Reining in the Administrative State: Agency Adjudication & Other Agency Action

Subcommittee on the Administrative State,
Regulatory Reform, and Antitrust

U.S. House Committee on the Judiciary

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Dear Chairman Jordan, Ranking Member Nadler, Chairman Massie, Ranking Member Correa, and Members of the Subcommittee:

Thank you for the invitation to appear today to testify regarding the current practice of administrative agency adjudication. I write and teach in the areas of administrative law, constitutional law, federal courts, and the separation of powers and serve as a Public Member of the Administrative Conference of the United States ("ACUS") and an elected Councilmember of the American Bar Association's Administrative Law Section. From 2019 through 2021, I served as an executive branch appointee within the U.S. Department of Justice as a Deputy Assistant Attorney General in the Office of Legal Counsel and then as an Associate Deputy Attorney General.

In 2018, I coauthored an ACUS report on the staffing and appointment of administrative law judges ("ALJs") who preside in formal agency adjudication hearings throughout the Executive Branch and have written extensively on constitutional and statutory issues related to agency adjudication. Within the field of agency adjudication, my scholarship focuses on constitutional and separation of powers issues related to the blending of policymaking, adjudicative, and investigative powers within single administrative and executive branch agencies. My testimony today will be based on the

[*] This testimony reflects my individual views and analysis as a legal academic and not the views of any institution which which I am affiliated.

2017 article, "Constitutionally Conforming Agency Adjudication,"[1] examining the constitutional contours of executive adjudication versus the adjudication of life, liberty, and property interests that must be resolved by Article III courts[2] subject to Seventh Amendment jury trial rights.[3] In addition, this testimony highlights key points from "Adjudicating in the Shadows," forthcoming this year in the *Notre Dame Law Review*, regarding the broad statutory discretion that Congress has granted agencies to bring enforcement actions in their own tribunals rather than before independent, tenure-protected federal courts, and the transparency, fairness, and accountability issues raised by this delegation.[4]

As former Justice Antonin Scalia observed in a concurring opinion in 1991 regarding tax court adjudicators, forms of executive branch adjudication have existed since 1789.[5] Adjudication as a broad category involves merely the application of general rules of law to particularized facts. Modest executive uses of adjudication to resolve internal exeuctive branch issues or to allocate government benefits and resources have historically been routine. For example, the first Congress in 1789 authorized the Department of Treasury to conduct in-house adjudication of public accounts.[6] The next year, in 1790, Congress created a three-member administrative board consisting of the Attorney General, the Secretary of State, and the Secretary of War to adjudicate the issuance of patents if the officers "deem[ed] the invention or discovery sufficiently useful and important."[7] And the first Congress authorized the five-member Sinking

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[1] Jennifer L. Mascott, *Constitutionally Conforming Agency Adjudi*cation, 2 LOYOLA JOURNAL OF REGULATORY COMPLIANCE 22 (2017) (online) (describing the proper electoral accountability of agency adjudicators subject to executive supervision, general direction, and removal and the questionable modern practice of assigning disputes to thse adjudicators that historically would have been before independent and tenure-protected Article III federal judges), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2992874 and cited in Axon v. FTC, 598 U.S. 175, 198-99, 203 (2023) (Thomas, J., concurring).

[2] *Cf.* U.S. CONST. amend. v ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

[3] U.S. CONST. amend. vii ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.").

[4] 99 NOTRE DAME L. REV. __ (forthcoming 2024), *early draft available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4765351.

[5] *See* Freytag v. Commissioner, 501 U.S. 868, 909 (1991) (concurring, opinion of Scalia, J.) (discussing the early position of Comptroller of the United States within the U.S. Treasury Department, a position that Congress first created in 1789, §§ 1, 3, 1 Stat. 65, 65-66).

[6] *See* § 5, 1 Stat. 65, 66 (assigning the presidentially appointed and Senate-confirmed Auditor to receive public accounts and certify their balance and then providing for appeal within six months to the Comptroller if one is "dissatisfied" with the initial audit of his account).

[7] Patent Act of 1790, ch. 7, 1 Stat. 109-110; *see also* Jennifer L. Mascott & John F. Duffy, *Executive Decisions After Arthrex*, SUP. CT. REVIEW (2021).

Fund Commission to continue managing and purchasing U.S securities following the Revolutionary War, continuing earlier practice under the Articles of Confederation.[8]

But current administrative practice substantially differs from this early executive practice. Underlying administrative agency power has vastly expanded over the past few decades, resulting in congressional allocations of significant regulatory, investigative, and adjudicative power to multimember commissions along with traditional executive branch agencies—impacting almost every aspect of American private, community, and business life. In addition to expanded substantive power to make binding rules impacting daily life and the economy, Congress has also expanded agency authority to investigate alleged violations of the rules that agencies create and then adjudicate guilt or innocence of those charges within an agency's own tribunals. These agency charges subject regulated individuals, schools, and businesses to potentially substantial monetary damages and other penalties and are in tension with the longstanding principle that "no man shall be a judge in his own case."[9]

Although many agencies currently exercise responsibilities conflating aspects of legislative, executive, and judicial power—categories of power that the historical federal constitutional system generally kept separate, this testimony will focus on just a handful of the more high-profile examples of recently expanded and extensive agency adjudicative activity. In the past fifteen years, for example, congressional allocation of power to the Securities and Exchange Commission ("SEC") to internally adjudicate and impose significant penalties on private individuals has drastically expanded and Congress established the Consumer Financial Protection Bureau ("CFPB") with the authority to internally impose penalties of up to one million dollars per day per regulatory violation.[10]

In recent years the U.S. Supreme Court has examined multiple constitutional challenges related to the blending of agency power and expansive adjudication. For example, currently in *SEC v. Jarkesy*, the Court is evaluating whether securities fraud charges brought before the SEC are subject to the Seventh Amendment right to a jury trial, meaning the charges must be brought in a federal court subject to independence and tenure protections. The *Jarkesy* litigation also reviews the ruling by the U.S. Court of Appeals for the Fifth Circuit that the statutory tenure protections for SEC administrative law judges ("ALJs") unconstitutionally intrude on presidential executive authority to supervise lower-level officers.[11] Back in 2018, the Supreme Court found that the SEC had been using unconstitutional procedures to hire its ALJs in violation of

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[8] An Act Making Provision for the Reduction of the Public Debt, 1 Stat. 186 (1790).

[9] *Cf.* 1 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND § 212.

[10] *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[11] SEC v. Jarkesy, No. 22-859 (S. Ct., argued in the 2023 Term).

the Constitution's Appointments Clause.[12] And in 2020, the Supreme Court concluded that the director of the CFPB was subject to unconstitutional tenure protections.[13]

Whether or not the Supreme Court this term reins in SEC authority as a constitutional matter, Congress could enact policy solutions to address the recent explosion in agency discretion to bring cases in its own home court. First, Congress could reexamine and reassess the recent decades-long trajectory of granting agencies like the SEC significantly more power to bring enforcement charges before their adjudicators. For example, even though Congress authorized courts in 1984 to impose monetary penalties for up to three times ill-gotten profit for insider trading violations,[14] it was not until 1990 that Congress authorized the SEC to impose such penalties internally, within its own tribunals. And even then, in 1990, the SEC had authority to impose insider trading civil penalties only on registered parties.[15] The Dodd-Frank Act, in 2010, was the first time that internal agency civil penalty authority was extended to sanctions against "any" individual.[16] Sarbanes-Oxley, in 2002, expanded internal SEC enforcement authority to seek professional practice bars against individual securities law violators.[17]

Even if Congress chose as a policy matter to retain current levels of agency authority to conduct internal adjudication of enforcement matters, Congress could reassess whether it should instruct agencies to weigh a particular group of statutorily prescribed factors when deciding whether to bring a case in-house or in federal court. For example, perhaps Congress could instruct agencies to evaluate fairness to parties, the weight and significance of any monetary penalties the agency intends to pursue, or the level of intent associated with the alleged regulatory violation when deciding whether it is most equitable and effective to pursue an in-house or federal judicial forum. Or Congress could simply instruct the agency itself to develop a list of policy factors guiding its choice of enforcement tribunal and make that list of factors public, to promote transparency and accountability.

Currently, agencies like the SEC and the CFPB have significant statutory discretion to choose between in-house enforcement proceedings or Article III supervision however they deem best, at least in many subject-matter areas where Congress has authorized both agency and judicial enforcement proceedings. Even if the Supreme Court rejects the claim this term in *Jarkesy v. SEC* that such discretion is so

[12] Lucia v. SEC, 585 U.S. 237 (2018).

[13] Seila Law v. CFPB, 140 S. Ct. 2183 (2020).

[14] Insider Trading Sanctions Act of 1984, section 2, 98 Stat. 1264.

[15] *See* Securities Enforcement Remedies and Penny Stock Reform Act, 104 Stat. 931 (1990).

[16] *See* Section 929P, Dodd-Frank Act, 124 Stat. 1376, 1862 (2010).

[17] *See* Section 305, Sarbanes-Oxley Act of 2002, P.L. 107-204, 116 Stat. 745; Eric Helland & George Vojta, *Legal Outcomes and Home-Court Advantage: Evidence from the SEC's Shift to Administrative Courts*, 66 JOURNAL OF LAW AND ECON. 797, 802 (2023).

broad it constitutes an unconstitutional assignment of legislative policymaking to agencies, Congress could choose to more precisely statutorily guide an agency's exercise of its enforcement authority and selection of which tribunal is best-suited for which parties and which types of claims or relief. Under current law, in contrast, the CFPB has blanket authority "to conduct hearings and adjudication proceedings with respect to any person" to enforce compliance with its rules and governing statutory provisions.[18] And for SEC matters, such as cease-and-desist proceedings, Congress at times simply allocates internal enforcement authority, without specifying any instructions for the particular circumstances where internal agency enforcement might be more appropriate than judicial enforcement or vice versa.[19]

The stakes are high. Agencies like the CFPB and the SEC in modern practice have statutory authority to impose sizable, and pervasive, monetary remedies and professional sanctions. For example, the CFPB has statutory authority to, "without limitation," provide relief in the form of "rescission or reformation of contracts," a "refund of moneys or return of real property," restitution, disgorgement or other forms of "compensation for unjust enricehment," payment of monetary damages, "limits on the activities or functions of the [regulated] person" and "civil money penalties."[20] Those civil monetary penalties can be up to $25,000 per day for reckless violations of federal consumer finance laws and up to one million dollars per day for knowing violations.[21] The CFPB's public statements on the agency website indicate that it "rarely" brings cases through administrative enforcement proceedings, instead opting to bring charges in federal court.[22] But in many agencies, including the CFPB, agency investigative authority along with the ability to potentially threaten internal agency enforcement action enables agencies to wield significant power. Agency investigations consequently often operate in the shadows rather than in the public, transparent light of a federal courtroom or subject to publicly known and readily comprehensible clear standards.

More, agencies often are not subject to statutory procedural requirements mandating that they provide the same basic procedural protections as a party would receive in federal court. Historically one justification for agency adjudication was efficiency, which perhaps would in turn justify more streamlined procedural rules and fewer protections for individual rights. But in modern practice, regulated parties can

[18] 12 U.S.C. § 5563(a).

[19] *See, e.g.*, Section 929P, Dodd-Frank Act, 124 Stat. 1376, 1862-65 (2010).

[20] 12 U.S.C. § 5565(a).

[21] 12 U.S.C. § 5565(c)(2).

[22] *See* "CFPB Finalizes Update to Administrative Enforcement Proceedings," Feb. 24, 2023, https://www.consumerfinance.gov/about-us/blog-cfpb-finalizes-update-to-administrative-enforcement-proceedings/.

face internal agency enforcement actions that extend for well over half a decade.[23] And agencies are frequently left to craft their own procedural rules for how to conduct those proceedings. For example, the CFPB has been instructed simply to "prescribe rules establishing such procedures as may be necessary" to carry out its adjudicative authority.[24]

When updating procedural rules for its adjudicative proceedings in 2023, the CFPB announced that it would issue a rule using notice-and-comment procedures to facilitate public awareness and input. But the CFPB noted it was not statutorily *required* to use the notice-and-comment process to change its adjudicative procedures.[25] And despite choosing to amend some of its procedural rules to more closely mirror the procedural framework applicable in federal Article III courts, the CFPB continues to provide less-generous procedural protections to parties than they would receive in the federal judiciary, such as a deadline of only 14 days for filing a notice of appeal from an initial decision within the agency.[26] In contrast, the Federal Rules of Appellate Procedure provide 30 days for filing a notice of appeal.[27] Under earlier versions of its procedural rules, the CFPB had imposed additional tougher standards for its respondents such as subjecting respondents to shorter timeframes for answering agency charges against them and providing fewer opportunities for the presentation of supportive evidence through discovery.[28]

One other significant procedural implication of agencies pursuing enforcement actions in their own tribunals rather than first filing charges in federal court is that agencies can bring their significant investigative authority to bear on a regulated party without any external judicial accountability, often strongly incentivizing settlement negotiations. Settlement agreements between agencies and regulated parties *within the context of a federal judicial proceeding* can sometimes lead to efficient and optimal outcomes such as a party not having to face trial or stare down the full intensity of an enforcement action from beginning to end. But where a party facing significantly burdensome and expensive investigative demands *outside of Article III supervision* reaches a settlement agreement with an agency, the party may waive the right to ever pursue judicial review of that settlement decision.[29] The party consequently loses the

[23] *See, e.g.*, Cochran v. SEC, 20 F. 4th 194 (CA5 2021) (describing the start of enforcement proceedings aagainst Michelle Cochran in 2016, which were not evaluated by the U.S. Supreme Court until 2023).

[24] 12 U.S.C. § 5563(e).

[25] *See supra* note 22.

[26] *See* 12 CFR 1081.402(a)(1).

[27] *See* Fed. R. App. P. 4(a).

[28] *See generally* Comment of the Administrative Law Clinic, Antonin Scalia Law School, *Request for Information Regarding Bureau Rules of Practice for Adjudication Proceedings*, Docket No. CFPB-2018-0002.

[29] *See, e.g.*, 12 CFR 1081.120(c)(3).

opportunity to acquire any meaningful federal court supervision of the agency's charges and investigation. Consistent with these concerns, empirical studies have indicated that the expansion of internal agency enforcement power under the Dodd-Frank Act is correlated with increased pressure on regulated parties to settle. One empirical assessment published in 2023 indicates that since the Dodd-Frank expansion of administrative adjudicative authority, respondents are likelier to settle by thirty percentage points and are 36 percentage points likelier to receive nonmonetary penalties like SEC bars on future practice.[30] A 2016 article suggested that following the enactment of Dodd-Frank, 80 percent of settlements were filed in administrative tribunals rather than federal court whereas before 2010, only 40 percent of settlements were filed in agencies.[31]

Even in cases where a regulated party successfully navigates an agency's internal procedures through to a decision and then potential Article III review, that judicial evaluation of agency proceedings never provides nearly as complete review as cases where an enforcement action was first brought directly into court.[32] Courts continue to grant *Chevron* deference to legal questions; limited "substantial evidence" review to agency factual determinations—a standard that has been deemed almost as deferential as review of a jury verdict;[33] and "arbitrary," "capricious," or "abuse of discretion" review to agency policy determinations.[34]

Outside of the administrative agency context, the U.S. Supreme Court has concluded that an individual's right to a jury determination before the imposition of sanctions can turn on the type of sanction or remedy that is at issue and whether that remedy approximates a kind of legal relief historically subject to jury trial rights.[35] In

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[30] Helland & Vojta, *supra* note 17, at 801. That said, the authors' report on their study also suggests that following Dodd-Frank enactment, monetary penalties were less likely to be recovered by the SEC in cases heard by administrative tribunals rather than federal courts.

[31] *See* Urska Velikonja, *Securities Settlements in the Shadows*, 126 YALE L. J. FORUM 124, 126 (2016).

[32] *See, e.g.*, 5 U.S.C. § 706 (arguably deferential Administrative Procedure Act judicial review standards).

[33] 5 U.S.C. § 706(2)(E); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (interpreting a similar "substantial evidence" review standard to "be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury").

[34] *See* 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .").

[35] *See, e.g.*, Tull v. United States, 481 U.S. 412, 420-425 (1987) (majority opinion by Justice William Brennan) (concluding in a Clean Water Act case that liability for claims involving equitable remedies like injunctions or monetary restitution is not accompanied by a jury trial right but liability determinations related to punitive remedies like civil penalties must be enforced in courts of law subject to jury trial rights); *id.* at 425-27 (concluding, nonetheless, that

contrast, the Supreme Court has articulated in the context of agency proceedings that the existence of a constitutional right to a jury trial and Article III judicial review turns on the public versus private nature of the controversy—i.e., disputes between two parties should be heard in federal court, whereas "public" rights cases involving the government are more suitable for agency adjudication.[36]

The Supreme Court has not clearly articulated why cases that the government chooses to bring in Article III court trigger a jury right to liability determinations for legal remedies like monetary damages, but civil penalty cases in agency tribunals somehow bypass the Seventh Amendment jury trial guarantee. If the Supreme Court were to apply the legal versus equitable relief test as the constitutional line for assessing whether a matter must be heard in federal court, agency actions involving restitutionary or equitable remedies like disgorgement and injunctions could be fit for agency determination but liability for monetary civil penalties would need federal judicial review. Whether or not the Supreme Court constrains the kinds of cases that agency adjudicators can hear, as a constitutional matter, this Term in *Jarkesy v. SEC*, Congress could consider imposing the legal/equitable relief standard set forth in cases like *Tull* (a Justice Brennan opinion) or subsequent cases like *Feltner v. Columbia Pictures Television* (a Justice Thomas opinion).[37]

Statutory imposition of the legal/equitable remedy test could eliminate agency authority to impose remedies that approximate a form of punishment or that intrude on liberty and property interests by stripping professional certifications or requiring the payment of significant penalties. But agencies would retain some measure of authority to stop unlawful behavior, make injured parties whole, and issue injunctions requiring compliance with regulatory and statutory commands.

Thank you. I look forward to your questions.

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there was no jury trial right to assessment of the specific amount of penalties to be awarded, just the underlying fact of liability associated with the penalties).

[36] *See, e.g.*, Atlas Roofing Co. v. OSHA, 430 U.S. 442, 450-52, 461 (1977).

[37] Feltner v. Columbia Pictures Television, 523 U.S. 340, 347-55 (1998) (holding in a copyright case that copyright disputes historically were subject to jury trial rights, which covered the calculation of monetary damages as well as the determination of liability in such matters).