by filing a complaint—especially, in the labor law context, where none of the employees of those two media organizations were remotely concerned about any unfair labor practice having taken place. Congress needs to fix that aspect of the National Labor Relations Act, so that only those with proximity to the workplace can sue over an alleged unfair labor practice.

The same kind of thing appears to be happening on an even larger scale against Elon Musk with multiple investigations begun simultaneously on a suspiciously timed series of inquiries across the breadth of Musk's holdings by multiple federal agencies at the same time.

23) Launching Low-Cost Internal Investigations

Because internal adjudications are low-cost, low-risk actions for agencies, they appear willing to bring cases that they would never bring in a real federal court. In one recent example, NCLA represented a client accused of violating a statute that required a 'knowing' violation to assign liability. There was zero evidence that the alleged violation, if it occurred, had been anything other than accidental. However, the agency apparently thought that it could force settlement by raising the specter of the costs to fight the adjudication. NCLA's pro bono intervention changed the calculus there, because the agency knew that the company was not facing the severe litigation costs the agency had hoped to use as leverage—and in all likelihood did use as leverage against most other defendants.

24) Enforcement by Adjudication Problem

Yet another problem with adjudication is the attempt by some agencies to use adjudication in place of rulemaking as a method of enforcement. So, for example, in the cryptocurrency space, the SEC, rather than issue a series of rules about what crypto companies can and cannot do, or regarding what the definition of a security entails in the crypto space, the agency prefers to bring enforcement actions against companies for guessing wrong. The agency prefers the deterrence that uncertainty creates over the clarity that rulemaking would provide. Pursuing enforcement via adjudication also has

the benefit of being able to punish someone retrospectively, whereas rulemaking typically only allows for prospective behavior changes.

25) Not Sharing Exculpatory Evidence with Enforcement Targets

The Department of Transportation has a history of poor respect for due process in its administrative adjudications. To combat this tendency, former agency General Counsel and then Deputy Secretary Steven Bradbury engineered an overhaul of processes at that agency to ensure greater transparency and efficiency in adjudications there. Unfortunately, Secretary Buttigieg unilaterally reversed those gains when he took over the Department. One important example of a change made by Bradbury and reversed by Buttigieg was the requirement that DOT turn over exculpatory material. DOJ is required to turn over such material to defendants in criminal cases, but enforcement agencies that have evidence of targets' innocence do not have to share that with them. Why not? Why can enforcement agencies hide the ball when they have reason to suspect someone may not be guilty of whatever it is that they are being accused of? How does that serve the cause of justice?

Conclusion

This list of 25 "Pathologies of Administrative Adjudication" is extensive, but it is hardly exhaustive. Another list of equal length enumerating other pathologies equally concerning could no doubt be generated. Seemingly every week NCLA learns about another victim of the Administrative State whose civil liberties have been trampled by truly astonishing feats of bureaucratic badgering. The important thing to take away from this list is that administrative adjudication is an inferior mode of adjudication that deprives people and companies of the kind of due process of law to which the Fifth Amendment entitles them.

Congress should stop trying to channel enforcement of legal violations into administrative apparatus. Behavior worthy of sanctioning severely belongs in Article III courts in front of genuinely independent judges with a right to trial by jury. The total number of ALJs outside of the Social Security Administration and similar benefits contexts is not unduly large. The cases

overseen by these tribunals could easily be moved into Article III courts with only a marginal increase in the size of the federal judiciary.

Alexis de Tocqueville, writing in the 1830s, reflected on the problem of shifting judicial power out of the courts:

> If one now examines what is taking place in the democratic nations of Europe that are called free, as well as in the others, one sees on all sides that alongside these courts, others, more dependent, are being created, the particular object of which is to decide exceptionally the contentious questions that can arise between the public administration and citizens. Independence is left to the former judicial power, but its jurisdiction is narrowed and it tends more and more to be made only an arbiter between particular interests. The number of these special courts constantly increases, and their prerogatives grow. The government is therefore escaping more each day from the obligation to have its will and its rights sanctioned by another power. Unable to do without judges, it wishes at least to choose its judges itself and to keep them always in hand; that is to say between it and particular persons it puts the image of justice rather than justice itself. Thus, it is not enough for the state to attract all business to itself; it also comes more and more to decide everything for itself without control and without recourse.

Alexis de Tocqueville, Democracy in America, Part IV 655 (Mansfield ed. 2000). Tocqueville aptly describes the political cost of devolving judicial power from courts to agencies. Almost 200 years later, Alexis de Tocqueville's diagnosis seems almost quaint. The problem he identified then has grown so severely that it threatens to derail, if not democracy, then certainly the rule of law in America.