

## Article

# Restoring ALJ Independence

Richard E. Levy<sup>†</sup> and Robert L. Glicksman<sup>††</sup>

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<sup>†</sup> J.B. Smith Distinguished Professor of Constitutional Law, University of Kansas School of Law. Copyright © 2020 by Richard E. Levy.

<sup>††</sup> J.B. & Maurice C. Shapiro Professor of Environmental Law, The George Washington University Law School. We thank Judge Julian Mann, Alan Morrison, Richard Pierce, and Judges David Welch, Gabrielle Vitiello, and Penny Loucas for helpful comments on earlier drafts. We are also grateful for the research assistance of Joy Merklen, University of Kansas Law School class of 2020, and thank W. Blake Wilson, Assistant Director for Instructional & Faculty Services, Wheat Law Library, University of Kansas School of Law. Copyright © 2020 by Robert L. Glicksman.

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## INTRODUCTION

The Trump Administration is at war with the federal bureaucracy.<sup>1</sup> Fueled by a belief that federal officials are “insufficiently loyal to the president and his agenda,” President Trump has vilified career civil servants as the “deep state.”<sup>2</sup> His penchant for removing officers who fail to do his bidding and his reliance on acting officers who are dependent on his good favor are well known.<sup>3</sup> Less well known, perhaps, are his efforts to dismantle key components of the civil service system, such as the Office of Personnel Management (OPM).<sup>4</sup> Recent

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1. See, e.g., Jon Michaels, Opinion, *How Trump Is Dismantling a Pillar of the American State*, GUARDIAN (Nov. 7, 2017), <https://www.theguardian.com/commentisfree/2017/nov/07/donald-trump-dismantling-american-administrative-state> [<https://perma.cc/R8N2-UPHF>] (“Trump is vilifying the professional bureaucracy, that vast community of apolitical, career officials whose work it is to design, administer, and demand compliance with administrative regulations—and who are, by congressional design and longstanding practice, well positioned to question and challenge the directives of an abusive, impulsive, or simply hyperpartisan president.”).

2. Heidi Kitrosser, *Accountability in the Deep State*, 65 UCLA L. REV. 1532, 1534 (2018).

3. A particularly salient example of this practice was his removal of Attorney General Jeff Sessions, who became the target of President Trump’s ire when he recused himself from oversight of the investigation into Russian election interference. See Kris Olson, *Too Close for Comfort: An Insider’s View of Presidents and Their Attorneys General*, 2019 YALE L. & POL’Y REV. INTER ALIA 1, 14–16. President Trump then circumvented the usual order of succession within the Justice Department to appoint Matthew Whitaker as acting Attorney General. See Paul J. Larkin, Jr., *Essay: A New Law Enforcement Agenda for a New Attorney General*, 17 GEO. J.L. & PUB. POL’Y 231, 232 (2019). President Trump eventually nominated William Barr to be Attorney General. See Rebecca Roiphe, *A Typology of Justice Department Lawyers’ Roles and Responsibilities*, 98 N.C. L. REV. 1077, 1122 (2020). Since his confirmation, Attorney General Barr has proven to be a reliable Trump loyalist. See *id.* at 1123; see also Charlie Savage, *Inspector General Fired by Trump Urges Whistle-Blowers ‘to Bravely Speak Up,’* N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/michael-atkinson-inspector-general-fired.html> [<https://perma.cc/LQP3-JNEE>] (describing firing of intelligence community inspector general who had deemed credible a whistleblower complaint concerning President Trump’s alleged coercion of the Ukraine’s government to investigate Joe Biden); Kyle Cheney, Natasha Bertrand & Meridith McGraw, *Impeachment Witnesses Ousted Amid Fears of Trump Revenge Campaign*, POLITICO (Feb. 7, 2020), <https://www.politico.com/news/2020/02/07/donald-trump-pressure-impeachment-witness-alexander-vindman-111997> [<https://perma.cc/2AVD-2PKN>] (discussing the President’s decision to fire officials who testified during impeachment proceedings before the House of Representatives).

4. See Chris Mills Rodrigo, *Trump Moving to Dismantle OPM: Report*, HILL (Apr. 10, 2019), <https://thehill.com/homenews/administration/438240-trump-moving-to-dismantle-opm-report> [<https://perma.cc/77XQ-F27W>] (explaining Trump’s efforts to eliminate the OPM and the outcome if Trump is to succeed).

United States Supreme Court decisions embracing a strong unitary executive theory bolster the President's claim to absolute control over executive officers and facilitate constitutional challenges to statutory and regulatory provisions that protect their independence.<sup>5</sup>

These developments challenge the longstanding consensus in favor of civil service protections for federal officers as a means of preventing cronyism and political patronage.<sup>6</sup> The loss of such protections is particularly problematic for officials engaged in administrative adjudication because an unbiased decision-maker is central to our concept of procedural fairness.<sup>7</sup> Accordingly, institutional structures that protect the impartiality of agency adjudicators and insulate them from undue political pressures are essential to the constitutional legitimacy of agency adjudication.<sup>8</sup> Although there are

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5. See *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (invalidating the appointment of SEC ALJs as a violation of the Appointments Clause); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010) (invalidating good-cause requirement for the removal of inferior officers whose supervising principal officers are also subject to good-cause removal requirements because this arrangement interfered with the President's duty to "take care" that the laws are faithfully executed); Exec. Order No. 13,843, Excepting Administrative Law Judges from the Competitive Service, 83 Fed. Reg. 32,755 (July 13, 2018) (relying on *Lucia* to exempt ALJ appointments from competitive civil service hiring processes); Memorandum from the Solicitor General to Agency General Counsels on Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.) 9 (July 2018) [hereinafter Guidance Memorandum], <https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf> [<https://perma.cc/9ZFU-5PGF>] (indicating the Department of Justice will only defend good-cause removal requirements for ALJs if those requirements are "properly read"); see also *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (invalidating good-cause removal provision for director of Consumer Financial Protection Bureau and embracing a strong unitary executive principle under which good-cause removal requirements are permissible only as narrow exceptions to presidential control over removal).

6. See Todd Brower, *The Duty of Fair Representation Under the Civil Service Reform Act: Judicial Power to Protect Employee Rights*, 40 OKLA. L. REV. 361, 365 (1987) ("Civil service reform in the United States began with the Pendleton Act of 1883. . . . The Pendleton Act provided for appointment to the Federal Civil Service on a merit basis through competitive examination, rather than through political cronyism."); David Schultz, *The Party's Over: Partisan Gerrymandering and the First Amendment*, 36 CAP. U. L. REV. 1, 38 (2007) (noting that supporters of the Pendleton Act's reform "believed that the only way to eliminate spoils was to depoliticize the civil service").

7. See generally *infra* Part I.A.

8. Of course, administrative adjudicators do not enjoy life tenure or constitutional salary protections, which raises questions concerning compliance with Article III. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 455 (1986). Nonetheless administrative adjudication is, under current doctrine, generally valid when so-called "public rights" are involved, and even when private rights are involved if the agency's jurisdiction is not too broad and the courts retain sufficient authority to review the agency's decision. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (upholding adjudication of common law counterclaims by administrative agency);

many different types of adjudicatory officials within administrative agencies, we focus here on Administrative Law Judges (ALJs).<sup>9</sup>

There is an inherent conflict of interest when agency officials adjudicate matters in which the agency's position is adverse to those of one or more parties, especially if the agency is acting in an enforcement capacity.<sup>10</sup> The Administrative Procedure Act (APA) addressed these concerns by providing for a separation of functions in agency adjudication and applying civil service protections to agency adjudicators.<sup>11</sup> Notwithstanding the need for independent adjudication,

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Kuretski v. Comm'r, 755 F.3d 929, 939 (D.C. Cir. 2014) (“[T]he Supreme Court has recognized a category of cases involving public rights that Congress can constitutionally assign to non-Article III tribunals.” (internal quotations and citations omitted)). Our focus here, however, is not on the constitutionality of administrative adjudication *per se*, and we will take as a given that agencies will continue to exercise authority to conduct administrative adjudication.

9. See generally VANESSA K. BURROWS, U.S. CONG. RSCH. SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW (2010). Many agency adjudications are not subject to the provisions of the Administrative Procedure Act that are designed to safeguard agency independence, see *infra* Part I.B, because the agency's organic statute does not require adjudicatory hearings to be “on the record” or because the adjudication falls within an exception to those procedures. See 5 U.S.C. § 554(a) (providing that “[t]his section applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing” and listing six exceptions). Insofar as the agency officials who conduct such adjudications lack independence, these adjudicatory processes raise fundamental questions. See KENT BARNETT, MALIA REDDICK, LOGAN CORNETT & RUSSELL WHEELER, ADMIN. CONF. OF THE U.S., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL (Draft Feb. 14, 2018), [https://www.acus.gov/sites/default/files/documents/Non-ALJ%20Draft%20Report\\_2.pdf](https://www.acus.gov/sites/default/files/documents/Non-ALJ%20Draft%20Report_2.pdf) [<https://perma.cc/9UXY-BDFC>] (reviewing the use of non-ALJ decision-makers in agency adjudications).

10. See, e.g., Jennifer Nou, *Dismissing Decisional Independence Suits*, 86 U. CHI. L. REV. 1187, 1187 (2019) (noting “the central tension between agency management and ALJ decisional independence [in which] agency heads have long sought means of *ex ante* control over their adjudicators, aware that their ability to review and reverse ALJ decisions *ex post* is a resource-limited one”).

11. See, e.g., Administrative Procedure Act, § 5(c), Pub. L. No. 79-404, 60 Stat. 237, 240 (1948) (providing for separation of prosecutorial and adjudicatory functions); *id.* § 11 (providing for appointment of examiners “[s]ubject to the civil-service . . . laws,” for removal of examiners only for good cause determined by the Civil Service Commission, and for salary to be determined by the Commission “independently of agency recommendations or ratings”). Congress recodified the APA in 1966 as part of a comprehensive recodification of Title 5 of the United States Code. See Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378 (1966).

At the time of the APA's adoption, agency adjudicators whose adjudications were covered by that statute were referred to as hearing examiners. In 1978, Congress replaced the term “hearing examiner” in the APA and various other statutes with the new title, “Administrative Law Judge.” Pub. L. No. 95-251, § 2(a), 92 Stat. 183 (1978). Later that year, Congress enacted the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (1978), which established the current federal civil service system. “The CSRA, which became effective January 11, 1979, replaced the Civil Service

agencies retain the ultimate responsibility to enforce their statutory mandates and make policy within the scope of their delegated authority. Indeed, adjudicatory independence may work against impartial adjudication if it prevents agencies from removing or disciplining adjudicators who exhibit bias. Accordingly, agencies have a legitimate interest in ensuring that adjudicators resolve cases promptly, accurately, consistently, and in accordance with laws and regulations. To accomplish these ends, agencies provide training for ALJs, issue guidance and regulations for ALJ adjudications, and typically have de novo decisional authority when they review ALJ decisions. The line between appropriate agency oversight and improper interference with ALJ independence is not always an easy one to draw, however, and agencies sometimes seek to impose policies through informal mechanisms that arguably assert improper influence over ALJ decisions.<sup>12</sup>

Recent Supreme Court decisions and executive actions raise concerns about the neutrality and independence of ALJs. On the judicial front, the Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*<sup>13</sup> cast doubt on the constitutionality of good-cause removal provisions for ALJs who work in independent agencies.<sup>14</sup> More recently, *Lucia v. SEC*<sup>15</sup> invalidated the appointment of ALJs by an agency's chief ALJ, casting doubt on the validity of most ALJ appointments. Although agencies could easily cure this defect by

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Commission with three new independent agencies: Office of Personnel Management (OPM), which manages the Federal work force; Federal Labor Relations Authority (FLRA), which oversees Federal labor-management relations; and the [Merit Systems Protection Board (MSPB)]." *About MSPB*, MERIT SYS. PROT. BD., <https://www.mspb.gov/About/about.htm> [<https://perma.cc/625G-N43L>]; see Civil Service Reform Act of 1978, Pub. L. No. 95-454, §§ 201(a), 202(a), 92 Stat. 1118-31.

12. See, e.g., *Ass'n of Admin. L. Judges, Inc. v. Heckler*, 594 F. Supp. 1132 (D.D.C. 1984), *amended by* 1985 WL 71829 (D.D.C. 1985) (invalidating "Bellmon" review program in which the Social Security Administration targeted ALJs with high allowance rates for review because targeted review interfered with their decisional independence).

13. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513-14 (2010) (invalidating good-cause requirement for the removal of inferior officers whose supervising principal officers are also subject to good-cause removal requirements because this arrangement interfered with the President's duty to "take care" that the laws are faithfully executed).

14. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020), decided while this Article was in press, also invalidated a good-cause removal provision as a violation of Article II. Its implications for ALJs are less clear. As discussed further *infra* notes 183-210 and accompanying text, the decision likely permits the continued use of good-cause removal provisions for ALJs but may cast doubt on the good-cause removal provision for the Commissioner of the Social Security Administration.

15. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (invalidating the appointment of ALJs by SEC's chief ALJ because this arrangement violated the Appointments Clause).

ratifying prior appointments,<sup>16</sup> President Trump issued an Executive Order exempting ALJs from the competitive civil service hiring process conducted by OPM altogether.<sup>17</sup> In addition, President Trump's Solicitor General issued post-*Lucia* guidance advancing a legal position that would weaken good-cause removal protections for ALJs.<sup>18</sup> These developments, in turn, make ALJs more susceptible to informal, unwritten, and at times unlawful policy directives that circumvent both APA procedures and public scrutiny.<sup>19</sup>

In this Article, we suggest that one response to concerns about ALJ neutrality would be to follow the central panel model that many states use for administrative adjudication.<sup>20</sup> This approach would establish an independent corps of federal ALJs, who would no longer be officers of the agencies that employ them.<sup>21</sup> A properly constructed

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16. See, e.g., Patrick L. Butler, *Saving Disgorgement from Itself: SEC Enforcement After Kokesch v. SEC*, 68 DUKE L.J. 333, 362 (2018) (reporting that the SEC ratified prior ALJ appointments in accordance with the Appointments Clause after *Lucia*); David Hahn, *Late for an Appointment: Balancing Impartiality and Accountability in the IRS Office of Appeals*, 103 MINN. L. REV. 385, 420 (2018). The Supreme Court in *Lucia* declined to rule on the validity of the SEC's ratification order. *Lucia*, 138 S. Ct. at 2056 n.6.

17. Exec. Order No. 13,843, *Excepting Administrative Law Judges from the Competitive Service*, 83 Fed. Reg. 32,755 (July 13, 2018).

18. See Guidance Memorandum, *supra* note 5 (specifying that the Justice Department would only defend good-cause removal restrictions if they are interpreted so as to "allow for removal of an ALJ who fails to perform adequately or to follow agency policies, procedures, or instructions," so long as an administrative official is not "removed for any invidious reason or to influence the outcome in a particular adjudication"); see also *id.* (indicating that MSPB review must be "suitably deferential to the determination of the Department Head").

19. See *infra* Part II.C.

20. See REVISED MODEL STATE ADMIN. PROC. ACT § 601 (UNIF. L. COMM'N 2010), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=3ab796d4-9636-d856-48e5-b638021eb54d> [<https://perma.cc/QG7H-45CS>] (providing for the creation of an Office of Administrative Hearings). For a history of the development of the central panel model in the states and an assessment of its pros and cons in that context, see Malcolm C. Rich & Alison C. Goldstein, *The Need for a Central Panel Approach to Administrative Adjudication: Pros, Cons, and Selected Practices*, 39 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 4 (2019), which states that, "The central panel approach was created to bring a new level of due process to state-based administrative adjudication."

21. The Chief Administrative Law Judge and Director of the State of North Carolina's Office of Administrative Hearings has described a central panel as "an autonomous, quasi-judicial, executive branch agency composed of an independent cadre of administrative law judges . . . [which] is designed to separate the hearings function from the investigative and prosecutorial functions in state administrative law." Judge Julian Mann, III, *Striving for Efficiency in Administrative Litigation: North Carolina's Office of Administrative Hearings*, 35 J. NAT'L ASS'N ADMIN. L. JUDICIARY 60, 64 (2015) (footnote omitted); see also Judge Julian Mann, III, *Administrative Justice: No Longer Just a Recommendation*, 79 N.C. L. REV. 1639, 1641 (2001) (explaining that North Carolina's central panel approach was "established to ensure that administrative decisions are

central panel could avoid the constitutional issues presented by *Lucia* and *Free Enterprise Fund* and provide greater security for ALJ neutrality and independence. At the same time, ALJs could continue to specialize in cases for particular agencies so as to promote specialized expertise and the agency itself would retain final decisional authority and the ability to make policy through legislative rules and precedential adjudications that bind independent ALJs.

The Article proceeds in three steps. First, we discuss the fundamental requirement of impartial adjudication in light of the constitutional requirements of Article III and due process.<sup>22</sup> Second, we consider how judicial decisions and executive actions raise concerns about the stability and sufficiency of current protections for ALJ independence.<sup>23</sup> Finally, we suggest that the creation of an independent ALJ corps using the central panel model is an appropriate and effective response and sketch out the basic contours of such an approach.<sup>24</sup>

Ultimately, the independence of administrative adjudication is a critical protection for the rule of law. Although other recent threats to the rule of law may deservedly garner the headlines, we should not lose sight of the critical role that impartial agency adjudication plays. Taking reasonable steps toward securing independent and impartial adjudication by agencies is a nonpartisan issue that Congress can and should address.

## I. INDEPENDENCE IN ADMINISTRATIVE ADJUDICATION

### A. CONSTITUTIONAL SAFEGUARDS

The Constitution safeguards the impartiality of federal adjudications through structural protections in Article III and individual rights protections under the Due Process Clause of the Fifth Amendment.<sup>25</sup>

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made in a fair and impartial manner to protect the due process rights of citizens who challenge administrative action and to provide a source of independent administrative law judges . . . [to] prevent the commingling of legislative, executive, and judicial functions in the administrative process" (internal quotations omitted)).

22. See *infra* Part I.

23. See *infra* Part II.

24. See *infra* Part III.

25. See U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."); *id.* amends. V, XIV (prohibiting the deprivation of "life, liberty, or property without due process of law"). The Constitution also provides for trial by jury in both civil and criminal cases. *Id.* amends. VI (criminal cases), VII (civil cases). Because ALJs lack the authority to conduct jury trials and cannot adjudicate cases if the right to a jury trial attaches and has not been waived, ALJ independence and the right to a jury trial do not interact in meaningful ways.

Although some forms of administrative adjudication may violate Article III,<sup>26</sup> under current doctrine the independence of the administrative adjudicators who serve in place of Article III judges is not a relevant consideration in making that determination. Thus, the critical constitutional protection for the independence of administrative adjudication is procedural due process, which requires notice and the opportunity to be heard by an unbiased decision-maker when the government deprives a person of life, liberty, or property.<sup>27</sup>

At first blush, administrative adjudication is difficult to square with Article III, which vests judicial power in the federal courts staffed by judges with life tenure and salary protections.<sup>28</sup> Nonetheless, the Supreme Court has long recognized that many executive actions resemble judicial decisions in that they require the determination of facts and the application of law.<sup>29</sup> Indeed, even quintessentially executive functions, such as deciding to prosecute an accused person for the commission of a crime, require that the prosecutor make a factual determination concerning the defendant's conduct and apply the law to assess whether a violation has occurred. Thus, "quasi-judicial" agency decisions are a well-established feature of administrative law.

Over time, the Supreme Court has developed two distinct doctrines that accommodate most forms of administrative adjudication. First, Congress is generally free to delegate adjudication of so-called "public rights" to administrative agencies.<sup>30</sup> Second, administrative

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26. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (articulating a three-part test under which administrative adjudication may violate Article III if it transfers the essential attributes of judicial power from courts to an agency, concerns rights at the core of the judicial power, and reflects improper or inadequate legislative purposes).

27. See, e.g., *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.").

28. U.S. CONST. art. III, § 1.

29. See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855) (upholding administrative adjudication of public rights). See generally Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review*, 58 ADMIN. L. REV. 499, 507–24 (2006) (discussing origins and rationale of the public rights doctrine).

30. See *Kuretski v. Comm'r*, 755 F.3d 929, 939–42 (D.C. Cir. 2014); cf. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 ("[W]hen Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'" (quoting *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 455 (1977))). The public rights doctrine is often defended on the theory that public rights implicate sovereign immunity and a party who would otherwise be denied any remedy whatsoever cannot complain that Congress has provided only a nonjudicial one. See *id.* at 68–69 (Scalia, J.,



agencies may function as adjunct factfinders for the courts,<sup>31</sup> provided that the essential functions of the judiciary are retained by the courts.<sup>32</sup> The independence and impartiality of agency adjudicators is not a relevant consideration under either of these doctrines.<sup>33</sup>

Thus, constitutional challenges to the independence and impartiality of agency adjudications generally arise under procedural due process. The first step in procedural due process analysis is to determine whether the government has deprived a person of a protected interest in life, liberty, or property.<sup>34</sup> In light of the Supreme Court's recognition that legal entitlements to government benefits, licenses, jobs, and other benefits are protected interests,<sup>35</sup> most administrative adjudications trigger due process safeguards. The core requirements of procedural due process are notice and the opportunity to be heard by an impartial or unbiased decision-maker.<sup>36</sup> Whatever form the

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concurring in part and concurring in the judgment). This explanation is unsatisfactory on many levels, *see Levy & Shapiro, supra* note 29, at 519–24, not the least of which is that public rights may include cases in which the government is not a party. Recent cases generally indicate, without extended discussion, that adjudication of public rights is sufficiently executive in character to allow for administrative adjudication. *See, e.g., Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (“This Court has not definitively explained the distinction between public and private rights [but] the doctrine covers matters which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.” (internal quotations and citations omitted)).

31. *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (“In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters, and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages.”).

32. The Court currently applies a multi-factor test from *Schor* to determine whether courts retain a sufficient role. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986). Under the *Schor* test, courts consider (1) the extent to which the essential attributes of judicial power have been taken from the courts and given to the agency in light of the agency's jurisdiction, the scope of judicial review, and other considerations; (2) the nature and origins of the right being asserted; and (3) the reasons for delegating adjudicatory authority to the agency. *Id.* It is unclear whether administrative adjudication of public rights is per se valid or is governed by the *Schor* test, but even if the *Schor* test does apply, the nature and origins of the right as a public right means that the *Schor* test is normally satisfied by administrative adjudication of public rights.

33. Under *Granfinanciera*, a right is a “public right” if the government is a party or if the right is a congressionally created right that is part of a comprehensive regulatory scheme. 492 U.S. at 54.

34. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972).

35. *See Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970).

36. *See* ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT 740–41 (3d ed. 2020).

notice and hearing take, those safeguards are not meaningful if the decision-maker is not impartial.<sup>37</sup>

Of course, impartiality may mean different things in different contexts.<sup>38</sup> Bias may arise because of a decision-maker's personal prejudices or a relationship to the parties in a particular case.<sup>39</sup> Our focus here is on more systemic concerns related to structures that secure ALJ independence, by which we mean freedom from political pressures that compromise the ALJ's ability to decide cases on their merits in light of the facts in the record and the applicable law. The expectation that ALJs will follow valid agency policies adopted through legislative rules, precedential adjudications, or other appropriate means is not inconsistent with adjudicatory independence. On the other hand, institutional structures that fail to protect the independence of ALJs may violate due process on a systemic level or lead to violations in particular cases.

Despite the importance of an impartial decision-maker to procedural fairness, it is typically difficult to establish a due process violation based on bias. The courts afford a general presumption of impartiality for government officials who make quasi-judicial decisions.<sup>40</sup> This presumption is ordinarily difficult to rebut, and claims of bias in individual cases usually fail.<sup>41</sup> The presumption does not apply, however, when the particular circumstances create too great a risk of bias or appearance of impropriety, such as when the decision-maker has a

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37. Thus, as early as 1610, in *Dr. Bonham's Case* (1610) 77 Eng. Rep. 646, 652 (KB), Lord Coke stated broadly that "[t]he Censors, cannot be Judges, Ministers, and parties; Judges, to give sentence or judgment; Ministers to make summons; and Parties, to have the moiety of the forfeiture, . . . and one cannot be Judge and Attorney for any of the parties."

38. See *Republican Party of Minn. v. White*, 536 U.S. 765, 775–78 (2002) (identifying three distinct meanings of impartiality in the context of canons of conduct regulating judicial campaign speech).

39. See, e.g., *United Nurses Ass'ns of Cal. v. NLRB*, 871 F.3d 767, 778 (9th Cir. 2017) (refusing to infer ALJ bias against an employer charged with unfair labor practices based on the ALJ's adverse credibility determinations, unfavorable evidentiary rulings, questioning of the employer's witnesses, and alleged expressions of impatience or anger).

40. See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (holding that claims of bias "must overcome a presumption of honesty and integrity in those serving as adjudicators").

41. Thus, for example, Social Security claimants often argue unsuccessfully that an ALJ was biased against them. *E.g.*, *Spicher v. Berryhill*, 898 F.3d 754 (7th Cir. 2018); *Perkins v. Astrue*, 648 F.3d 892 (8th Cir. 2011); *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685 (9th Cir. 2009); *Keith v. Barnhart*, 473 F.3d 782 (7th Cir. 2007); *Bayliss v. Barnhart*, 427 F.3d 1211 (9th Cir. 2005).

financial stake in the outcome,<sup>42</sup> a relationship with one of the parties,<sup>43</sup> or prior involvement with the case.<sup>44</sup>

Nonetheless, the Constitution does not ordinarily preclude the current model for agency adjudication, even though the agency employs the ALJs (or other officials) who conduct its adjudications. Thus, for example, the Supreme Court has upheld the adjudication of benefit claims by agency officials despite the potential conflict between the official's role as neutral adjudicator and the agency's interests in preserving its resources by denying benefits.<sup>45</sup> Particular institutional arrangements or efforts to control agency adjudicators in particular cases, however, may violate due process.<sup>46</sup>

#### B. STATUTORY PROTECTIONS FOR ALJ INDEPENDENCE

The fairness of agency adjudications was one of the central concerns that fueled the adoption of the APA, which established important protections for the independence of ALJs (although they were called hearing examiners at the time of the APA's adoption).<sup>47</sup> First, § 554(d) mandated the separation of an agency's prosecutorial and adjudicatory functions and prohibited *ex parte* contacts during an adjudication.<sup>48</sup> Second, the APA provided that hearing examiners would

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42. See, e.g., *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972) (holding that adjudication by mayor whose town benefited from proceeds violated due process).

43. See, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (holding that state supreme court justice's participation in case involving donor who contributed millions of dollars to his campaign violated due process).

44. See, e.g., *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (“[U]nder the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case.”).

45. See *Schweiker v. McClure*, 456 U.S. 188, 199–200 (1982) (upholding adjudication of Medicare Part B claims by employees of fiscal intermediaries that processed claims for agency); *Withrow*, 421 U.S. at 57 (upholding the revocation of a medical license by a board that combined investigatory and adjudicatory functions); *Richardson v. Perales*, 402 U.S. 389 (1971) (rejecting due process challenge to ALJs' wearing “two hats” in disability benefit adjudications).

46. For example, if an agency awarded pay increases based on adjudicatory outcomes that favored the agency, such an arrangement would certainly violate due process.

47. See generally *Butz v. Economou*, 438 U.S. 478, 513–14 (1978) (discussing the APA's safeguards for independence of hearing examiners and concluding that they were sufficiently like judges so as to warrant judicial immunity).

48. See 5 U.S.C. § 554(d). First, paragraph (d)(1) specifies that a hearing examiner may not “consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate.” *Id.* § 554(d)(1). Congress later expanded and strengthened the ban on *ex parte* communications. See *id.* § 557(d). Second, under § 554(d)(2), the hearing examiner may not “be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or

be subject to civil service protections, including merit selection, good-cause requirements for adverse employment actions, and salary determinations made independently of any agency performance evaluation.<sup>49</sup>

The provisions of § 554(d) require an institutional separation between the agency's enforcement staff and its adjudicatory functions.<sup>50</sup> This separation is likely necessary to prevent due process violations, insofar as the role of the agency in enforcing the law is clearly incompatible with its operation as an impartial adjudicator.<sup>51</sup> This institutional separation is not absolute, however. First, the APA's separation of functions constraints do not apply "to the agency or a member or members of the body comprising the agency."<sup>52</sup> Second, non-adversarial procedures in which an ALJ wears "two hats" are also permissible, at least in cases involving the administration of benefits.<sup>53</sup> While these institutional separation provisions may be imperfect, they have functioned reasonably well and have not been affected by recent developments.

Thus, our principal concerns relate to the erosion of civil service protections. As noted above,<sup>54</sup> the original APA applied these protections to hearing examiners, as ALJs were then called, and those protections were carried forward when Congress created the position of

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prosecuting functions for an agency." *Id.* § 554(d)(2). Further, "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings." *Id.*

Notwithstanding this institutional separation, the initiation by an agency of enforcement actions presided over by an ALJ who works for the agency creates at least the appearance of a conflict of interest that may undermine the perception of ALJ independence. Thus, the central panel model we endorse below may be desirable even if the recent threats to ALJ independence that are the focus of this Article had not occurred.

49. See *infra* notes 50–58 and accompanying text (discussing these protections).

50. See also 5 U.S.C. § 3105 ("Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.").

51. See, e.g., *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1910 (2016) (holding that it violated due process for a former prosecutor with prior involvement in a case to sit as a judge in a subsequent appeal).

52. 5 U.S.C. § 554(d)(C).

53. See *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (rejecting the argument that a Social Security hearing examiner's "advocate-judge-multiple-hat" role violated due process because a hearing examiner is not acting as counsel, but as an examiner with the duty of developing facts); see also *Schweiker v. McClure*, 456 U.S. 188, 199–200 (1982) (upholding the adjudication of Medicare Part B claims by employees of "fiscal intermediaries").

54. See *supra* note 11 and accompanying text.

ALJ and revised the civil service laws. These civil service protections include (1) good-cause requirements for disciplinary actions, including removal and salary reductions;<sup>55</sup> (2) salary determinations insulated from the agency's control or influence;<sup>56</sup> and (3) competitive appointments.<sup>57</sup> These protections play an essential role in ensuring the independence and impartiality of ALJs.

The first two protections—good cause for removal or other discipline and independent salary determinations—mirror the protections that Article III affords federal judges, albeit in somewhat weakened form. Good-cause removal is akin to life tenure, although the grounds that constitute good cause for removal are broader than the grounds for impeachment and removal of judges. ALJs are also exempt from performance evaluations, which prevents the agencies that employ ALJs from adjusting ALJ salaries based on the results of their decisions.<sup>58</sup>

Until recently,<sup>59</sup> ALJs were also subject to the OPM's competitive appointment processes.<sup>60</sup> Under this system, appointing agencies are

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55. See 5 U.S.C. § 7521(a) (providing that an agency may take an action “against an administrative law judge appointed under section 3105 of this title . . . only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board” and listing removal and reduction in pay as covered actions).

56. See 5 U.S.C. § 5372 (establishing pay scales for ALJs).

57. See 5 U.S.C. § 3304; Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1654 (2016) [hereinafter Barnett, *Against AJs*].

58. See 5 U.S.C. § 4301(2)(D) (excluding ALJs from the definition of “employee” for purposes of civil service performance evaluations provisions); James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN. L.J. AM. U. 629, 631–32 (1994) (discussing provisions of original APA prohibiting performance evaluation of ALJs and Congress's subsequent rejection of proposals for performance evaluation of ALJs in order to protect their decisional independence). Not everyone shares the view that prohibiting performance evaluations of ALJs is a good thing. A 1992 ACUS report, for example, recommended periodic performance evaluations. See ADMIN. CONF. OF THE U.S., RECOMMENDATION 92-7: THE FEDERAL ADMINISTRATIVE JUDICIARY (1992), [https://www.acus.gov/sites/default/files/documents/92-7\\_0.pdf](https://www.acus.gov/sites/default/files/documents/92-7_0.pdf) [<https://perma.cc/6YNW-NM5C>]; see also Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589 (1994).

59. See *infra* notes 89–131 and accompanying text (discussing executive order exempting ALJs from competitive appointment).

60. See 5 U.S.C. § 3304(b) (“An individual may be appointed in the competitive service only if he has passed an examination or is specifically excepted from examination under section 3302 of this title.”). Although the original APA provided explicitly for the appointment of hearing examiners through competitive processes, this explicit requirement was eliminated when the APA was recodified, apparently because Congress thought it unnecessary insofar as competitive selection was the default rule for federal employees. See 5 U.S.C. § 3105 note (“The words ‘Subject to the civil service’ are omitted as unnecessary inasmuch as appointments are made subject to the civil

required to select an employee from the top three eligible candidates based on examination scores (after adjustment for veterans' preferences).<sup>61</sup> Competitive appointment is designed primarily to prevent cronyism and ensure that appointments are based on merit,<sup>62</sup> but as applied to ALJs it also has the effect of depoliticizing these appointments in a manner that promotes the independence and impartiality of adjudication.<sup>63</sup>

As this Part has explained, both the Constitution and federal statutes have provided important protections for ALJ independence. As Part II demonstrates, these safeguards are at risk as a result of a combination of recent judicial decisions and presidential actions.

## II. THREATS TO ALJ INDEPENDENCE

Through the APA and civil services laws, Congress incorporated statutory protections for the independence of ALJs, including competitive merit selection and good-cause requirements for removal or other disciplinary actions.<sup>64</sup> In the last decade, however, a

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service laws unless specifically excepted.”). OPM regulations, however, explicitly provided for the application of competitive hiring to ALJs. *See* 5 C.F.R. § 930.204(a) (2020) (“An agency may appoint an individual to an administrative law judge position only with prior approval of OPM, except when it makes its selection from the list of eligibles provided by OPM.”).

61. *See* 5 U.S.C. § 3318(a) (“The nominating or appointing authority shall select for appointment to each vacancy from the highest three eligibles . . .”).

62. *See, e.g.*, Thomas C. Mans, *Selecting the ‘Hidden Judiciary’: How the Merit Process Works in Choosing Administrative Law Judges (Part I)*, 63 JUDICATURE 60, 64–65 (1979) (“The introduction of a merit system was justified primarily [by] . . . the attentive public’s perception of the legitimacy of adjudication and . . . issues of competence . . .”).

63. *See* *Nash v. Califano*, 613 F.2d 10, 16 (2d Cir. 1980) (“The APA creates a comprehensive bulwark to protect ALJs from agency interference. The independence granted to ALJs is designed to maintain public confidence in the essential fairness of the process . . . by ensuring impartial decisionmaking.”); *Advancing the Judicial Independence and Efficiency of the Administrative Judiciary: A Report to the President-Elect of the United States*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 93, 99 (2009) (stating that APA provisions designed to safeguard ALJ independence include “a merit competitive civil service selection process administered by OPM . . . to ensure that ALJs are . . . able to exercise independent judgment in deciding cases without the influence of agency pressure”); *Article II—Appointments Clause—Officers of the United States—Lucia v. SEC*, 132 HARV. L. REV. 287, 288 n.13 (2018) (noting that, before *Lucia*, ALJs “were selected through a competitive civil service hiring process designed to ensure their expertise and impartiality”). Similar considerations have led many states to adopt merit-based selection processes for judges, although there are some who criticize these mechanisms as antidemocratic and prone to a different sort of politicization. *See, e.g.*, Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 860 (2002) (“Analysis likewise indicates that the merit selection process does not remove the effects of politics. Rather it alters the dynamics of how political considerations are manifested.”).

64. As noted above, these safeguards mirror to some extent the protections

combination of judicial decisions creating constitutional uncertainty and executive branch actions targeting appointment and removal have undermined ALJ independence. These shifts in administrative law doctrine and processes enhance the degree to which the President and his political appointees can control or influence, directly or indirectly, ALJ decision-making. In this Part, we explore the growing threats to ALJ independence.

#### A. APPOINTMENTS

Two recent developments concerning the appointment of ALJs have combined to remove them from the competitive hiring process. First, in *Lucia v. SEC*,<sup>65</sup> the Supreme Court held that ALJs are officers of the United States whose appointment by agency personnel other than the head of the agency violates the Appointments Clause. Second, the Trump Administration responded to *Lucia* by issuing Executive Order 13,843,<sup>66</sup> which exempts ALJs from the competitive hiring process. As a result, the traditional safeguards intended to ensure ALJ competence and prevent cronyism and patronage are no longer in place.<sup>67</sup>

##### 1. *Lucia* and ALJ Appointments

The Constitution's Appointments Clause provides two different methods for the appointment of executive officers. First, it vests in the President, with the advice and consent of the Senate, the authority to appoint "Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law."<sup>68</sup> Second, it authorizes Congress to vest the power to appoint "inferior Officers . . . in the President alone, in the Courts of Law, or in the

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designed to assure the independence and impartiality afforded to, and expected by, Article III judges. *See supra* notes 51–54 and accompanying text. *But cf.* Nou, *supra* note 10, at 1190 ("ALJ decisional independence is . . . distinct from the more familiar notion of Article III judicial independence [because] ALJs hold adjudicatory proceedings but also reside in the lower ranks of the executive branch hierarchy.").

65. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

66. Exec. Order No. 13,843, Excepting Administrative Law Judges from the Competitive Service, 83 Fed. Reg. 32,755 (July 13, 2018). The Solicitor General's Office relied on *Lucia* to issue guidance that signals an effort to weaken good-cause removal protections for ALJs as well. *See* Guidance Memorandum, *supra* note 5; *infra* notes 188–96 and accompanying text (discussing Guidance Memorandum and its implications).

67. *See* Peter M. Shane, *Trump's Quiet Power Grab*, ATLANTIC (Feb. 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/trumps-quiet-power-grab/607087> [<https://perma.cc/KF7U-SEVV>] ("[T]he Trump administration wants to upend a long-standing system for assuring both the reality and appearance of fairness in agency adjudication . . .").

68. U.S. CONST. art. II, § 2.

Heads of Departments.”<sup>69</sup> The Appointments Clause only applies to “Officers of the United States,” which the Supreme Court has construed to include “any appointee exercising significant authority pursuant to the laws of the United States.”<sup>70</sup> Under the Appointments Clause, then, the critical issues for the appointment of ALJs are (1) whether they are officers of the United States and (2) if so, whether they qualify as “principal” or inferior officers.

It seems reasonably clear that ALJs are officers of the United States. In *Freytag v. Commissioner of Internal Revenue*,<sup>71</sup> the Supreme Court upheld the Tax Court’s power to appoint special judges. It concluded that special judges were officers of the United States because of “the significance of the duties and discretion that [they] possess,”<sup>72</sup> but it upheld their appointment by the Chief Judge of the Tax Court because the Tax Court is a “Court of Law” for purposes of the Appointments Clause.<sup>73</sup> The latter holding necessarily implies that special judges are inferior officers, because principal officers may only be appointed by the President with Senate consent.<sup>74</sup> The decision in *Freytag* set the stage for the Court’s consideration in *Lucia* as to whether ALJs are officers of the United States.

In *Lucia*, the SEC had initiated an administrative enforcement proceeding against the defendant and his investment company, alleging violations of securities laws.<sup>75</sup> An ALJ appointed by SEC staff pursuant to the OPM’s competitive hiring process conducted a hearing and issued an initial decision finding violations and imposing sanctions.<sup>76</sup> The defendant argued that the ALJ’s decision was invalid

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69. *Id.*

70. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). Congress has the authority to specify the method of appointing government officials who do not qualify as officers of the United States (sometimes referred to simply as employees or “lesser functionaries”). *Freytag v. Comm’r*, 501 U.S. 868, 880 (1991).

71. 501 U.S. 868.

72. *Id.* at 881. The Court reasoned that the office of special trial judge is “established by Law” in that “the duties, salary, and means of appointment for that office are specified by statute,” and that special trial judges “perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.” *Id.* at 881–82.

73. *Id.* at 888–92.

74. *See, e.g., id.* at 882 (referring to conclusion that “special trial judges are ‘inferior Officers’”).

75. *Lucia v. SEC*, 138 S. Ct. 2044, 2049–50 (2018).

76. *Id.* at 2050 (noting that “the Commission had left the task of appointing ALJs, including Judge Elliot, to SEC staff members”).



because he had not been constitutionally appointed.<sup>77</sup> The Supreme Court agreed, relying on *Freytag* to hold that SEC ALJs are officers of the United States whose appointment must comply with the Appointments Clause.<sup>78</sup>

The Court in *Lucia* reasoned that, like the special judges in *Freytag*, SEC ALJs hold appointments to a position created by statute and “exercise the same ‘significant discretion’ when carrying out the same ‘important functions’” as special judges do.<sup>79</sup> Indeed, SEC ALJs “can play [a] more autonomous role”<sup>80</sup> to the extent that special judge decisions must be reviewed by a Tax Court Judge,<sup>81</sup> while the SEC may decline to review an ALJ decision, which then becomes the agency’s decision.<sup>82</sup> Because SEC ALJs were therefore officers of the United States, they could not be appointed by SEC staff, and the Court

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77. The D.C. Circuit, sitting en banc, divided evenly, issuing a per curiam opinion upholding the ALJ’s decision. *Id.* at 2049–51 (citing Raymond J. Lucia Cos. v. SEC, 868 F.3d 1021 (D.C. Cir. 2017)). The Supreme Court granted review to resolve a circuit split, which arose because the 10th Circuit had held that SEC ALJs were officers of the United States whose appointment was governed by the Appointments Clause. *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), *reh’g and reh’g en banc denied*, 855 F.3d 1128 (10th Cir. 2017).

78. See *Lucia*, 138 S. Ct. at 2053 (“*Freytag* says everything necessary to decide this case.”); see also *Jones Bros. v. Sec’y of Lab.*, 898 F.3d 669 (6th Cir. 2018) (holding, based on *Lucia*, that appointment of Mine Safety and Health Administration ALJ violated the Appointments Clause).

79. *Lucia*, 138 S. Ct. at 2053. Both sets of adjudicators “have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges,” including the authority to take testimony, conduct trials, rule on the admissibility of evidence, enforce compliance with discovery orders, and punish other contemptuous conduct. *Id.*

80. *Id.*

81. See 26 U.S.C. § 7443A(c) (providing that the Tax Court may authorize a special trial judge “to make the decision of the court” in specified proceedings, “subject to such conditions and review as the court may provide”); see also *Freytag v. Comm’r*, 501 U.S. 868, 874 (1991) (referring to special trial judges’ “lack of authority actually to decide [cases concerning liens and levies], which is reserved exclusively for judges of the Tax Court”).

82. 138 S. Ct. at 2053–54; see also *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019) (holding that Administrative Patent Judges (APJs) are officers of the United States and that their authority to issue final decisions on behalf of the Patent and Trademark Office without review by a principal officer made them principal officers, but severing and invalidating statutory provision that imposed good-cause restrictions on removal of APJs, thereby converting them into inferior officers). The Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 508–10 (2010), also invalidated good-cause removal restrictions to cure a constitutional violation (the existence of double good-cause removal restrictions). According to Professor Barnett, “courts frequently sever offending removal provisions as a cure for Article II violations.” Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1718 (2020) [hereinafter Barnett, *Impartiality*].

remanded for a new hearing before a properly appointed ALJ.<sup>83</sup> Although *Lucia* addressed only the status of SEC ALJs, its analysis appears to apply equally to ALJs in other agencies, who are therefore likely officers of the United States as well.<sup>84</sup>

Although *Lucia* did not discuss it,<sup>85</sup> ALJs are probably inferior officers whose appointment Congress may delegate to the heads of departments, rather than principal officers who must be appointed by the President with Senate consent.<sup>86</sup> The prevailing test for making that determination is whether the officer's "work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."<sup>87</sup> Applying this

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83. That person could not be the ALJ who issued the original decision, even if he were validly reappointed, because "[h]e cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which *Lucia* is entitled." *Lucia*, 138 S. Ct. at 2055. On remand, the D.C. Circuit remanded to the SEC for a new hearing before another ALJ or the Commission. *Raymond J. Lucia Cos. v. SEC*, 736 F. App'x 2 (D.C. Cir. 2018). Compare *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015) (holding that decision by Copyright Royalty Judges properly appointed by the Librarian of Congress following invalidation of decision by an improperly appointed panel of judges remedied the original constitutional violation, even though the new panel reviewed the existing record de novo instead of holding a new hearing).

84. In a pending case, however, an organization of Social Security ALJs has argued that federal ALJs should be treated as mere employees because of "a labyrinth of detailed agency regulations, policies and guidelines that cabin their decision-making processes." See Brief of Amicus Curiae SSA ALJ Collective in Support of Court-Appointed Amicus Curiae at 9, *Fleming v. U.S. Dep't of Agric.*, No. 17-1246 (D.C. Cir. Feb. 6, 2020); see also *id.* at 5 (arguing that "the holding in *Lucia* is narrow and relates only to SEC ALJs" and that "there can be no one-size-fits-all approach to the Article II question"). In the alternative, the Collective has argued that even if ALJs are officers of the United States, the good-cause removal protections provided by 5 U.S.C. § 7521 are not unconstitutional because they "are not an inappropriate impediment to executive power given the constitutional pedigree of the APA and the legitimate need for decisional independence for adjudicators." *Id.* at 14–15.

85. The Court's opinion only considered whether SEC ALJs are officers of the United States and did not refer to them as either principal or inferior officers. Likewise, the Court's discussion of the remedy referred only to a new hearing before a "properly appointed official." 138 S. Ct. at 2055; see also *id.* at 2056 n.1 (Thomas, J., concurring) ("I address only the dividing line between 'Officers of the United States,' who are subject to the Appointments Clause, and nonofficer employees, who are not. I express no view on . . . the difference between principal officers and inferior officers under the Appointments Clause.").

86. This is the position that the Solicitor General took in the wake of *Lucia*. See Guidance Memorandum, *supra* note 5, at 2 (indicating that "all ALJs and similarly situated administrative judges should be appointed as inferior officers under the Appointments Clause").

87. *Edmond v. United States*, 520 U.S. 651, 663 (1997); see also *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 510 (2010). In an earlier decision, the

test to other classes of administrative judges, lower courts have considered factors such as whether decisions are subject to administrative review, the employing agency's authority to engage in administrative oversight, and the power to remove officers.<sup>88</sup> As we will discuss more fully below, ALJ decisions are subject to de novo administrative review within the agency that employs them, which suggests that they are inferior officers.<sup>89</sup> The requirement of good cause to remove ALJs, however, might support the contention that they are principal officers because it enhances their authority and weakens the oversight to which they are subject.<sup>90</sup>

If, as the Solicitor General has concluded, ALJs are inferior, not principal officers, agencies could correct the problem of improper ALJ appointment under *Lucia* if the head of the agency reappoints its ALJs, clearing them to issue decisions in future cases.<sup>91</sup> While the immediate

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Court had identified several factors that are relevant to distinguishing between principal and inferior officers, including whether the officer (1) is removable by an officer beneath the President; (2) has or lacks significant policymaking discretion or authority; (3) has limited jurisdiction; and (4) has limited tenure. *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988). The lower courts noted some tension between the two approaches. *See, e.g., United States v. Hilario*, 218 F.3d 19, 24 (1st Cir. 2000).

88. *See Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1335 (Fed. Cir. 2019) *reh'g and reh'g en banc denied*, 953 F.3d 760 (Fed. Cir. 2020) (“The lack of any presidentially-appointed officer who can review, vacate, or correct decisions by [administrative patent judges] combined with the limited removal power lead us to conclude . . . that these are principal officers.”); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012) (engaging in similar reasoning to conclude that Copyright Royalty Judges are principal officers). Interestingly, both *Arthrex* and *Intercollegiate* cured the constitutional violation by severing the good-cause removal provision in the respective statutes, thereby converting the officers in question into inferior officers subject to removal by officers removable at will by the President.

89. *See* 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”).

90. *See infra* notes 168–75 and accompanying text (discussing interaction between *Lucia* and good-cause removal requirements for purposes of ALJs' status as principal or inferior officers).

91. *See Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.6 (2018) (noting that the SEC had ratified the appointments of ALJs, but declining to rule on the effect of the ratification); *Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process—UPDATE, EM-18003 REV 2*, SOC. SEC. ADMIN. (Aug. 6, 2018), <https://secure.ssa.gov/apps10/reference.nsf/links/08062018021025PM> [<https://perma.cc/C7MF-S7HL>] (“On July 16, 2018, the Acting Commissioner ratified the appointment of ALJs and AAJs and approved their appointments as her own in order to address any Appointments Clause questions involving SSA claims.”); Giles D. Beal IV, *Judge, Jury, and Executioner: SEC Administrative Law Judges Post-Dodd Frank*, 20 N.C. BANKING INST. 413, 437 (2016) (“In order to fix the constitutional flaw in the appointment process for its ALJs, the SEC could implement a relatively easy solution: re-appoint the ALJs in a constitutionally valid manner.”). This remedy, however, would not resolve the question of how the agency must proceed with

holding of *Lucia* thus requires an adjustment to the appointment of ALJs, that adjustment, in itself, does not present a significant threat to ALJ independence so long as agency heads appoint ALJs pursuant to competitive civil service processes. The Trump Administration, however, seized upon *Lucia* to exempt ALJ hiring from the competitive civil services process altogether, an action that does present a threat to ALJ independence.<sup>92</sup>

## 2. Executive Action Exempting ALJ Appointment from the Civil Service

As indicated above, merit selection pursuant to civil service hiring processes has been a core protection for administrative adjudication since the adoption of the APA in 1946.<sup>93</sup> After civil service reform legislation in 1978, the so-called “rule of three,” applied to ALJ hiring. Under this process, OPM would rank ALJ applicants based on the results of a civil service examination it administers, and an agency was required to select an ALJ from the top three ranked candidates.<sup>94</sup>

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respect to cases decided by improperly appointed ALJs. For discussion of this issue, see generally Kent Barnett, *The Consumer Financial Protection Bureau's Appointment with Trouble*, 60 AM. U. L. REV. 1459, 1481–85 (2011) [hereinafter Barnett, *Trouble*]; and Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481 (2014) [hereinafter Barnett, *Toil*].

92. As will be discussed further below, see *infra* notes 188–96 and accompanying text, *Lucia* may also support executive efforts to assert broader power to remove ALJs. See Barnett, *Impartiality*, *supra* note 82, at 1697–98 (arguing that *Lucia* triggers concern over “ALJs’ insulation” and “undermines [their] . . . appearance of impartiality” by raising the possibility that supervising officials can remove them at will); see also *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (reasoning that good-cause removal requirements are permissible only as narrow exceptions to presidential control over removal).

93. See *supra* note 11. The original APA mandated that hearing examiners who presided over APA adjudications (when the agency itself did not) had to be hired using civil service processes. This practice was carried forward after the APA was recodified, even though the recodification omitted an explicit statutory requirement. See Pub. L. No. 89-554, §§ 3317–18, 80 Stat. 378, 421 (1966). The Civil Service Commission adopted regulations explicitly extending civil service hiring procedures to hearing examiners in 1968. Administrative Personnel, Civil Service Commission, 33 Fed. Reg. 12,402, 12,427 (Sept. 4, 1968).

94. See 5 U.S.C. § 3318(a); Barnett, *Against AJs*, *supra* note 57 (describing the “Rule of Three”). Under OPM’s process, ALJ applicants had to have at least seven years’ experience as an attorney and at least two years’ litigation experience. They were ranked on a 100-point scale based on their experience, references, interview, and test scores. Jeffrey S. Lubbers, *The Regulatory Accountability Act Loses Steam but the Trump Executive Order on ALJ Selection Upturned 71 Years of Practice*, 94 CHI.-KENT L. REV. 741, 744–45 (2019). Disabled veterans were given a preference. *Id.* at 745. Then-Professor Antonin Scalia argued that Congress did not intend for OPM to rank ALJ candidates. Rather, “it was evidently contemplated that the Civil Service Commission would establish qualifying requirements by general rule, and that the agencies would then select from

OPM's process was designed "to render [ALJ] appointments nonpolitical."<sup>95</sup> *Lucia's* conclusion that SEC ALJs are officers of the United States whose appointment is governed by the Appointments Clause, however, raised a question as to whether OPM's role in the ALJ selection process improperly constrains the authority of the agencies hiring them. President Trump apparently thought the answer was yes.

Less than a month after the Supreme Court handed down *Lucia*, President Trump issued Executive Order 13,843.<sup>96</sup> The Order recounts that "The Federal Government benefits from a professional cadre of [ALJs] . . . who are impartial and committed to the rule of law."<sup>97</sup> Nonetheless, it construed *Lucia* as raising questions about the existing appointment process, including "whether competitive examination and competitive service selection procedures are compatible with the discretion an agency head must possess under the Appointments Clause in selecting ALJs."<sup>98</sup> Further, "sound policy reasons" supported taking steps to eliminate doubts about the constitutionality of ALJ appointment methods. Accordingly, the Order provides "that conditions of good administration" require exempting ALJs from competitive hiring rules and examinations to "provide agency heads with additional flexibility to assess prospective appointees without the limitations imposed by competitive examination and competitive service selection procedures."<sup>99</sup>

The Order exempts ALJs from the competitive civil service hiring process by amending OPM's rules that govern competitive civil service exemptions. It creates a new "Schedule E" that adds the "[p]osition of administrative law judge appointed under 5 U.S.C. 3105" to the previous categories of exempted positions.<sup>100</sup> The Order also amends OPM regulations to provide that appointments to positions exempted from

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among *all* individuals who met those requirements." Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 59 (1979) (emphasis added).

95. Barnett, *Against AJs*, *supra* note 57.

96. Exec. Order No. 13,843, Excepting Administrative Law Judges from the Competitive Service, 83 Fed. Reg. 32,755 (July 13, 2018). The Order "dramatically expand[ed] executive control over administrative adjudicators." Paul R. Verkuil, *Presidential Administration, the Appointment of ALJs, and the Future of For Cause Protection*, 72 ADMIN. L. REV. 461, 464 (2020).

97. Exec. Order No. 13,843, § 1. It also states that "Especially given the importance of the functions they discharge . . . ALJs must display appropriate temperament, legal acumen, impartiality, and sound judgment." *Id.*

98. *Id. But cf. Lubbers*, *supra* note 94, at 747 ("*Lucia* did not raise those questions at all.").

99. Exec. Order No. 13,843, § 1. *But cf. Verkuil*, *supra* note 96, at 465 (arguing that "E.O. 13,843's reasoning that *Lucia* mandated agency control of ALJ selections seems unpersuasive").

100. Exec. Order No. 13,843, § 3(a)(i) (amending 5 C.F.R. § 6.2).

the competitive civil service “shall be made in accordance with such regulations and practices as the head of the agency concerned finds necessary.”<sup>101</sup> Under the Order, the only required qualification for new ALJs is that the applicant possess a professional license to practice law in a U.S. state or territory.<sup>102</sup>

The Order raises several intriguing legal questions, regarding its consistency with statutory provisions concerning ALJ appointments, the President’s authority to amend OPM regulations, and whether the Order violates the APA.

*a. Is Executive Order 13,843 Consistent with the APA?*

The first issue highlights the history of § 3105, which authorizes agencies to employ ALJs.<sup>103</sup> As noted above, the original APA explicitly specified that hearing examiners, as ALJs were then called, must be selected using competitive civil service processes.<sup>104</sup> Unless that requirement was unconstitutional, it would have precluded any executive order purporting to exempt hearing examiners from the competitive service appointments process. This explicit language was omitted, however, when the APA was later recodified.<sup>105</sup> Other civil service safeguards for the independence of hearing examiners, including good-cause removal requirements, were retained or recodified elsewhere,<sup>106</sup> but there was no recodified statutory provision requiring that hearing examiners—or later ALJs—be appointed pursuant to the competitive service process.<sup>107</sup>

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101. *Id.* § 3(a)(ii) (amending 5 C.F.R. § 6.3(b)).

102. *Id.*

103. 5 U.S.C. § 3105 (“Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.”).

104. Pub. L. No. 79-404, § 11, 60 Stat. 237, 244 (1946) (originally codified at 5 U.S.C. § 1010) (providing for appointment of examiners “[s]ubject to the civil-service . . . laws”).

105. See Pub. L. No. 89-554, § 3105, 80 Stat. 378, 415 (1966) (recodifying 5 U.S.C. § 1010 as 5 U.S.C. § 3105 and omitting requirement of competitive civil service selection).

106. See Pub. L. No. 89-554, § 7521, 80 Stat. 378, 528 (1966) (enacting 5 U.S.C. § 7521).

107. The Civil Service Commission and later the OPM, however, promulgated regulations explicitly subjecting ALJs to the competitive hiring process. See 5 C.F.R. § 930.204(a) (2020) (“An agency may appoint an individual to an administrative law judge position only with prior approval of OPM, except when it makes its selection from the list of eligibles provided by OPM.”).

This sort of statutory change would normally support a very strong inference that Congress intended to remove any requirement for competitive civil service selection, but the legislative history suggests that no such change was intended. Instead, the omission of this language apparently reflected Congress's assumption that an explicit requirement was unnecessary because competitive civil service appointment would be the generally applicable default rule for federal employees.<sup>108</sup> Thus, an OPM trial attorney once argued to a congressional committee that "any persons appointed as administrative law judges must still be qualified for such an appointment, and such appointments are still subject to the civil service and other laws not inconsistent with the APA."<sup>109</sup> This conclusion is supported by the recodification canon of statutory construction, under which changes in statutory language as a result of comprehensive recodification do not change prior law unless there is a clear intent to do so.<sup>110</sup>

Thus, there is a plausible argument that the omission of any statutory requirement for competitive civil service selection of ALJs from § 3105 does not authorize presidential or OPM actions to exempt ALJs from competitive civil service selection. This sort of argument based on legislative history and intent may have once been persuasive,<sup>111</sup> but under the Supreme Court's current approach to statutory interpretation, it is less likely to carry the day.<sup>112</sup> Because the plain

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108. See 5 U.S.C. § 3105 note ("The words 'Subject to the civil service' are omitted as unnecessary inasmuch as appointments are made subject to the civil service laws unless specifically excepted."); see also S. REP. NO. 89-1380, at 18 (1966) ("The purpose of this bill is to restate in comprehensive form, *without substantive change*, the statutes in effect before July 1, 1965, that relate to Government employees, the organization and powers of Federal agencies generally, and administrative procedure[s] . . ." (emphasis added)).

109. *Administrative Law Judge Program of the Federal Trade Commission: Hearing Before the Subcomm. on Investigations of the H. Comm. on Post Off. & Civ. Serv.*, 96th Cong. 56-57 (1980) (OPM memorandum from Earl A. Sanders, OPM Trial Att'y, to Margery Waxman, Gen. Couns.); see also *id.* at 57 ("[B]ased on the philosophy expressed in the reasons given for the omission of the references to the civil service and other consistent statutes, one can assume that the phrase was discarded as unnecessary: Congress did not intend that persons be appointed as administrative law judges or to any other position who were unqualified and incompetent. The fact that the language and organization of the APA provisions were altered in the codification of title 5 by P.L. 89-554 does not alter their substance.").

110. See RICHARD E. LEVY & ROBERT L. GLICKSMAN, *STATUTORY ANALYSIS IN THE REGULATORY STATE* 211 (2014) (discussing canons and citing cases).

111. See *Int'l Tel. & Tel. Corp. v. Loc. 134, Int'l Brotherhood of Elec. Workers*, 419 U.S. 428, 431 n.3 (1975) ("Slight modifications in [5 U.S.C. § 554] were made at the time of codification, but no substantive changes were intended." (first citing H.R. REP. NO. 89-901, at 3 (1965); and then citing S. REP. NO. 89-1380, at 18)).

112. See LEVY & GLICKSMAN, *supra* note 110, at 171-74 (discussing intentionalism-textualism debate and the rise of textualism). *But cf.* *Cnty. of Maui v. Haw. Wildlife*

language of neither § 3105 nor any of the statutory provisions providing for competitive civil service requires competitive selection for ALJs,<sup>113</sup> it seems unlikely that a court would hold that the order violates the civil service laws.

*b. May the President Amend OPM Regulations by Executive Order?*

Assuming that § 3105 and other provisions do not require competitive civil service appointment of ALJs, the next question is whether the President has the authority to amend OPM's regulations by executive order.<sup>114</sup> Ordinarily, we might doubt the authority of a President to amend agency regulations because the authority to promulgate the regulations is delegated to the agency rather than the President.<sup>115</sup> In the context of OPM and the competitive service, however, the relevant statutes delegate rulemaking authority directly to the President and include explicit authority to create exceptions to the competitive civil service hiring process.<sup>116</sup> In addition, OPM's statutory authority to adopt regulations is "subject to the rules prescribed by the President

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Fund, 140 S. Ct. 1462, 1471 (2020) (reasoning that for "those who look to legislative history to help interpret a statute," the legislative history of the federal Clean Water Act "strongly supports" the Court's relatively narrow interpretation of EPA's authority to regulate discharges to groundwater).

113. See 5 U.S.C. §§ 3301–30e (provisions governing examination, certification, and appointment).

114. See VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10172, CAN A PRESIDENT AMEND REGULATIONS BY EXECUTIVE ORDER? 1 (2018) ("Somewhat unusually, the order directly amends three provisions in the CFR, rather than directing an agency to amend the regulations.").

115. The President could, however, direct an executive agency to amend its regulations. See, e.g., *Gingery v. Dep't of Def.*, 550 F.3d 1347, 1349 (Fed. Cir. 2008) (discussing President Clinton's Executive Order 13,162, which directed the OPM to promulgate regulations to promote the recruitment of "exceptional employees for careers in the public sector"). In fulfilling such a presidential directive, the agency would have to comply with the APA and so could not amend the regulation without following notice and comment procedures or creating a sufficient record to support the substantive basis for agency action. See generally Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1669–86 (2019) (documenting numerous examples of Trump Administration regulatory actions that violated APA procedural requirements and canvassing how those actions have fared in court).

116. See 5 U.S.C. § 3301(1) (authorizing the President to "prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service"); *id.* § 3302 (providing that "[t]he President may prescribe rules governing the competitive service . . . [which] shall provide, as nearly as conditions of good administration warrant, for . . . (1) necessary exceptions of positions from the competitive service; and (2) necessary exceptions from the provisions of section[] . . . 3304(a) . . . of this title"); see also *id.* § 3304(b) ("An individual may be appointed in the competitive service only if he has passed an examination or is specifically excepted from examination under section 3302 of this title.").



... for the administration of the competitive service . . . .”<sup>117</sup> Thus, previous Presidents have amended OPM regulations by executive order.<sup>118</sup>

Courts have generally upheld these executive orders as being within the scope of the President’s delegated authority, albeit without specifically addressing the authority to amend regulations directly. In *Mow Sun Wong v. Campbell*,<sup>119</sup> for example, the Ninth Circuit held that President Ford had statutory authority to issue a regulation, 5 C.F.R. § 7.4, by means of Executive Order 11,935.<sup>120</sup> This regulation, which imposed a citizenship requirement for civil service employees, had a complex procedural history. In *Hampton v. Mow Sun Wong*,<sup>121</sup> the Supreme Court invalidated a previous version of the regulation adopted by the Civil Service Commission (CSC), concluding that the CSC had justified the regulation on the basis of foreign relations and immigration considerations that were beyond its purview.<sup>122</sup> This limitation on valid agency considerations was not applicable to the President,

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117. 5 U.S.C. § 1302(a); *see also* 5 C.F.R. § 5.1 (2020) (providing that “[t]he Director, Office of Personnel Management, shall promulgate and enforce regulations necessary to carry out the provisions of the Civil Service Act, . . . the Civil Service Rules, and all other statutes and Executive orders imposing responsibilities on the Office” (emphasis added)). Indeed, OPM derives its authority to provide for civil service hiring from an executive order. In 1954, President Eisenhower delegated his authority to adopt rules implementing the Civil Service Act of 1883 to the Civil Service Commission (CSC). Exec. Order No. 10,577, Amending the Civil Service Rules and Authorizing a New Appointment System for the Competitive Service, 19 Fed. Reg. 7521 (Nov. 23, 1954). The CSC was dissolved by the Civil Service Act of 1978, which transferred its authority to OPM and MSPB. *See Nat’l Treasury Emps. Union v. Tigert*, 53 F.3d 1289, 1291 (D.C. Cir. 1995) (describing Executive Order 10,577 as having delegated to OPM the authority to create exceptions to competitive civil service examinations); *see also* Dep’t of Pub. Welfare v. U.S. Dep’t of Health & Hum. Servs., 80 F.3d 796, 807 (3d Cir. 1996) (same); *Nat’l Treasury Emps. Union v. Horner*, 854 F.2d 490, 492 (D.C. Cir. 1988) (same).

118. *See, e.g.*, Exec. Order No. 13,562, 75 Fed. Reg. 82,585 (Dec. 30, 2010) (creating programs for hiring of recent graduates and amending 5 C.F.R. §§ 6.1(a), 6.2, 6.4, & 6.6); Exec. Order No. 12,300, 46 Fed. Reg. 18,683 (Mar. 26, 1981) (creating exemption from competitive civil service for certain Department of Agriculture employees and amending 5 C.F.R. § 6.8); Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (Sept. 3, 1976) (creating citizenship requirement for civil service employees and adding 5 C.F.R. § 7.4).

119. 626 F.2d 739, 740 (9th Cir. 1980) (discussing Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (Sept. 3, 1976), which added citizenship requirements to civil service qualifications).

120. 41 Fed. Reg. 37,301 (Sept. 3, 1976).

121. 426 U.S. 88 (1976).

122. *Id.* at 116 (“In sum, assuming without deciding that the national interests identified by the petitioners would adequately support an explicit determination by Congress or the President to exclude all noncitizens from the federal service, we conclude that those interests cannot provide an acceptable rationalization for such a determination by the Civil Service Commission.”).

however.<sup>123</sup> Thus, the court of appeals in *Mow Sun Wong v. Campbell* read the Supreme Court's decision as establishing the President's authority to issue the rule:

Given the Court's conclusion that the CSC was sufficiently empowered by the delegation from the President to consider and issue a regulation incorporating a citizenship requirement (if the CSC could justify such a regulation with a legitimate interest properly within its concern), it is clear that the President's authority under 5 U.S.C. § 3301(1) to issue Executive Order No. 11935 can be no less valid since in that order the President is merely exercising the authority that he had previously delegated to the CSC.<sup>124</sup>

Although the court of appeals did not explicitly address the validity of the direct issuance of regulations by executive order, its conclusion that the order was within the scope of the President's authority necessarily implies that the issuance of regulations by executive order was proper.<sup>125</sup>

*c. Did Amendment of OPM Regulations Violate APA Procedures or Constitute Arbitrary Decision-Making?*

Assuming the President has the statutory authority to make direct revisions to civil service regulations, a third question is whether Executive Order 13,843 violates the APA, either because it amended a regulation without following notice and comment procedures or because it fails to provide an adequate explanation for the exemption and is therefore arbitrary and capricious. Had the amendments included in the order been adopted by OPM, the agency would have had to comply with APA notice and comment procedures, and it would have had to provide a sufficient explanation, grounded in the rulemaking record, to pass muster under arbitrary and capricious review. It seems likely, however, that the APA would not apply because the President is not an "agency" for purposes of the APA.<sup>126</sup> Thus, Professor

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123. See *Mow Sun Wong*, 626 F.2d at 743 (distinguishing *Hampton v. Mow Sun Wong* and outlining the President's authority over such matters). Indeed, the court of appeals agreed with the district court that "the dispute over the President's power to issue such order had already been decided in the affirmative by the Supreme Court based on Congress' delegation to the President in 5 U.S.C. § 3301(1)." *Id.* at 741-42.

124. *Id.* at 742-43. The President is authorized to "prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service." 5 U.S.C. § 3301(1).

125. See also *Dean v. Dep't of Lab.*, 808 F.3d 497, 499-500, 505-06 (Fed. Cir. 2015) (upholding Executive Order 13,562 against challenge based on veterans' benefit statute without addressing the order's inclusion of provisions directly amending regulations); *Brunton v. United States*, 518 F. Supp. 223, 228-29 (S.D. Ohio 1981) (denying constitutional challenge to dismissal following reclassification of position so as to exempt it from civil service protections pursuant to Executive Order 12,300 without addressing validity of the order).

126. *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) ("The President is not

Lubbers concluded that although OPM's regulations implementing President Trump's executive order must follow notice and comment procedures, the President is not required to do so.<sup>127</sup> The same reasoning suggests that Executive Order 13,843 is not subject to judicial review under the APA.<sup>128</sup> Thus, it seems unlikely that a legal challenge to the order would be successful, regardless of whether the challenge is based on violations of the civil service laws, presidential authority to amend regulations, or compliance with the APA.<sup>129</sup>

*d. Implications of the Order for ALJ Independence*

Putting aside questions about the Order's validity, its impact on ALJ independence and impartiality is troubling. Because agencies are no longer required to select ALJs based on competitive civil services processes designed to ensure selection of ALJs based on merit,<sup>130</sup> the program has been opened up "to potential cronyism or political

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explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion."); *accord Dalton v. Specter*, 511 U.S. 462, 470 (1994) ("The actions of the President . . . are not reviewable under the APA because, as we concluded in *Franklin*, the President is not an 'agency.'").

127. Lubbers, *supra* note 94, at 751–52. Specifically, Professor Lubbers reasoned that the APA's general exemption from notice and comment procedures for rules relating to agency personnel, 5 U.S.C. § 553(a)(2), would not apply to OPM regulations because the Civil Service Act explicitly requires OPM to follow notice and comment rulemaking procedures. 5 U.S.C. § 1103(b)(1). On the other hand, the President is exempt from APA requirements under *Franklin*. *Accord* BRANNON, *supra* note 114, at 3 ("Under *Franklin v. Massachusetts*, it appears that the President's issuance of the executive order was not itself subject to the procedural requirements of the APA, even though the President did exercise statutory authority to engage in rulemaking. But when OPM acts to implement the President's order, it will presumably be subject to the APA, and if OPM (or any other executive agency) acts to create, amend, or repeal any rules, it will likely have to follow notice-and-comment rulemaking procedures.").

128. Indeed, this was the specific holding of *Franklin*. See *supra* note 126.

129. Although it is possible that other statutory or constitutional claims might be advanced, it is unclear what they might be. In any event, it is also unclear who would have standing to bring any claim challenging the order. A losing litigant in a proceeding presided over by an ALJ appointed pursuant to the order might have standing to contest the means of appointment of that ALJ. On the question of whether ALJs would have standing to litigate the legality of incursions on their decisional independence, see generally Nou, *supra* note 10, at 1189 (arguing that "the trend toward judicial dismissal of ALJ suits based on [APA] is a salutary one").

130. See, e.g., Daniel B. Listwa & Lydia K. Fuller, Note, *Constraint Through Independence*, 129 YALE L.J. 548, 560 (2019) (describing the Order's intent as allowing agency heads to "circumvent [the] apolitical, centralized process [for appointing civil servants] and instead directly appoint ALJs who meet agency-specific qualifications").

favoritism in the hiring of new ALJs.”<sup>131</sup> ALJs, in particular, have objected to the order. Thus, the President of the Association of Administrative Law Judges declared in an op-ed published in the Washington Post that “as a result of the president’s executive order, an agency that wants to employ an ALJ can recruit any attorney regardless of skill or experience. Competence and impartiality apparently are no longer essential; cronyism and political interference will no longer be taboo.”<sup>132</sup>

Critics of the Order contend that “efforts to relocate ALJ positions back to the centralized, apolitical hiring apparatus of the Competitive Service, will be crucial to securing ALJ independence.”<sup>133</sup> Those efforts have already begun. Less than a month after President Trump signed Executive Order 13,843, bipartisan legislation was introduced in Congress that would again require that agencies select ALJs from a list of eligible candidates supplied by OPM.<sup>134</sup> Senator Susan Collins, one of the bill’s sponsors, explained that the bill was designed to ensure the appointment of well-qualified, impartial ALJs through a nonpartisan and fair process.<sup>135</sup>

## B. REMOVAL

Although apolitical, merit-based selection is an important protection for ALJs’ adjudicatory independence, protections against removal

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131. Lubbers, *supra* note 94, at 748; see also Michael Sant’Ambrogio, *Private Enforcement in Administrative Courts*, 72 VAND. L. REV. 425, 486 n.262 (2019) (arguing that *Lucia* and Executive Order 13,843 heighten the risk of “political capture of agency adjudication”); Jack Beermann, *The Future of Administrative Law Judge Selection*, REGUL. REV. (Oct. 29, 2019), <https://www.theregreview.org/2019/10/29/beermann-administrative-law-judge-selection> [<https://perma.cc/K4ZE-NHKJ>] (arguing that “moving the hiring process into the agencies themselves . . . presents the danger of politicization, especially since the *Lucia* decision mandates the involvement of agency heads who are politically appointed,” and that politicization “could threaten the efficiency and perceived impartiality of the adjudicatory system,” generating a loss of public confidence whose “consequences could be disastrous”); Listwa & Fuller, *supra* note 130, at 606–07 (stating that “the long-term neutrality of agencies’ adjudicatory records depends crucially on the incoming pipeline of those who build them”); Peter L. Strauss, *Preface*, 94 CHI.-KENT L. REV. 229, 238 (2019) (asserting that the Order, “ostensibly based on *Lucia*, appears to invite political hiring”).

132. Lubbers, *supra* note 94, at 748 (quoting Marilyn Zahm, Opinion, *Do You Have a Social Security Card? Then Take This Executive Order Personally*, WASH. POST (July 18, 2018), [https://www.washingtonpost.com/opinions/do-you-have-a-social-security-card-then-take-this-executive-order-personally/2018/07/18/4d66339c-89d6-11e8-85ae-511bc1146b0b\\_story.html](https://www.washingtonpost.com/opinions/do-you-have-a-social-security-card-then-take-this-executive-order-personally/2018/07/18/4d66339c-89d6-11e8-85ae-511bc1146b0b_story.html) [<https://perma.cc/JD2S-EE67>]).

133. Listwa & Fuller, *supra* note 130, at 607.

134. *E.g.*, S. 3887, 115th Cong. (2018). Nonetheless, according to the Congress.gov bill tracker, no further action was taken on this bill. See *S. 3387–A Bill to Restore Administrative Law Judges to the Competitive Service*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/3387> [<https://perma.cc/WCP4-FZV2>].

135. Listwa & Fuller, *supra* note 130, at 606.

or other disciplinary action in retaliation for decisions in individual cases are even more essential.<sup>136</sup> As discussed above, the APA and civil service laws protect against this sort of action by requiring “good cause” for the removal of ALJs (or other disciplinary sanctions) and providing for a neutral adjudicatory process before the Merit Systems Protection Board (MSPB) when an agency seeks to do so.<sup>137</sup> Like the appointment of ALJs, however, these protections have been placed in doubt by a combination of judicial decisions that have unsettled constitutional doctrine and executive action that has undermined the good-cause requirement.<sup>138</sup>

### 1. Judicial Decisions and Good-Cause Removal Restrictions

Good-cause requirements for the removal of executive branch officials are central to the debate over the unitary executive. Although the Supreme Court has recognized inherent presidential authority to remove executive officers,<sup>139</sup> it has upheld statutory provisions requiring good cause for the removal of officers, provided that such requirements do not interfere with the essential functions of the President.<sup>140</sup> These precedents, which accommodated the creation of

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136. See, e.g., *Wiener v. United States*, 357 U.S. 349, 356 (1958) (“If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, a fortiori must it be inferred that Congress did not wish to have hang over the Commission the Damocles’ sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.”).

137. 5 U.S.C. § 7521(a) (“An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.”).

138. See generally Kent Barnett, *Regulating Impartiality in Agency Adjudication*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 23, 2019), <https://www.yalejreg.com/nc/regulating-impartiality-in-agency-adjudication-by-kent-barnett> [<https://perma.cc/3RW7-6MGX>] (discussing conflict between Article II and due process concerns raised by good-cause removal requirement for ALJs).

139. *Myers v. United States*, 272 U.S. 52 (1926) (invalidating statute requiring Senate consent for the removal of a postmaster); see also *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (invalidating statutory provisions delegating executive power to the Comptroller General, a legislative officer removable only by Congress, because “Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment”).

140. See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935) (upholding statute limiting removal of commissioners of the Federal Trade Commission (FTC) to good cause and distinguishing *Myers* on the ground that the FTC was a “quasi legislative or quasi judicial agenc[y]” whose functions were not central to the President’s executive functions); see also *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988) (upholding statutory good-cause requirement for the Attorney General’s removal of independent

independent agencies, provide support for the constitutionality of good-cause removal requirements for ALJs. Nonetheless, recent judicial decisions cast doubt on that conclusion, including *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,<sup>141</sup> *Lucia v. SEC*,<sup>142</sup> and *Seila Law, LLC v. Consumer Financial Protection Bureau*,<sup>143</sup> all of which narrow the permissible scope of good-cause removal provisions and cast doubt on the validity of good-cause requirements for ALJs and their superiors.

*a. Dual Good-Cause Removal Provisions*

First, the Court held in *Free Enterprise Fund* that two layers of good-cause protection impermissibly interfered with the President's duty to take care that the laws are faithfully executed.<sup>144</sup> The Sarbanes-Oxley Act of 2002<sup>145</sup> created the Public Company Accounting Oversight Board (the Board) to oversee regulation of accounting practices related to securities markets and vested the Board with rulemaking and enforcement authority.<sup>146</sup> The Board's five members are appointed by the SEC to staggered five-year terms,<sup>147</sup> and the Act allowed the SEC to remove Board members only for good cause.<sup>148</sup> An accounting firm under investigation by the Board sought a declaratory judgment that the Board was unconstitutional and an injunction against further exercise of its powers, contending that the Act violated the separation of powers by conferring extensive executive powers on the Board that were not subject to Presidential control.<sup>149</sup>

The Supreme Court held that the Act's dual good-cause removal structure, under which the SEC could remove Board members only for

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counsel even though the counsel's functions were purely executive because the independent exercise of those functions did not interfere with "the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed'" under Article II, § 3); *Wiener v. United States*, 357 U.S. 349 (1958) (reading silent statute to impose good-cause restriction on President's power to remove members of war claims tribunal acting in a quasi-judicial capacity because presidential control might violate due process).

141. 561 U.S. 477 (2010) (invalidating second layer of good-cause removal protections for Public Company Accounting Oversight Board).

142. 138 S. Ct. 2044 (2018) (concluding that ALJs are officers of the United States who must be appointed pursuant to the Appointments Clause, art. II, § 2, cl. 2).

143. 140 S. Ct. 2183 (2020) (invalidating good-cause removal provisions for Director of the Consumer Financial Protection Bureau).

144. 561 U.S. at 513–14 (2010).

145. Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201–7266).

146. 15 U.S.C. § 7211(c)(2)–(4).

147. *Id.* § 7211(e)(1), (5).

148. *Id.* § 7211(e)(6).

149. *Free Enter. Fund*, 561 U.S. at 487.

good cause and the President could remove members of the SEC only for good cause, was unconstitutional.<sup>150</sup> The Court reasoned that this structure prevented the President from ensuring that the Board was faithfully executing the laws because he could not hold either the Board or the SEC accountable for the Board's conduct.<sup>151</sup> Thus, the Court concluded that "this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts" and was therefore "incompatible with the Constitution's separation of powers."<sup>152</sup> The Court remedied the violation by declaring the constraints on the SEC's power to remove Board members unconstitutional and severing them from the rest of the statute.<sup>153</sup>

The Court's decision in *Free Enterprise Fund* has obvious implications for ALJs who serve in independent agencies, insofar as such arrangements involve two layers of good-cause removal.<sup>154</sup> Recognizing

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150. Justice Breyer, joined by four other Justices, dissented from the decision in *Free Enterprise Fund*. *Id.* at 514 (Breyer, J., dissenting). He disagreed that the statute significantly interfered with the President's executive power or violated separation of powers. In his view, the Court failed to show why two layers of good-cause restrictions imposed any more serious limitations on presidential powers than one did. *Id.* at 525. This point of course, might be a double-edged sword, insofar as it could just as easily imply that a single layer of good cause protections is unconstitutional.

151. *See id.* at 495 (majority opinion) (concluding that the statute "not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President's direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board."); *id.* at 496 ("The Commissioners are not responsible for the Board's actions. They are only responsible for their own determination of whether the Act's rigorous good-cause standard is met. And even if the President disagrees with their determination, he is powerless to intervene, unless the SEC's determination of lack of good cause to remove Board members is so unreasonable as to give rise to good cause to remove SEC members.").

152. *Id.* at 498.

153. *Id.* at 509 (explaining that this relief "leaves the President separated from Board members by only a single level of good-cause tenure. The Commission is then fully responsible for the Board's actions, which are no less subject than the Commission's own functions to Presidential oversight.").

154. Indeed, most ALJs serve in independent agencies. In particular, the SSA—which employs more ALJs than all other agencies combined—is headed by a commissioner whom the President may remove only for good cause. *See* 42 U.S.C. § 902(a)(1), (3) (providing that the Commissioner of the SSA serves for a six-year term and "may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance"); *ALJs by Agency*, OPM, <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> [<https://perma.cc/WUU9-VSZY>] (reporting that, as of March 2017, the SSA employed 1,655 of 1,931 ALJs employed by the federal government). A number of other independent agencies whose members are subject to good-cause removal restrictions also employ ALJs, including the Federal

this potential concern, the Court stated in a footnote that “our holding . . . does not address that subset of independent agency employees who serve as administrative law judges.”<sup>155</sup> It offered several possible reasons why dual good-cause removal provisions for ALJs might be distinguishable, including uncertainty about their status as officers of the United States, their performance of adjudicatory (rather than policymaking) functions, and their possession in some instances of “purely recommendatory powers.”<sup>156</sup>

These points, however, are not especially convincing for three reasons.<sup>157</sup> *Lucia*, of course, subsequently held that SEC ALJs are officers of the United States, eliminating that distinction.<sup>158</sup> Most adjudications include an element of policy discretion, and many agencies, like the National Labor Relations Board (NLRB), use precedential adjudications to make policy.<sup>159</sup> Finally, most ALJs are empowered to render

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Communications Commission, FTC, National Labor Relations Board, Occupational Safety and Health Review Commission, and SEC. *Id.* It is not entirely clear whether the relevant superior in this context is the agency that employs the ALJ or the MSPB, but that would not significantly affect the analysis because the MSPB’s members can only be removed for good cause under 5 U.S.C. § 1202(d). *See Listwa & Fuller, supra* note 130, at 550 (observing that this structure “insulates ALJs, at least to some extent, from the influences of their respective agencies’ political appointees”).

155. *Free Enter. Fund*, 561 U.S. at 507 n.10. The Court also professed not to decide whether members of “the civil service system within independent agencies” are distinguishable from the Board members at issue in *Free Enterprise Fund, id.* at 507, but under Executive Order 13,843, ALJs are no longer part of the competitive civil service (except for incumbent ALJs as of July 10, 2018, who will remain in the competitive service as long as they remain in their current positions), Exec. Order No. 13,843, § 3(a)(iv), Excepting Administrative Law Judges from the Competitive Service, 83 Fed. Reg. 32,755, 32,757 (July 13, 2018). Nonetheless, Justice Breyer estimated that the Court’s decision put the job security of hundreds or thousands of government officials, including ALJs, constitutionally at risk. *Free Enter. Fund*, 561 U.S. at 507, 542–43 (Breyer, J., dissenting).

156. *Free Enter. Fund*, 561 U.S. at 507 n.10. *See generally* Richard J. Pierce, Jr., *The Court Should Change the Scope of the Removal Power by Adopting a Purely Functional Approach*, 26 GEO. MASON L. REV. 657 (2019) (arguing that the Court should allow good-cause removal provisions for officers who adjudicate disputes between individuals and the government but not those who make policy).

157. *See, e.g.*, Linda D. Jellum, “You’re Fired!” *Why the ALJ Multi-Track Dual Removal Provisions Violate the Constitution and Possible Fixes*, 26 GEO. MASON L. REV. 705 (2019) (arguing that good-cause removal provisions for ALJs in both independent and executive agencies are invalid).

158. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

159. *See* GLICKSMAN & LEVY, *supra* note 36, at 523. The Association of Administrative Law Judges takes the position that administrative adjudications of disability claims under the Social Security Act are not precedential. *See* Letter from Judge Gabrielle Vitellio & Penny Loucas to authors 22 (May 28, 2020) [hereinafter AALJ Letter] (on file with authors) (noting that “SSA has argued in formal proceedings that ALJs do not make policy. It is the position of the AALJ that the ALJs who are not management officials at SSA do no[sic] make policy.”). The AALJ “is a union that . . . represents . . .



final decisions unless the agency or an appellate body within the agency grants review.<sup>160</sup> The constitutionality of dual good-cause removal provisions for ALJs in independent agencies thus remains in doubt.<sup>161</sup> In *Duka v. SEC*,<sup>162</sup> for example, the district court relied on the Supreme Court's footnote in *Free Enterprise Fund* to uphold dual good-cause removal requirements for ALJs, but that decision was abrogated on appeal on jurisdictional grounds. Conversely, the Solicitor General, in briefs subsequently filed in *Lucia*, urged the Court to invalidate the good-cause removal restrictions on ALJs, thereby allowing agency heads to remove them at will.<sup>163</sup> *Lucia*, however, declined to address the issue.<sup>164</sup>

If dual good-cause removal provisions for ALJs are improper, then it is important to determine whether the relevant principal officer is the agency that employs the ALJ or the MSPB, which adjudicates removal and other disciplinary action. If the relevant principal is the agency itself, then the dual good-cause problem arises only if the agency head is also subject to good cause removal, like the SEC or the SSA. If, on the other hand, the relevant principal is the MSPB, whose

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administrative law judges in collective bargaining . . . pursuant to the Federal Labor-Management Relations Act." *Ass'n of Admin. L. Judges v. Colvin*, 777 F.3d 402, 403 (7th Cir. 2015).

160. See 5 U.S.C. § 557(b) ("When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule."). In particular, SSA ALJs enter final decisions unless the Appeals Council grants review. See, e.g., *Smith v. Berryhill*, 139 S. Ct. 1765, 1775–76 (2019) (concluding that SSA decision denying benefits was a final decision when the Appeals Council dismissed the claimant's petition for review as untimely).

161. The Fifth Circuit, for example, enjoined an adjudication before an SEC ALJ until it has resolved the constitutionality of the ALJ's protection from at-will removal. See *Barnett, Impartiality*, *supra* note 82, at 1695 (citing *Cochran v. SEC*, No. 19-10396 (5th Cir. Sept. 24, 2019), [https://nclalegal.org/wp-content/uploads/2019/09/19-10396\\_Documents-1.pdf](https://nclalegal.org/wp-content/uploads/2019/09/19-10396_Documents-1.pdf) [<https://perma.cc/MA8Z-9DHU>]).

162. 103 F. Supp. 3d 382 (S.D.N.Y. 2015), *abrogated on jurisdictional grounds*, 824 F.3d 276 (2d Cir. 2016). The district court reasoned that (1) ALJs do not have enforcement or policy discretion of the kind that the President must control; and (2) allowing presidential control was incompatible with due process in agency adjudications. *Id.* at 395–96.

163. See *Lubbers*, *supra* note 94, at 754–56.

164. *Lucia v. SEC*, 138 S. Ct. 2044, 2050 n.1 (2018) ("In [its] certiorari-stage brief, the Government asked us to add a second question presented: whether the statutory restrictions on removing the Commission's ALJs are constitutional. When we granted certiorari, we chose not to take that step. The Government's merits brief now asks us again to address the removal issue. We once more decline. No court has addressed that question, and we ordinarily await 'thorough lower court opinions to guide our analysis of the merits.'" (citations omitted)). For further discussion of the Solicitor General's position on good-cause removal for ALJs, see *infra* notes 188–96 and accompanying text (discussing Guidance Memorandum seeking to weaken good-cause protections).

members are removable only for good cause, then all ALJs are subject to dual good-cause removal provisions.<sup>165</sup> Since the vast majority of ALJs are employed by the Social Security Administration (SSA) and other independent agencies,<sup>166</sup> the issue of whether the principal is the agency or the MSPB for purposes of the *Free Enterprise Fund* rule matters only for a relatively small number of ALJs employed by executive agencies.<sup>167</sup>

Whether the principal is the employing agency or the MSPB is also relevant to the proper remedy in the event that dual good-cause removal provisions for ALJs are invalid. In *Free Enterprise Fund*, the Court severed the Public Company Accounting Board's good-cause protections, leaving the good-cause removal requirements for the SEC intact.<sup>168</sup> As noted above, the Solicitor General proposed a similar remedy in *Lucia*, which would allow the SEC to remove ALJs at will.<sup>169</sup> An alternative remedy, however, would be to sever the good-cause removal requirements for the superior agency. Thus, in *Bandimere v. SEC*, a concurring judge suggested that any dual good-cause removal issues for SEC ALJs could be remedied by severing the MSPB's good-cause removal requirements (as opposed to the SEC's).<sup>170</sup>

We think that the principal officer is the head of the employing agency, not the MSPB. The applicable statute provides that “[a]n action may be taken against an administrative law judge . . . by the agency in which the administrative law judge is employed only for good cause

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165. See Jellum, *supra* note 157, at 743 (arguing that because ALJs in executive agencies are protected by the MSPB, they are subject to dual good-cause removal protections that violate *Free Enterprise Fund*).

166. See *supra* note 154.

167. It is, however, pending before the D.C. Circuit in a case involving ALJs in the Department of Agriculture. *Fleming v. U.S. Dep't of Agric.*, No. 17-1246 (D.C. Cir. filed Nov. 16, 2017); see Richard J. Pierce, Jr., *The Collision Between the Constitution of the 1930s and the Constitution of 2020*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 18, 2019), <https://www.yalejreg.com/nc/the-collision-between-the-constitution-of-the-1930s-and-the-constitution-of-2020-by-richard-j-pierce-jr> [<https://perma.cc/3QUD-4JMP>] (stating that it is unclear whether *Free Enterprise Fund* applies to ALJs).

168. See *supra* note 153 and accompanying text.

169. See *supra* note 163 and accompanying text.

170. In *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), *reh'g en banc denied*, 855 F.3d 1128 (10th Cir. 2017), for example, the Tenth Circuit held (before *Lucia*) that SEC ALJs were inferior officers whose appointments violated the Appointments Clause. A dissenting judge expressed concern that this holding would jeopardize for-cause removal provisions for ALJs under *Free Enterprise Fund*. See *id.* at 1200 (McKay, J., dissenting) (“When understood in conjunction with *Free Enterprise Fund*, I worry today’s opinion will be used to strip ALJs of their dual layer for-cause protection.”). In response, a concurring judge suggested that the problem could be cured by “rendering the [Merit Systems Protection Board’s] three members removable by the President at will.” *Id.* at 1191 (Briscoe, J., concurring).

established and determined by the [MSPB] on the record after opportunity for hearing before the Board.”<sup>171</sup> This provision indicates that *the employing agency* initiates the action to remove an ALJ; the MSPB has no authority to do so. In this respect, the MSPB acts as an independent check on the existence of good cause, in much the same way that a court would act as a check on the termination of an employee who files a wrongful termination suit.

In any event, if having two layers of good-cause removal for ALJs is a violation of the President’s removal power, a court would have to determine whether to invalidate the good-cause removal provision for ALJs,<sup>172</sup> or to sever good-cause removal requirements for the agency head.<sup>173</sup> The first option would seriously compromise the principal of independent and impartial agency adjudication under the APA by exposing ALJs to removal in retaliation for decisions in particular cases that contravene the wishes of their politically appointed superiors. The second option would eliminate the independence of agencies such as the SEC, the NLRB, or the SSA, a fundamental alteration that Congress likely would not have intended.<sup>174</sup> Removing the independence of the employing agency, moreover, might indirectly undermine the effectiveness of good-cause removal protections for ALJs by increasing the likelihood that agency officials will put political pressure on ALJs.<sup>175</sup>

*b. Good-Cause Removal Provisions and the Appointments Clause*

*Lucia* creates another uncertainty about the constitutionality of good-cause removal provisions for ALJs. Once it is determined that

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171. 5 U.S.C. § 7521(a) (emphasis added). Section 7521(b)(1) defines “action” to include “a removal.” *Id.* § 7521(b)(1).

172. *Id.* § 7521.

173. *Cf.* Jellum, *supra* note 157, at 745–50 (examining possible fixes for the unconstitutional dual good-cause removal provisions for ALJs, including invalidating § 7521 but leaving “less robust” civil service protections in place, narrowing *Humphrey’s Executor* to adjudicatory bodies, and overruling *Humphrey’s Executor* so as to prevent good-cause removal restrictions from being imposed on principal officers).

174. For those who believe that independent agencies are unconstitutional, however, eliminating good-cause removal protections for the Board and similar agencies would be a salutary result. *See, e.g., In re Aiken Cnty.*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (observing that as a result of *Humphrey’s Executor*, the President lacked “day-to-day control over large swaths of regulatory policy and enforcement in the Executive Branch,” resulting in independent agencies that are “democratically unaccountable—neither elected by the people nor supervised in their day-to-day activities by the elected President”).

175. *See infra* notes 188–96 and accompanying text (discussing efforts to weaken good-cause removal protections for ALJs so as to give agencies greater control over their decisions).

ALJs are officers of the United States, the validity of their appointment by agency heads depends on whether they are principal or inferior officers.<sup>176</sup> Although the assumption appears to be that ALJs qualify as inferior officers,<sup>177</sup> that conclusion may depend on whether they are subject to good-cause removal provisions. This possibility is reflected in *Arthrex, Inc. v. Smith & Nephew, Inc.*,<sup>178</sup> a recent decision in which the Federal Circuit concluded that Administrative Patent Judges (APJs) are principal officers because they are not subordinate to a superior officer beneath the President. The court reasoned that “[t]he lack of any presidentially-appointed officer who can review, vacate, or correct decisions by the APJs combined with the limited removal power lead us to conclude . . . that [APJs] are principal officers.”<sup>179</sup> The court severed the good-cause removal provision so as to convert them into inferior officers.<sup>180</sup>

A similar argument might apply to ALJs, even though their decisions (unlike the decisions of APJs) are subject to de novo review within the agency. This distinction applies whether or not those decisions are purely recommendatory or may go into effect if not reversed

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176. Pursuant to the Appointments Clause, a principal officer may only be appointed by the President with Senate advice and consent, while Congress may provide for appointment of an inferior officer by the President alone, the courts, or the head of a department. U.S. CONST. art. II, § 2, cl. 2.

177. Thus, for example, the Solicitor General’s post-*Lucia* guidance states that “all ALJs and similarly situated administrative judges should be appointed as inferior officers under the Appointments Clause.” Guidance Memorandum, *supra* note 5, at 2.

178. 941 F.3d 1320 (Fed. Cir. 2019). Another case, *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012), which the *Arthrex* court relied on, had reached the same result with respect to Copyright Royalty Judges (CRJs). *See id.* at 1339 (“We find that, given the CRJs’ nonremovability and the finality of their decisions . . . the Librarian’s and Register’s supervision functions still fall short of the kind that would render the CRJs inferior officers.”).

179. 941 F.3d at 1335.

180. *Id.* at 1335–38; *accord Intercollegiate Broad.*, 684 F.3d at 1340 (“We . . . conclude here that invalidating and severing the restrictions on the Librarian’s ability to remove the CRJs eliminates the Appointments Clause violation and minimizes any collateral damage.”).

The interplay between the statutory removal provisions and the Appointments Clause poses a Hobson’s choice between politicizing ALJ appointments and exposing ALJs to retaliatory removal. The courts in *Arthrex* and *Intercollegiate Broadcasting* invalidated statutory good-cause removal provisions, thereby exposing APJs and CRJs in those cases to retaliatory removal, in order to convert the officers in those cases into inferior officers whose appointment could be vested in the President, the heads of departments, or the courts. Retaining good-cause removal protections, however, might mean that the officers involved would be principal officers, thus invalidating appointment by any means other than presidential appointment with Senate consent and exposing the appointment process to politicization.

by the agency for which the ALJ conducted the adjudication.<sup>181</sup> Given that agencies review a relatively small percentage of ALJ decisions and are constrained in their review by limited resources, however, the availability of de novo agency review may be insufficient to justify the conclusion that ALJs are inferior officers.<sup>182</sup> If not, a court might invalidate good-cause removal for ALJs so as to avoid an Appointments Clause violation.

*c. The Future of Good-Cause Removal Provisions*

A final issue concerns whether good-cause removal restrictions on ALJs are themselves constitutional, independently of any dual good-cause removal problem or any concerns over their implications for the proper means of appointment. Until recently, there appeared to be little doubt on this issue, but *Seila Law*, the Court's most recent decision on good-cause removal provisions, suggests that all good-cause removal provisions may be constitutionally suspect.<sup>183</sup>

The narrow issue in *Seila Law* was the validity of good-cause removal provision for the head of an agency who is a single individual.<sup>184</sup> After then-Judge Kavanaugh advanced the proposition that this arrangement violated Article II by giving too much power to a single individual who was beyond presidential control, this issue had divided the lower courts.<sup>185</sup> It should come as no surprise that, after joining

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181. 5 U.S.C. § 557(b).

182. In fiscal year 2018, for example, the Social Security Appeals Council reviewed less than twenty percent of all ALJ decisions. See SOC. SEC. ADMIN., FY 2020 CONGRESSIONAL JUSTIFICATION 174 (2019), [https://www.ssa.gov/budget/FY20Files/FY20-JEAC\\_2.pdf](https://www.ssa.gov/budget/FY20Files/FY20-JEAC_2.pdf) [<https://perma.cc/QL5C-CLQL>] (reporting that there were 562,452 ALJ decisions and 106,575 Appeals Council Decisions in that year). The same may be true of agency adjudicators who are not administrative law judges protected by the APA's decisional independence provisions. For example, the Board of Immigration Appeals (BIA), which is housed within the Department of Justice, must refer to the Attorney General all cases which the Attorney General wishes to review, as well as those which the Chairman of the Board or a majority of the Board believes should be referred to the Attorney General. 8 C.F.R. § 1003.1(h)(1) (2019). Cf. Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will to Make It an Article I Court?*, 19 BARRY L. REV. 17, 25 (2013) ("The BIA has never been recognized by congressional statute; it is entirely a creature of the Attorney General's regulations, and the Attorney General appoints its members."). In recent decades, more than 20,000 persons were granted asylum in the United States each year, *id.* at 26, making review of each case by the Attorney General impractical.

183. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

184. *Id.* at 2191.

185. First, Judge Kavanaugh authored the majority opinion for a panel decision that invalidated the good-cause removal provision for the CFPB, *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), but that decision was reversed by the circuit sitting en banc. 881 F.3d 75 (D.C. Cir. 2018). The Fifth Circuit, however, invalidated a single director good-cause removal provision in *Collins v. Mnuchin*, 938

the Court, Justice Kavanaugh would cast the crucial fifth vote to invalidate good-cause removal protections for the Director of the Consumer Financial Protection Bureau (CFPB).

The majority reasoned that its prior decisions in *Humphrey's Executor*<sup>186</sup> and *Morrison*<sup>187</sup> did not support the good cause removal provisions at issue.<sup>188</sup> In so doing, the Court embraced a strong unitary executive theory under which the President's power to remove officers "at will" is the default rule and any departures from it must be specially justified and narrowly construed.<sup>189</sup> The exception in *Humphrey's Executor* was limited to multimember quasi-legislative and quasi-judicial bodies<sup>190</sup> and the exception in *Morrison* was limited to low-level inferior officers without policy discretion.<sup>191</sup> The CFPB Director did not fall under the *Humphrey's Executor* exception because the office is filled by a single individual (rather than a nonpartisan body of experts) and the Director "is hardly a mere legislative or judicial aid."<sup>192</sup> The Director did not fall under the *Morrison* exception because "[e]veryone agrees the CFPB Director is not an inferior officer" and the Director "has the authority to bring the coercive power of the

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F.3d 553 (5th Cir. 2019) (en banc) (reinstating 896 F.3d 640 (5th Cir. 2018)). Although the Fifth Circuit purported to distinguish the Federal Housing Finance Agency (FHFA) from the CFPB, so as to reconcile its decision with the en banc decision in *PHH*, these distinctions were unpersuasive, and the *Collins* court relied heavily on Judge Kavanaugh's dissent from that decision. See 896 F.3d at 659–75. The Ninth Circuit followed the en banc decision, *Consumer Fin. Prot. Bureau v. Seila L. LLC*, 923 F.3d 680 (9th Cir. 2019), and the Supreme Court granted review.

186. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (upholding good-cause removal restrictions for FTC commissioners).

187. *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding good-cause removal restrictions on the independent counsel).

188. *Seila L.*, 140 S. Ct. at 2200–01.

189. *Id.* at 2197–98 (discussing history and precedent supporting "President's prerogative to remove executive officials," characterizing *Free Enterprise Fund* as "adher[ing] to the general rule that the President possesses 'the authority to remove those who assist him in carrying out his duties,'" and describing *Humphrey's Executor* and *Morrison* as "exceptions to the President's unrestricted removal power"); see also *id.* at 2205 (rejecting more "modest" view of the President's removal power advanced by defenders of the CFPB).

190. *Id.* at 2199 ("In short, *Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power.").

191. *Id.* at 2200 (describing *Morrison* as reflecting an exception for "inferior officers with limited duties and no policymaking or administrative authority"). The Court in *Seila Law* also cited *United States v. Perkins*, 116 U.S. 483 (1886) (upholding good-cause removal restrictions on naval cadet-engineer), as falling within this exception. See *Seila L.*, 140 S. Ct. at 2199.

192. *Id.* at 2200.

state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions.”<sup>193</sup>

The Court thus framed the question as “whether to extend those precedents to the ‘new situation’ before us, namely an independent agency led by a single Director and vested with significant executive power.”<sup>194</sup> This the Court declined to do, concluding that “[s]uch an agency has no basis in history and no place in our constitutional structure.”<sup>195</sup> In so doing, the Court concluded that the lack of historical analogies was a strong indicator that the CFPB’s structure was unconstitutional, rejecting several purportedly analogous agencies advanced by the CFPB’s defenders, including the SSA.<sup>196</sup> The Court then engaged in extensive textual and historical defense of a strong unitary executive principal, concluding that:

The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President.<sup>197</sup>

Finally, the Court rejected several other arguments advanced in defense of the good-cause removal provision, observing that the lack of explicit textual support in Article II for the removal power was not material because separation of powers principles are derived from the structure of the Constitution rather than its text,<sup>198</sup> rejecting a more modest version of the President’s removal power that permitted congressional restrictions on removal as inconsistent with the unitary executive,<sup>199</sup> and concluding that a broad construction of the grounds for removal could not save the statute under the doctrine of constitutional avoidance.<sup>200</sup> Having found the good-cause removal provision

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193. *Id.* at 2200–01.

194. *Id.* at 2201.

195. *Id.*

196. *See id.* at 2201–02.

197. *Id.* at 2203.

198. *See id.* at 2205 (explaining that “foundational doctrines” like federalism and separation of powers are “evident from the Constitution’s vesting of certain powers in certain bodies” and that the “President’s removal power stems from Article II’s vesting of the ‘executive Power’ in the President”).

199. *See id.* at 2205–06 (rejecting argument that precedents permit Congress to regulate presidential removal provided that Congress does not reserve a role for itself in the removal process and does not eliminate the President’s power to remove officers altogether).

200. *See id.* at 2206–07 (concluding that the statute was clear and could not support an alternative construction).

to be invalid, the Court severed the provision so as to permit the President to remove the CFPB Director “at will.”<sup>201</sup>

The holding of *Seila Law* has important implications for the SSA, which employs the vast majority of ALJs, and its reasoning may cast doubt on the validity of any good-cause removal provisions for ALJs. Most directly, the holding and analysis in *Seila Law* suggest that the good-cause removal provision for the SSA Commissioner is probably invalid.<sup>202</sup> Like the Director of the CFPB, the Commissioner of Social Security is a single individual who is a principal officer at the head of an agency with broad governmental power. Indeed, the Court in *Seila Law* rejected the Commissioner of Social Security as historical precedent for the CFPB Director in part because the good-cause removal provision for the Commissioner was controversial and “President Clinton contested [its] constitutionality.”<sup>203</sup> On the other hand, the Court also distinguished the SSA from the CFPB, observing that “unlike the CFPB, the SSA lacks the authority to bring enforcement actions against private parties. Its role is largely limited to adjudicating claims for Social Security benefits.”<sup>204</sup> Thus, the Court sent mixed signals as to the constitutionality of the good-cause removal requirement for the SSA Commissioner. Nonetheless, *Seila Law’s* reasoning would suggest the provision is constitutionally invalid unless the Court is prepared to recognize a new exception to the President’s authority to remove executive officers at will. If the good-cause removal provision for the SSA Commissioner is invalid, that result would—somewhat paradoxically—moot the issue of dual good-cause removal for the vast majority of ALJs because although SSA ALJs would still be subject to good-cause removal protections, the SSA Commissioner would not.<sup>205</sup> This conclusion assumes that the principal officer for SSA ALJs is the Commissioner, rather than the MSPB.<sup>206</sup>

The reasoning of *Seila Law*, however, has broader implications for good-cause removal provisions as applied to ALJs in general and without regard to whether they are supervised by a principal officer subject to good-cause removal provisions. Insofar as *Seila Law*

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201. See *id.* at 2207–11 (concluding that the good-cause removal provision was severable).

202. See 42 U.S.C. § 902(a)(3) (“An individual serving in the office of Commissioner may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office.”).

203. 140 S. Ct. at 2202.

204. *Id.*

205. Such a result would, however, make Social Security ALJs more vulnerable to political pressure, especially if the President succeeds in weakening good-cause removal requirements. See *infra* note 246 and accompanying text.

206. See *supra* note 171 and accompanying text.



reasoned that presidential removal at will is the rule, and good-cause restrictions are the exceptions,<sup>207</sup> good-cause limitations on ALJs may violate Article II. At the very least, defenders of good-cause protections for ALJ independence must establish that these positions fall within the recognized exceptions based on *Humphrey's Executor* and *Morrison* or persuade the Court to recognize a new exception for ALJs.<sup>208</sup> Insofar as ALJs are inferior officers who lack policymaking authority and function in a quasi-judicial capacity, they may fall within either or both of those exceptions as defined in *Seila Law*.<sup>209</sup> Likewise, the due process implications of allowing ALJs to be removed at will might justify recognizing a new exception.<sup>210</sup> Even if the Court ultimately rebuffs a constitutional challenge to good-cause removal protections for ALJs, the language and reasoning of *Seila Law* would seem to lend support to the Solicitor General's guidance, discussed in the following section, under which good-cause protections for ALJs should be read to allow a broader measure of presidential control.

## 2. Executive Action to Weaken Good-Cause Removal Requirements for ALJs

Just as the uncertainty surrounding ALJ appointments created by *Lucia* sparked President Trump's Executive Order exempting ALJs from competitive civil-service hiring, the uncertainties surrounding good-cause removal provisions for federal officers has fueled the Trump Administration's efforts to weaken good-cause protections for ALJs.<sup>211</sup> In particular, the Solicitor General issued guidance indicating that the Justice Department will defend against challenges to ALJ good-cause removal requirements only if these provisions are construed to allow agency heads to exercise sufficient control over ALJs.<sup>212</sup>

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207. 140 S. Ct. at 2205.

208. *Id.* at 2192.

209. *Id.*

210. There may also be a stronger historical case for ALJ independence. The APA itself has been in place since 1946, and there may be earlier examples of good-cause protection for quasi-judicial officers.

211. See Guidance Memorandum, *supra* note 5.

212. See *id.* Although the Guidance Memorandum is labeled as "Privileged and Confidential Attorney Work Product," it is sufficiently public to be available on Internet sites, including Reuters, and has been discussed in scholarly literature. See *id.*; Listwa & Fuller, *supra* note 130, at 560 & n.56 (describing the memorandum's contention that the MSPB must be "suitably deferential" to agency heads as "[i]n line with [a] strong reading of *Lucia*"); Lubbers, *supra* note 94, at 757-58 (criticizing memorandum's treatment of good-cause removal); *Guidance on Administrative Law Judges After Lucia v. SEC (S.Ct.)*, July 2018, 132 HARV. L. REV. 1120 (2019) [hereinafter *Harvard Guidance Note*] (describing memorandum in detail and offering various criticisms).

Citing *Free Enterprise Fund*, the Guidance Memorandum states that “[t]he Constitution not only specifies the manner in which officers of the United States must be appointed, but also limits the extent to which officers may permissibly be shielded from removal by the Department Head.”<sup>213</sup> It then observes that “[m]any litigants have already argued that ALJs are impermissibly shielded from removal” by 5 U.S.C. § 7521(a), and that “[w]e expect more such challenges in the wake of *Lucia*.”<sup>214</sup> The Guidance Memorandum then sets forth the Justice Department’s position regarding the defense of § 7521(a) against such challenges:

The Department of Justice is prepared to defend the constitutionality of Section 7521, as properly construed. As the government argued in the Supreme Court in *Lucia*, Section 7521’s “good cause” standard for removal is properly read to allow for removal of an ALJ who fails to perform adequately or to follow agency policies, procedures, or *instructions* . . . . An ALJ cannot, however, be removed for any invidious reason or to influence the outcome in a particular adjudication. As so construed, and *provided MSPB review is suitably deferential to the determination of the Department Head*, the Department of Justice will argue that Section 7521 gives the President a constitutionally adequate degree of control over ALJs. This is true of ALJs who work at independent agencies, as well as ALJs at traditional Executive Branch agencies.<sup>215</sup>

Several features of this passage are worth highlighting.

First, although *Free Enterprise Fund* only held that dual good-cause removal requirements were constitutionally invalid, the Guidance Memorandum makes no effort to differentiate between ALJs employed by executive and independent agencies, suggesting instead that Department Heads must be able to exercise control over ALJs.<sup>216</sup>

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213. Guidance Memorandum, *supra* note 5.

214. *Id.* Such challenges are even more likely to proliferate after *Seila Law*.

215. *Id.* (emphasis added) (citation omitted). As reflected in this passage, the Solicitor General advanced this position in much greater detail in *Lucia*. See Brief for Respondent Supporting Petitioners at 39–55, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130) (arguing that “[s]tatutory restrictions on removal of the Commission’s ALJs must be narrowly construed in light of serious separation of powers concerns”). For a critical discussion of this passage, see *Harvard Guidance Note*, *supra* note 212, at 1127 (“[T]he proposed removal procedures are substantially more deferential to agency leadership than current practice is and provide little guidance as to what justifications for removal might be unacceptable. These changes bolster presidential control over administrative officials and lend credence to Justice Breyer’s worry that *Lucia* could be used to weaken the independence of adjudicators.” (footnote omitted)). See also Verkuil, *supra* note 96, at 469 (“By requiring removal restrictions to be deferential to the executive authority, [the Solicitor General’s Guidance Memorandum] challenges established statutory schemes.”).

216. Indeed, the reference to a “Department Head” would surely include executive departments that employ ALJs, even though there is no dual good-cause removal problem in those agencies. See *Morrison v. Olson*, 487 U.S. 654, 656–57 (1988) (upholding statute limiting the Attorney General’s power to remove for good cause). *Free Enterprise Fund*, of course, distinguished *Morrison* precisely because it involved only one

In this respect, the Guidance Memorandum's analysis would apply equally to other good-cause removal provisions, including those of traditional independent agencies, such as the FTC, the NLRB, or the SEC.

Second, although the Guidance Memorandum acknowledges that ALJs could not be removed "for any invidious reason or to influence the outcome in a particular adjudication," the Solicitor General asserts that agencies must be able to remove an ALJ who "fails . . . to follow agency policies, procedures, or instructions."<sup>217</sup> As we discuss more fully below, this language would place ALJs in an untenable position when agencies adopt informal policies or issue instructions that appear to conflict with statutes and regulations.<sup>218</sup>

Third, the Guidance Memorandum's position undermines the role of the MSPB as an independent check on the removal of ALJs. Degrees of deference affect the allocation of decision-making authority between an initial decision-maker and a reviewing body. Thus, requiring the MSPB to defer to the agency decision regarding the removal of ALJs takes decision-making authority away from the MSPB and gives it to the agency. This result appears to be contrary to the plain language of § 7521(a), which requires good cause to be "*established and determined* by the Merit Systems Protection Board . . ."<sup>219</sup>

In short, the Guidance Memorandum represents an especially strong assertion of the unitary executive principle in which Article II's demands for presidential control of executive officers outweigh the need to protect the procedural due process rights of parties to administrative adjudications by ensuring the impartiality and independence of adjudicatory officials. Under this view, although ALJs are called "judges," they are first and foremost executive officers whose duty is

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layer of good cause. *See* *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495 (2010) ("*Morrison* did not, however, address the consequences of more than one level of good-cause tenure . . .").

217. Guidance Memorandum, *supra* note 5.

218. *See infra* notes 233–63 and accompanying text (discussing history of SSA pressure on ALJs).

219. 5 U.S.C. § 7521(a) (emphasis added); *see* *Wilson v. Comm'r*, 705 F.3d 980, 988–89 (9th Cir. 2013) (concluding that statutory delegation to Tax Court of authority "to *determine* the appropriate relief" indicated that Tax Court had authority to make a de novo determination of eligibility for equitable relief without deference to the IRS Appeals Officer). Although the constitutional avoidance doctrine might justify a narrow construction, it cannot be used to reach a result that is contrary to the plain and unambiguous language of the statute. *See, e.g.,* *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018) ("That is not how the canon of constitutional avoidance works. Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases. Instead, the canon permits a court to 'choos[e] between competing *plausible* interpretations of a statutory text.'" (quoting *Clark v. Martinez*, 543 U.S. 371, 381 (2005))).

to carry out the policy of the political leaders of the agency. Thus, it is hardly surprising that the commentary on the Guidance Memorandum has largely been critical.<sup>220</sup> Nonetheless, the Court's analysis in *Seila Law* suggests that a majority of Justices may be receptive to the Solicitor General's position.

### C. ALJ INDEPENDENCE AND IMPARTIAL DECISION-MAKING

The purpose of ALJ independence in general, and of competitive hiring and good-cause protection for ALJs in particular, is to ensure that ALJs will conduct adjudications impartially.<sup>221</sup> Thus, the ultimate question raised by the developments described above is whether those developments open the door to improper agency influence that could undermine the fairness of ALJ decisions.<sup>222</sup> Drawing the proper balance between Article II oversight and adjudicatory independence is not a new problem; it has been a contested issue since the dawn of the administrative state. Whatever the agency's legitimate interest in ALJ oversight, however, it does not include interference with the impartiality of agency adjudications.

#### 1. Improper Influence

To assess the problem of improper influence, we might differentiate between presidential or agency interference in the outcome of a particular case and systemic influence to drive outcomes in a

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220. In addition to the commentary cited *supra* in note 212 (citing commentary on the Guidance Memorandum), see Kevin D. Collins, *Administrative Hearings: Executive Power and the Administrative State*, 2019 ROCKY MTN. MIN. L. FOUND. SPECIAL INST. ON NAT. RES. DEV. & ADMIN. STATE \*12-7, which concludes that “[t]he Department of Justice’s change in position during the *Lucia* appeal and efforts to address removal of ALJs demonstrates an effort by the Trump Administration to assert greater executive control over administrative courts”; and Michael Devine & Erin Wirth, *ALJ Independence Under the Federal Administrative Procedure Act in the Wake of the Supreme Court’s Decision in Lucia v. SEC*, 58 JUDGES’ J. 6, 9 (2019), which describes Guidance Memorandum as “an effort to redefine ‘good cause’ to . . . allow much greater control by the executive branch and agency heads” which “would have the effect of transforming them into at-will employees, diminishing their independence in direct contradiction to the language and intent of the APA” (footnote omitted).

221. See 5 U.S.C. § 556(b) (directing ALJs to conduct proceedings under §§ 556 and 557 “in an impartial manner”).

222. See, e.g., Barnett, *Impartiality*, *supra* note 82, at 1697–98 (arguing that *Lucia* triggers “concern over ALJs’ insulation” and “undermines [their] . . . appearance of impartiality” by raising the possibility that supervising officials can remove them at will); Lubbers, *supra* note 94, at 752–53 (“Although Executive Order 13,843’s establishment of an almost unrestricted selection process for ALJs can be seen as an indirect dilution of their independence, even more concerning is the seeming campaign by the Department of Justice (DOJ) to weaken ALJs’ for-cause protection from discipline and removal.”).

preferred direction.<sup>223</sup> Agencies, of course, may decide cases heard by ALJs de novo through the normal adjudicatory process, and they may adopt policies that bind ALJs through rulemaking and precedential adjudications. Aside from these legitimate processes, there is little doubt that it would be improper for the President or an agency to direct an ALJ to decide a particular case in a particular way. The question of systemic influence is a more complex one, as the line between legitimate agency policy and illegitimate influence that compromises ALJ impartiality is a difficult one to draw.

The possibility that the politicization of appointments and weakening of good-cause removal requirements will open the door to improper influence in individual cases cannot be discounted.<sup>224</sup> Nonetheless, this concern does not strike us as the most serious problem with the erosion of ALJ independence. Neither the precedents nor the executive actions discussed above suggest that the President or agency heads have the power to appoint and remove ALJs to achieve a desired outcome in an individual case.<sup>225</sup> As a practical matter, moreover, appointments are at best an indirect way to influence the outcome in particular cases.<sup>226</sup> While removal may be a more direct means to control outcomes in particular cases, such actions would face other statutory and constitutional constraints. Thus, we believe the greater concern is that political appointments and expanded

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223. For example, a decision-maker might have a financial conflict of interest in a particular case (e.g., by owning stock in one of the parties) or in the outcomes of cases generally (such as when an insurance company decides question of coverage). *Compare* *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 868–69, 873 (2009) (finding improper conflict of interest where elected state supreme court justice had received millions of dollars in campaign funding from one of the parties), *with* *Schweiker v. McClure*, 456 U.S. 188, 188–89 (1982) (finding no improper conflict of interest when Medicare fiscal intermediaries decided coverage questions because claims were paid by Medicare, not the fiscal intermediary).

224. The Justice Department's intervention in criminal proceedings against former Trump administration officials such as Michael Flynn has sparked considerable controversy. *See, e.g.*, Peter M. Shane, *Flynn's New Argument Is Constitutional Nonsense*, ATLANTIC (May 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/flynn-new-argument-constitutional-nonsense/611770> [<https://perma.cc/H66S-96HK>]; C. Ryan Barber, *Thousands of Ex-Prosecutors Urge Flynn Judge to Question Barr's Move to Drop Case*, LAW.COM (May 11, 2020), <https://www.law.com/nationallawjournal/2020/05/11/thousands-of-ex-prosecutors-urge-flynn-judge-to-question-barrs-move-to-drop-case> [<https://perma.cc/KST6-68QR>].

225. Even the Solicitor General acknowledged this limitation on the removal power. *See* Guidance Memorandum, *supra* note 5 (“An ALJ cannot, however, be removed for any invidious reason or to influence the outcome in a particular adjudication.”).

226. This is especially true so long as adjudications are assigned randomly to ALJs, as required by 5 U.S.C. § 3105.

removal powers will contribute to systemic biases that compromise the impartiality of agency adjudication on a macro level.

Systemic bias has been a major problem for agencies that use adjudicators who lack the degree of independence that ALJs enjoyed before the onset of the threats described in this Article.<sup>227</sup> For example, Professors Kim and Semet concluded, based on logistical regression analysis results, that President Trump has been able to influence removal decisions by Immigration Judges, undermining the assumption of independence among administrative adjudicators.<sup>228</sup> These efforts appear to have taken a toll on the morale of Immigration Judges and other administrative personnel making decisions on the immigration status of individuals.<sup>229</sup> The Trump Administration's alleged efforts to interfere with the decisional independence of agency adjudicators may extend to other agencies such as the Board of Veterans' Appeals, as well.<sup>230</sup>

Competitive civil service appointment, good-cause removal provisions, and other APA safeguards, such as restrictions on performance evaluations for ALJs, protect against this sort of systemic

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227. For discussion of the need for impartial decision-making by administrative judges, see Barnett, *Against AJs*, *supra* note 57, at 1671–85.

228. Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 625–30 (2020); *see also id.* at 583 (“The Trump Administration has taken a particularly aggressive approach to reshaping immigration courts, which the President has publicly and repeatedly denigrated.”). Although Immigration Judges are not ALJs governed by the APA’s provisions concerning formal adjudication, they “are understood to exercise ‘independent judgment’ in deciding cases.” *Id.* at 582 (citing 8 C.F.R. § 1003.10(b) (2020)).

229. See Priscilla Alvarez, *Immigration Judges Quit in Response to Administration Policies*, CNN POLITICS (Dec. 27, 2019), <https://www.cnn.com/2019/12/27/politics/immigration-judges-resign/index.html> [<https://perma.cc/NDL4-5423>] (describing an exodus of immigration judges from their positions that reflected “frustration over a mounting number of policy changes that, they argue, chipped away at their authority”); *see also* Charles Tjersland, Jr., *I Became an Asylum Officer to Help People. Now I Put Them Back in Harm’s Way.*, WASH. POST (July 19, 2019), [https://www.washingtonpost.com/outlook/i-became-an-asylum-officer-to-help-people-now-i-put-them-back-in-harms-way/2019/07/19/1c9f98f0-a962-11e9-9214-246e594de5d5\\_story.html](https://www.washingtonpost.com/outlook/i-became-an-asylum-officer-to-help-people-now-i-put-them-back-in-harms-way/2019/07/19/1c9f98f0-a962-11e9-9214-246e594de5d5_story.html) [<https://perma.cc/3JQJ-KKU8>] (reporting that asylum officers in the U.S. Citizenship and Immigration Services “have reported feeling pressured by supervisors to say it is safe for migrants to return to Mexico,” knowing “that [the migrants] might be kidnapped, assaulted or killed” upon their return).

230. See Kim & Semet, *supra* note 228, at 586; *see also* Jennifer Yachnin, *Appointments Signal Political Shift for In-House Judges*, E&E NEWS (May 1, 2020), <https://www.eenews.net/stories/1063022081> [<https://perma.cc/GR8D-G7DU>] (describing a “seismic shift” in the manner in which the administrative judges on the Interior Board of Land Appeals are appointed, characterized by a focus on the political ideology of appointees).

bias.<sup>231</sup> Of course, such protections also make it more difficult for agencies to engage in legitimate oversight of ALJs so as to ensure ALJs decide cases accurately, consistently, and expeditiously in accordance with agency law and policy. Nonetheless, when oversight efforts cross the line from legitimate supervision to improper influence, ALJ independence is an essential safeguard for impartial decisions.

## 2. ALJ Oversight in the Social Security Administration

In this respect, the history of the SSA, which employs the lion's share of federal ALJs, is instructive. During the Reagan Administration, the SSA adopted various policies and practices designed to decrease the rate of ALJ disability allowances.<sup>232</sup> Many of these policies and practices appeared to cross the line from legitimate oversight and policy direction into improper influence that could compromise the impartiality of ALJs.<sup>233</sup> Thus, although the SSA had its defenders,<sup>234</sup> many of its policies and practices were invalidated by the courts, reversed by statute, or withdrawn by the SSA in the face of widespread criticism.<sup>235</sup>

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231. See *supra* notes 64–73 and accompanying text (discussing civil service protections for ALJs).

232. See generally Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 BYU L. REV. 461, 484–507 (discussing policies and practices).

233. In testimony before a congressional subcommittee, for example, the President of the Association of Administrative Law Judges reported that seventy percent of ALJs responding to an independent survey reported that there was agency pressure to deny benefits. *Social Security Disability Reviews: The Role of the Administrative Law Judge: Hearing Before the Subcomm. on Oversight of Gov't Mgmt. of the S. Comm. on Governmental Affs.*, 98th Cong. 73 (1983) (statement of Charles N. Bono) [hereinafter *Disability Reviews*]. In other testimony at the same hearing, an ALJ reported that orientation sessions reflected the view that “most claims deserve to be denied” and that lecturers “argued with [ALJs] on mock cases, attempting to convince us that they should not be granted”. *Id.* at 295 (statement of Joyce Krutick Barlow); see also AALJ Letter, *supra* note 159, at 6 (contending that SSA ALJs “are placed in an untenable position, because they have taken an oath to perform their non-delegable adjudicatory duty grounded in both the Constitution and statute” but “are being subjected to increased intimidation and discipline to ensure enforcement of non-binding Agency ‘policy’ and ‘guidance’ for the purpose of ‘sending a message’ to other judges”).

234. E.g., Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 500–01 (1990) (arguing that judicial decisions invalidating SSA practices improperly interfered with political control of agency policy). Even if ALJs tend to grant benefits too easily or are too prone to deny benefits to claimants who qualify, agency efforts to influence ALJ decision-making through the kind of nonbinding policies and guidance we describe in this section represent precisely the kinds of threats to ALJ impartiality and independence that support the adoption of the central panel model we discuss in Part III below.

235. See Levy, *supra* note 232 (discussing policies and practices and responses to

*Dixon v. Shalala* provides a useful example.<sup>236</sup> Under SSA regulations, which establish a five-step evaluation process for disposition of disability claims, benefits are denied at step two if the claimant's impairments are not "severe."<sup>237</sup> This step is intended to operate as a relatively low threshold requirement and can only be used to deny benefits to "those claimants with slight abnormalities that do not significantly limit any 'basic work activity' . . ."<sup>238</sup> Nonetheless, the *Dixon* court upheld a trial court's finding that the SSA had systematically misapplied the policy to improperly deny benefits, using a variety of informal policies and practices to increase the rate of denials at this step of the evaluation process from 8% to 40%.<sup>239</sup>

Similar issues arose in relation to many other aspects of disability adjudications as the SSA, through a combination of nonlegislative rules, personnel manuals, and internal memoranda, directed ALJs, for

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them).

236. 54 F.3d 1019, 1020–21 (2d Cir. 1995) (describing systematic misapplication of "severity regulation" to improperly deny benefits in thousands of cases). Another example was the SSA's policy of denying benefits to claimants with mental impairments by conclusively presuming that they had the capacity to perform unskilled labor if their impairments were not severe enough to be per se disabling. See *City of New York v. Heckler*, 578 F. Supp. 1109, 1115 (E.D.N.Y. 1984) (finding that the SSA had followed an illegal and clandestine policy that conclusively presumed mentally disabled claimants retained the capacity to perform unskilled work if their impairments were not sufficiently severe to be per se disabling), *aff'd*, 742 F.2d 729 (2d Cir. 1984), *aff'd sub nom.* *Bowen v. City of New York*, 476 U.S. 467 (1986); *Mental Health Ass'n of Minn. v. Schweiker*, 554 F. Supp. 157, 168 (D. Minn. 1982) (enjoining policy concerning mentally impaired claimants' eligibility for disability benefits), *aff'd in part and modified in part sub nom.* *Mental Health Ass'n of Minn. v. Heckler*, 720 F.2d 965 (8th Cir. 1983).

237. 20 C.F.R. § 404.1520(c) (2019); *id.* § 416.920(c). Both regulations provide: "If you do not have any impairment . . . which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience."

238. *Bowen v. Yuckert*, 482 U.S. 137, 158 (1987) (O'Connor, J., concurring) (citing 20 C.F.R. § 404.1521(a)). Although *Yuckert* upheld the regulation as facially valid, Justice O'Connor's concurring opinion emphasized that the regulation could not be applied to deny benefits improperly. Her opinion, joined by Justice Stevens, was necessary to the result and *Dixon*, therefore, treated it as controlling. See 54 F.3d at 1030 ("We find that the record evidence supports the district court's finding that Step Two was employed pervasively during this period to do exactly what the *Yuckert* Court forbade—to deny benefits to a claimant who may fit within the statutory definition without determining whether the impairment prevents the claimant from engaging in either his prior work or substantial gainful employment that, in light of the claimant's age, education, and experience, is available to him in the national economy." (quoting *Yuckert*, 482 U.S. at 158 (O'Connor, J., concurring))).

239. *Dixon*, 54 F.3d at 1029–31 (recounting the use of policy guidance, instructional manuals, and less formal controls to produce systematic misapplication of the severity regulations).



example, to refuse to consider the combined effects of multiple impairments, disregard claimants' subjective complaints of pain, and discount the opinions of claimants' treating physicians.<sup>240</sup> Although many of these policies were invalidated by courts, the SSA followed a policy of "non-acquiescence" whereby it would instruct agency personnel to disregard judicial decisions invalidating agency policies—even in the circuit in which the judicial decisions were rendered.<sup>241</sup> Under these circumstances, ALJ independence is critical as a check against improper agency policies.<sup>242</sup>

It is hardly surprising, then, that the SSA sought to pressure ALJs to deny benefits in accordance with its policies, notwithstanding the questionable legality of those policies. The most prominent example of agency efforts to pressure ALJs is the so-called Bellmon Review Program,<sup>243</sup> through which the SSA "targeted" ALJs with high allowance rates for performance review on the theory that high allowance rates correlated with high error rates.<sup>244</sup> In *Association of Administrative Law Judges v. Heckler (AALS)*, a district court concluded that the SSA's "unremitting focus on allowance rates . . . created an untenable atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof."<sup>245</sup> The SSA also used other methods to

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240. See GLICKSMAN & LEVY, *supra* note 36, at 678–79 (listing ten controversial agency policies).

241. See Levy, *supra* note 232, at 503–07 (discussing non-acquiescence policy).

242. We do not think it would violate Article II's "take care" clause if an ALJ qualifying as an officer of the United States could not be removed from his or her position based on a refusal to follow nonbinding agency policies the ALJ regarded as inconsistent with an applicable statute or legislative regulation, particularly if a circuit court decision from that circuit supported the ALJ's approach. In *Kendall v. United States*, the Supreme Court rejected the contention that the "take care" clause vested in the President exclusive authority to control the exercise of the Postmaster General's discretion. 37 U.S. 524, 612–13 (1838). Doing so would "cloth[e] the President with a power entirely to control the legislation of [C]ongress and paralyze the administration of justice." *Id.*

243. The "Bellmon Amendment," enacted as part of the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 304(g), 94 Stat. 441, 456 (1980), directed the Secretary of the Department of Health and Human Services (HHS) to "implement a program of reviewing, on his own motion, decisions rendered by administrative law judges" and to report to Congress on the results of this review program. This report, known as the Bellmon Report, is reprinted in its entirety in the Social Security Bulletin. DEP'T OF HEALTH AND HUM. SERVS. & SOC. SEC. ADMIN., THE BELLMON REPORT, reprinted in 45 SOC. SEC. BULL. 3, 3–27 (1982).

244. See Levy, *supra* note 232, at 498–99 & n.200 (discussing implementation of program and resulting controversy).

245. 594 F. Supp. 1132, 1143 (D.D.C. 1984). The district court also observed that "the injudicious use of phrases such as 'targeting,' 'goals' and 'behavior modification' could have tended to corrupt the ability of administrative law judges to exercise that independence in the vital cases that they decide." *Id.* The district court declined to issue

influence ALJs, including increased efforts to remove them, restrictions on travel privileges, denial of staff, and letters advising ALJs that they must increase productivity or decrease their allowance rates.<sup>246</sup>

Ultimately, these two cases and other appellate court decisions suggest that the validity of the SSA's oversight efforts appears to depend on the extent to which they tend to pressure ALJs to decide cases in a particular way. Thus, for example, in *Nash v. Bowen*, the court concluded that the SSA's peer review program, establishment of production goals, and use of ALJ reversal rates to select decisions for quality assurance review did not interfere with the decisional independence of ALJs.<sup>247</sup> Similarly, in *Association of Administrative Law Judges v. Colvin*, a recent Seventh Circuit case, the court upheld the SSA's adoption of a quota requiring ALJs to issue at least 500 disability claim decisions a year.<sup>248</sup> The court rejected the ALJ union's argument that the quota pressured ALJs to award benefits because it is easier to prepare a justification for granting than for denying benefits.<sup>249</sup> The court concluded that the APA's protection of ALJ independence did not prohibit the adoption of a bona fide production quota, notwithstanding its "incidental consequences."<sup>250</sup>

The history of pressure on ALJs within the SSA highlights the threat to ALJ independence presented by the Solicitor General's position that agency heads must be able to remove ALJs who do not "follow agency policies, procedures, or instructions."<sup>251</sup> Agency policies, procedures, and instructions come in various forms, often with little or no

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injunctive relief only because the SSA had already abandoned the objectionable aspects of its review program. *Id.*; see also *W.C. v. Bowen*, 807 F.2d 1502, 1505 (9th Cir.) (concluding that the targeted review program was a substantive rule that had been adopted in violation of the notice and comment procedures of the APA, relying in part on a district court finding that the program was intended to and did alter ALJ decisions), *modified on denial of reh'g en banc*, 819 F.2d 237 (9th Cir. 1987). *But cf.* *NLRB v. Ohio New & Rebuilt Parts, Inc.*, 760 F.2d 1443, 1451-52 (6th Cir. 1985) (holding that the NLRB's system of performance evaluations for regional directors did not sufficiently compromise their impartiality so as to violate due process).

246. See *Disability Reviews*, *supra* note 233, at 72-73; *id.* at 265-68 (Chart, Actions Against Administrative Law Judges 1946-83).

247. 869 F.2d 675, 678 (2d Cir. 1989). The court also expressed doubt that the APA creates a general right of ALJ independence, aside from its specific provisions concerning tenure, compensation, and exemption from performance evaluations. *Id.*

248. 777 F.3d 402, 405-06 (7th Cir. 2015).

249. *Id.* at 404. According to the union, an ALJ need not be as careful in analyzing a disability claim in granting benefits because the SSA cannot appeal an award, so that the ALJ "doesn't . . . have to try to make his decision appeal proof." *Id.*

250. *Id.* at 405-06.

251. Guidance Memorandum, *supra* note 5.

public input, and may be of dubious legality.<sup>252</sup> Some agency policies, such as the SSA's "Social Security Rulings," are relatively formal "non-legislative rules" that are published in the Federal Register and broadly available to the public. Others, however, are less formal and less transparent, including agency personnel manuals, internal memoranda and instructions, and even oral communications.

When agencies use nonlegislative rules to make policy, they may do so without following notice-and-comment procedures,<sup>253</sup> but such policies are not supposed to be binding on the general public.<sup>254</sup> Nonetheless, agencies typically treat them as binding on agency personnel, including ALJs. The SSA, for example, has stated that although Social Security Rulings do not have the force and effect of the law or regulations, "[t]hey are binding on all components of the Social Security Administration."<sup>255</sup> More specifically, the SSA has stated that "[w]e require adjudicators at all levels of administrative review to follow agency policy, as set out in the Commissioner's regulations, SSRs, Social Security Acquiescence Rulings (ARs), and other instructions, such as the Program Operations Manual System (POMS), Emergency Messages, and the Hearings, Appeals and Litigation Law Manual (HALLEX)."<sup>256</sup> It has taken this position despite judicial rulings that the agency's nonlegislative rules, such as HALLEX, do not create binding obligations.<sup>257</sup> Although it may be proper for agencies to rely on

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252. President Trump has subjected some agency guidance documents to notice-and-comment procedures normally reserved for legislative rules. Exec. Order No. 13,891, Promoting the Rule of Law Through Improved Agency Guidance Documents, 84 Fed. Reg. 55,235, 55,237 (Oct. 15, 2019); *see also* Memorandum from Dominic J. Mancini, Acting Adm'r, Off. of Info. & Regul. Affs., to Regul. Pol'y Officers at Exec. Dep'ts & Agencies & Managing & Exec. Dirs. of Certain Agencies and Comm'ns (Oct. 31, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf> [<https://perma.cc/LTE7-XZHG>].

253. 5 U.S.C. § 553(b)(A).

254. *See, e.g.*, *Hagens v. Comm'r of Soc. Sec.*, 694 F.3d 287, 302–03 (3d Cir. 2012) (stating that SSA Acquiescence Rulings "lack the force of law" and are "a type of ruling that is non-binding except within the agency"); *Farrell v. Dep't of the Interior*, 314 F.3d 584, 590 (Fed. Cir. 2002) (concerning policy statements).

255. 20 C.F.R. § 402.35(b)(1) (2018); *see also* *Preface to Social Security and Acquiescence Rulings*, SOC. SEC. ADMIN., [http://www.ssa.gov/OP\\_Home/rulings/rulings-pref.html](http://www.ssa.gov/OP_Home/rulings/rulings-pref.html) [<https://perma.cc/B4PZ-NJ56>] (stating that the agency's "Acquiescence Rulings do not have the force and effect of the law or regulations, however, they are binding on all components of SSA"). According to representatives of the Association of Administrative Law Judges, International Federation of Professional and Technical Employees, Judicial Council 1, AFL-CIO, "ALJs are not a component [of SSA]. ALJs are appointees under Section 3105 of the APA. We conduct non-adversarial, inquisitorial hearings under Section 556 of the APA." AALJ Letter, *supra* note 159, at 5.

256. Social Security Ruling 13-2p; Titles II and XVI: Evaluating Cases Involving Drug Addiction and Alcoholism (DAA), 78 Fed. Reg. 11,939, 11,946 (Feb. 20, 2013).

257. *See, e.g.*, *Lowry v. Barnhart*, 329 F.3d 1019, 1023 (9th Cir. 2003) (HALLEX and

nonlegislative rules for support in an adjudication,<sup>258</sup> if those rules are binding on ALJs, they are for all practical purposes binding on the general public as well, especially if backed with the threat of disciplinary action for ALJs who do not follow them.<sup>259</sup>

The threat of disciplinary action against ALJs who do not follow agency policies and instructions is all the more problematic when those policies and instructions are less formal, such as those found in personnel manuals, memoranda to agency personnel, and oral communications. As reflected in the foregoing discussion, the SSA's past use of such informal policies and instructions often lacked transparency, making it difficult to identify their influence on ALJ decisions. In addition, when the failure of ALJs to follow informal policies and instructions that violate statutes and agency regulations subjects them to disciplinary action, including removal from office, ALJs are in an untenable position that compromises their ability to conduct impartial adjudications.<sup>260</sup>

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POMS); *cf.* *Moore v. Apfel*, 216 F.3d 864, 869 (9th Cir. 2000) ("As HALLEX does not have the force and effect of law, it is not binding on the Commissioner and we will not review allegations of noncompliance with the manual." (citing *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 900 (9th Cir. 1996))).

258. *See, e.g., Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 87–88 (1995) (upholding HHS's reliance on an interpretive rule to resolve the hospital's Medicare reimbursement claim because the rule was not inconsistent with agency legislative rules and, therefore, did not effect a substantive change in the law). In such cases, however, the ruling is not necessarily binding, and reliance may be constrained. *See, e.g., Allen v. Barnhart*, 417 F.3d 396, 407–08 (3d Cir. 2005) (stating, in dictum, that if the SSA wishes to rely on a Social Security Ruling to deny disability benefits, "advance notice should be given," and that the court will apply "close scrutiny" to an ALJ's reliance on a Ruling in the absence of notice of its relevance in advance of the ALJ hearing).

259. *See Texas v. EEOC*, 933 F.3d 433, 442 (5th Cir. 2019) ("That the agency's action binds its staff or creates safe harbors demonstrates that legal consequences flow from it, even when the agency lacks authority to promulgate substantive regulations implementing the statute it administers."); *Robertson v. Colvin*, No. 12-cv-1419-DGK-SSA, 2014 WL 106117, at \*7 n.5 (W.D. Mo. Jan. 10, 2014) ("Although the POMS is not binding on ALJs, it is a persuasive authority for courts to use in analyzing an ALJ's findings." (citing *Hartfield v. Barnhart*, 384 F.3d 986, 988 (8th Cir. 2004))); Nicholas R. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, 71 ADMIN. L. REV. 57, 61 (2019) (describing complaints that agencies follow guidance "as they would a binding legislative rule, and regulated parties are under coercive pressure to do the same," but that public participation opportunities are more limited than for legislative rules).

260. *See, e.g., Salling v. Bowen*, 641 F. Supp. 1046, 1067 (W.D. Va. 1986) (concluding that "unadvertised internal decision[s]" that "radically changed" agency policies "by internal rules that do not have the force and effect of regulations" were "simply nothing more nor less than an attempt by the bureaucracy to control the independence of the ALJs").

### III. THE CENTRAL PANEL MODEL AS A LEGISLATIVE RESPONSE TO THREATS TO ALJ INDEPENDENCE

In view of these threats to ALJ independence, some legislative response is needed to restore ALJ independence and preserve impartial agency adjudication.<sup>261</sup> Any such reforms would have to be consistent with the constitutional demands of separation of powers, including the Supreme Court's decisions in *Free Enterprise Fund*, *Lucia*, and *Seila Law*. In this part of the Article, we suggest that a variation of the "central panel" used in many states might be a workable approach to securing ALJ independence without violating constitutional norms.<sup>262</sup>

#### A. A LEGISLATIVE RESPONSE

As Part II makes clear, some sort of congressional response is necessary to address constitutional issues and reinforce ALJ independence.<sup>263</sup> Indeed, notwithstanding our hyper-partisan times, we hope that this will be regarded as a nonpartisan issue.<sup>264</sup> Both progressives and conservatives should be concerned that overzealous political appointees will try to exert improper influence over

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261. Cf. AALJ Letter, *supra* note 159, at 5 ("With less and less congressional oversight, it is highly likely that . . . the use of guidance and non-legislative rules has derailed Social Security's mission . . .").

262. See generally Malcolm C. Rich & Alison C. Goldstein, *The Need for a Central Panel Approach to Administrative Adjudication: Pros, Cons, and Selected Practices*, 39 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 5 (2019) (providing a comprehensive review of central panels in the states and suggesting best practices, intended in part "to inform the debate over whether the central panel approach is something that the federal government should consider"); REVISED MODEL STATE ADMIN. PROC. ACT prefatory note at 6 (UNIF. L. COMM'N 2010) (explaining that "[t]he growth of central panel agencies in the states since the adoption of the 1981 Act has been significant with 25 states currently having these agencies"); JOINT STATE GOV'T COMM'N, GEN. ASSEMBLY OF THE COMMONWEALTH OF PA., REFORMING THE ADMINISTRATIVE LAW OF PENNSYLVANIA 34–36 (2014) (listing 27 states with central panels).

263. See also Nou, *supra* note 10, at 1199 ("In the final analysis, the ideal monitor for protecting ALJ decisional independence may ultimately be Congress itself.").

264. See, e.g., Jessie Bur, *Bipartisan Bill Would Counter Administrative Law Judge Executive Order*, FED. TIMES (Sept. 4, 2018), <https://www.federaltimes.com/federal-oversight/congress/2018/09/04/bipartisan-bill-would-counter-administrative-law-judge-executive-order> [<https://perma.cc/B7C9-MNE9>] (quoting statement by Senator Susan Collins that bill she co-sponsored with Senator Maria Cantwell was "bipartisan legislation [that] would ensure that administrative law judges remain well qualified and impartial, while this crucial process remains nonpartisan and fair"). Of course, the two political parties might be more or less concerned about political influence depending on the context and who controls political appointments. See *infra* note 267. Impartial adjudication is the long-term and stable solution to these concerns, and it is in the long-term interests of both political parties. At the same time, we do not wish to overstate the prospect of the two parties looking past their mutual antagonism and zero-sum thinking to cooperate on this sort of measure.

adjudications within their purview. Accordingly, even as the Trump Administration has taken steps to remove or undermine safeguards for ALJ independence, the Office of Management and Budget (OMB) has issued a “request for information” on “[i]mproving and/or reforming regulatory enforcement and adjudication.”<sup>265</sup> Among the topics on which OMB requested information is whether “adjudicators sometimes lack independence from the enforcement arm of the agency.”<sup>266</sup> Assuming that some legislative response is in order, what sort of response would be the most desirable?

One approach would be to shore up the particular safeguards for ALJ appointment and removal that have been eroded by judicial decisions and executive actions. Restoring competitive civil service appointments, for example, would be a fairly straightforward proposition.<sup>267</sup> Likewise, it might be possible to amend § 7521(a) so as to strengthen the good-cause removal requirement and preclude the Solicitor General’s interpretation.<sup>268</sup> Such a statutory fix, however, might

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265. Improving and Reforming Regulatory Enforcement and Adjudication, 85 Fed. Reg. 5,483 (Jan. 30, 2020).

266. *Id.* at 5,484. The apparent concern here is that agency adjudicators lack the independence to resist an agency’s overzealous regulatory enforcement—a “conservative” concern. In contrast, concerns over agency pressure to wrongfully deny Social Security disability benefits is a more “progressive” concern.

267. *See supra* notes 134–36 and accompanying text (describing introduction of bill to restore civil service appointments for ALJs). Restoring the rule of three depends, of course, on the constitutionality of constraining appointments by heads of departments from a short list of candidates selected using a competitive merit selection process, an issue that *Lucia* did not address. The Department of Justice might argue that such constraints interfere with the President or agency head’s political discretion to appoint executive officers. *See, e.g.*, David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 13 (2020) (arguing that *Lucia* “cast doubt on . . . [the] constitutionality” of the “nonpolitical [appointment] process administered by [OPM]”); Drew Thornley & Justin Blount, *SEC In-House Tribunals: A Call for Reform*, 62 VILL. L. REV. 261, 289 (2017) (describing pre-*Lucia* contentions that the SEC’s process of appointing ALJs through selection by the SEC’s Office of Administrative Law Judges from an OPM-recommended list of candidates was unconstitutional). The legality of the rule of three may also depend on the characterization of ALJs as principal or inferior officers. Even assuming constitutional concerns regarding application of the rule of three to ALJ appointments are valid, however, they simply reinforce our conviction that a more systemic solution such as the central panel model we recommend is essential for the protection of ALJ independence. In devising an apolitical appointment process for the ALJs on the central panel, it may be appropriate to design the process to avoid this issue. One option would be to provide for ALJ appointment by the courts, which would be constitutionally valid if ALJs are inferior officers. U.S. CONST. art. II, § 2. For further discussion of this issue, see *infra* notes 282–87 and accompanying text.

268. *See supra* notes 212–21 (discussing the Solicitor General’s Guidance Memorandum that interpreted the statute as allowing removal for failure to follow policies, procedures, and instructions and as requiring the MSPB to defer to the agency head).

actually bolster the argument that the President has inadequate control over ALJs and cause the Solicitor General to decline to defend the provision.<sup>269</sup> Equally important, it would not solve the problem of dual good-cause removal requirements.

There is no obvious legislative fix for the dual good-cause issue.<sup>270</sup> Removing good-cause protections for ALJs would solve the constitutional problem but would further undermine ALJ independence rather than bolster it. Removing good-cause protections for the principal officers who oversee ALJs would also solve the dual good-cause problem but only by fundamentally altering the character of many agencies that use ALJs. For traditional independent agencies like the FTC, NLRB, or SEC, eliminating agency independence seems like the tail wagging the dog—even if independent agencies are unconstitutional or a bad idea, that issue should be decided on its own merits, not as a remedy for a different constitutional problem.<sup>271</sup> The vast majority of ALJs work in the SSA, which did not become an independent agency until the 1990s.<sup>272</sup> Thus, eliminating the Social Security Commissioner’s good-cause removal protections might be more acceptable, especially since their constitutionality is in doubt after *Seila Law*.<sup>273</sup> But removal of those protections might politicize the agency in ways that would tend to increase improper pressures on ALJs and compromise the SSA’s independence on other matters, such as managing the Social Security Trust Fund.<sup>274</sup>

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269. Nonetheless, we think it would be preferable to shore up the statutory language of good-cause removal protections, as opposed to allowing the Court to rely on the constitutional avoidance canon to weaken those protections. We support this all-or-nothing approach because we consider an explicit repudiation of good cause to be more transparent than the sham of retaining good-cause removal provisions that do not provide adequate safeguards against improper removal. If the impartiality of ALJs cannot be protected, it is better for legislators and the public to know so that they can pursue alternative adjudicatory models (such as the creation of an Article I court).

270. See *supra* notes 168–76 and accompanying text (discussing proper remedies if dual good-cause removal requirements for ALJs violate *Free Enterprise Fund*); Jellum, *supra* note 157, at 745 (“Assuming that the Supreme Court is likely to hold 5 U.S.C. § 7521 unconstitutional, and that protecting ALJ independence within constitutional constraints is a worthy endeavor, then the question is, how might the Court resolve this mess? There is no perfect resolution . . .”).

271. As noted above, proponents of a strong, unitary executive might regard the elimination of independent agencies as a good thing that is, in fact, constitutionally required. See *supra* note 174.

272. Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 101, 108 Stat. 1464, 1465 (codified at 42 U.S.C. § 901(a)).

273. See *supra* notes 202–07 and accompanying text (discussing implications of *Seila Law* for the constitutional validity of good-cause protections for the Commissioner of the SSA).

274. Of course, like all agencies, the SSA is already politicized to a significant

The MSPB adds an additional wrinkle, as some judges and litigants seem to treat it as the relevant principal officer under *Free Enterprise Fund*.<sup>275</sup> Congress could try to avoid eliminating the good-cause removal protections for independent agencies by eliminating them for the MSPB, but that solution is problematic as well. In the first place, it may not be sufficient if, as we suspect, the agency head is the relevant principal.<sup>276</sup> Even if the dual good-cause removal problem could be solved by removing good-cause protections for the MSPB (without eliminating good-cause removal for the independent agencies employing ALJs),<sup>277</sup> the MSPB is intended to be an independent adjudicatory body,<sup>278</sup> and politicizing it would create its own problems both for civil service in general and ALJs in particular. Indeed, good-cause removal provisions for ALJs are not meaningful in the absence of some independent determination of whether good cause exists.

Ultimately, shoring up particular safeguards for appointment and removal provisions is a more complex and less effective response than it might appear at first glance. More fundamentally, deeper questions about agency efforts to control ALJs through problematic means will persist. The relevant concerns include the use of nonlegislative rules that purport to be binding only internally but that effectively bind the public. They also include the use of even less formal means to exert pressure to produce outcomes that are consistent with the legally questionable preferences of agencies' political leaders. Accordingly, more comprehensive reforms may be in order.

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degree. See *supra* note 233 (discussing agency pressure on ALJs in the SSA). The question is whether eliminating the Commissioner's independence would tend to increase the degree of politicization.

275. In *Fleming v. United States Department of Agriculture*, No. 17-1246 (D.C. Cir. filed Nov. 16, 2017), the petitioners have challenged good-cause removal provisions for ALJs in the Department of Agriculture on the theory that the good-cause removal requirements for the MSPB create a second layer of good-cause removal requirements in violation of *Free Enterprise Fund*. See Corrected Brief of Petitioners Joe Fleming, Sam Perkins and Jarrett Bradley at 55-59, *Fleming v. U.S. Dep't of Agric.*, No. 17-1246 (D.C. Cir. May 21, 2019).

276. Professor Jellum has suggested that it may be necessary to eliminate good-cause protections for both the employing agency head and the MSPB. See Jellum, *supra* note 157, at 743-44 (arguing that even ALJs in executive agencies whose head is removable at will by the President violate *Free Enterprise Fund*'s prohibition on dual good-cause removal because the MSPB's members are only removable for good cause).

277. See *supra* note 170 and accompanying text (explaining that eliminating good-cause protections for the MSPB was suggested by a concurring judge in *Bandimere v. SEC*, 844 F.3d 1168, 1191 (10th Cir. 2016) (Briscoe, J., concurring)).

278. See 5 U.S.C. § 7521(a).



One possibility would be to create an administrative court, as Professor Rappaport has advocated.<sup>279</sup> This solution has some appeal, insofar as it would separate the adjudication of cases from agency enforcement and policymaking, but it also presents a number of practical problems. These problems would arise whether such an administrative court is constituted as an Article III or an Article I court. For several reasons, we think that an Article III court is a political “non-starter.” An Article I court would be more politically feasible but ultimately suffers from most of the same problems.

The creation of an Article III administrative court would mean that administrative judges are subject to the same constitutional provisions and protections as other Article III judges. They would be appointed by the President with Senate consent,<sup>280</sup> and they would enjoy life tenure and salary protections.<sup>281</sup> More broadly, the structural independence of the federal judiciary would limit an agency’s ability to influence adjudication through its oversight of adjudicatory personnel.<sup>282</sup> These constitutional requirements, however, make an Article III court an unsuitable entity for the adjudication of administrative matters.<sup>283</sup> Recent experience with the appointment process in

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279. See Michael B. Rappaport, *Replacing Agency Adjudication with Independent Administrative Courts*, 26 GEO. MASON L. REV. 811, 812 (2019) (arguing that “the use of genuinely independent courts that have expertise and that use the streamlined procedures of administrative adjudications . . . would serve to promote the limited and effective government of the separation of powers while also furthering the expert and expeditious decision-making of agency adjudication”). Many other countries have administrative courts, including Germany and France. See, e.g., Ronald J. Krotoszynski, Jr., “History Belongs to the Winners”: *The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 1009 (2006) (“In France and Germany, specialized courts are charged with overseeing the rationality of agency work product.” (citations omitted)).

280. U.S. CONST. art. II, § 2, cl. 2 (specifying that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for”). Although the Appointments Clause does not explicitly require this means of appointment for lower court judges, we are not aware of anyone who has suggested that lower federal court judges with Article III status can be treated as inferior officers.

281. U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

282. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219–25 (1995) (describing the historical background and separation of powers principles underlying the creation of a separate judicial branch of government under the Constitution).

283. These concerns would not apply, however, to the creation of a specialized Article III court that engages in judicial review of some or all final agency actions, including agency adjudications. We take no position on the desirability of such a court.

various contexts has amply demonstrated that presidential appointment with Senate consent is unlikely to depoliticize the appointment of administrative judges.<sup>284</sup> In addition, administrative adjudication is much more streamlined than a judicial trial,<sup>285</sup> and so this option would likely be too resource-intensive.

More fundamentally, under the current system of administrative adjudication, ALJs make the initial decision, subject to a *de novo* determination by the agency head or an internal appellate body.<sup>286</sup> This arrangement uses ALJs to process high-volume administrative adjudications, while the agencies have the final say on policy matters, including the ability to make policy through precedential adjudication.<sup>287</sup> If Article III courts conduct the initial adjudication, however, it would be unconstitutional to give the agency any review power because the final decisions of Article III courts cannot be reviewed or reopened by the executive or legislative branches.<sup>288</sup> Thus, the creation of an Article III court to adjudicate matters currently resolved by ALJs would necessarily eliminate the agencies' ability to review administrative adjudications or make policy through precedential decisions.

The creation of an Article I court might address some of these issues. Some Article I courts, like the Tax Court, utilize presidential appointment with Senate consent and provide for removal by the President for good cause after a public hearing.<sup>289</sup> This model, which treats Article I judges as principal officers, would likely avoid any

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284. See *supra* notes 14–19 and accompanying text (analyzing recent Supreme Court decisions and executive actions affecting ALJs). See generally Shany Winder, *Extraordinary Policymaking Powers of the Executive Branch: A New Approach*, 37 VA. ENV'T L.J. 207, 232 (2019) (“Politicization is achieved through presidential political appointments in agencies to ensure the loyalty of personnel and the agencies’ commitment to the president’s preferred policy agenda.”); Madeline June Kass, *Presidentially Appointed Environmental Agency Saboteurs*, 87 UMKC L. REV. 697, 706 (2019) (charging that “extreme politicization of the EPA poses dangers both to environmental protection and representative democracy absent viable checks on the presidential appointment powers”).

285. See, e.g., Beermann, *supra* note 131.

286. See 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . .”).

287. See *supra* note 159 and accompanying text (discussing how precedential adjudications may be used to make policy).

288. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (stating that *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792), “stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch”).

289. See 26 U.S.C. § 7443(b) (“Judges of the Tax Court shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office.”); *id.* § 7443(f) (“Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause.”).

constitutional issues with either appointment or removal,<sup>290</sup> but it might not provide sufficient protection against the politicization of agency adjudication. Bankruptcy judges, on the other hand, are treated as inferior officers; they are appointed by the courts of appeal and subject to removal only for good cause by the judicial council of the circuit in which they are located.<sup>291</sup> This model might reduce the politicization of administrative appointment and removals,<sup>292</sup> but its constitutionality is less clear.

To the extent that Article I courts are considered to be part of the judicial branch, moreover, it is unclear that using an Article I administrative court would solve the problem of review by the administrative agency. Such an arrangement still would likely be unconstitutional because the validity of Article I courts rests largely on the retained supervisory authority of the Article III courts.<sup>293</sup> Although most agency adjudications might be regarded as addressing public rights that may be determined by agencies or Article I courts,<sup>294</sup> it is unlikely that Congress could vest an agency with *de novo* decisional authority over the decisions of an Article I court.<sup>295</sup> We are not aware of any Article I court that follows such a model.<sup>296</sup>

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290. *Seila Law* deals with officials in agencies within the executive branch, not Article I courts located (at least nominally) in the judicial branch. 140 S. Ct. 2183, 2191 (2020). To the extent that Article I judges are considered to be part of the judicial branch, the vesting of executive power in the President would not imply any authority to remove them. *See supra* notes 198–99 and accompanying text (discussing *Seila Law*'s articulation of a strong presidential removal power derived from the Vesting Clause of Article II).

291. *See, e.g.*, 28 U.S.C. § 152(a)(1) (“Each bankruptcy judge . . . shall be appointed by the court of appeals of the United States for the circuit in which [the judge’s] district is located.”); *id.* § 152(e) (“A bankruptcy judge may be removed during the term for which such bankruptcy judge is appointed, only for incompetence, misconduct, neglect of duty, or physical or mental disability and only by the judicial council of the circuit in which the judge’s official duty station is located. Removal may not occur unless a majority of all of the judges of such council concur in the order of removal.”).

292. In addition, appointments might be constrained through some sort of merit requirements. *Cf.* 28 U.S.C. § 152(a)(1) (directing appointments of bankruptcy judges to be made “after considering the recommendations of the Judicial Conference”).

293. *Cf. Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015) (“But allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers *so long as Article III courts retain supervisory authority over the process.*” (emphasis added)).

294. *See supra* note 30 and accompanying text (discussing the public rights doctrine).

295. *Hayburn’s Case*, for example, held that Congress could not assign the determination of military pensions—a quintessential public right—to the federal courts subject to review by the Secretary of War. 2 U.S. (2 Dall.) 408, 410 (1792).

296. Appeals from the Tax Court, the Bankruptcy Court, the Court of Federal Claims, and the Court of Appeals for Veteran’s Claims, for example, all go directly to

Given the problems with specific statutory fixes or the use of an administrative court to address current threats to independent agency adjudication, we think another option warrants consideration: the central panel model. A properly structured central panel of independent federal ALJs could protect impartial agency adjudication, avoid constitutional problems, and allow agencies an appropriate degree of policy control.

#### B. THE CENTRAL PANEL MODEL

The essential feature of the central panel model is that agency adjudicators are not part of the agency for which they adjudicate cases.<sup>297</sup> The Uniform Law Commission recommended this approach in the Revised Model State Administrative Procedure Act (Revised Model Act) adopted in 2010.<sup>298</sup> The prefatory note to the Revised Model Act explains that this model “provides for a neutral separation of the hearing and decision authority from the agency authority to enforce the law and adopt agency rules” and that “[c]entral panel agencies have independence from other executive branch agencies which can provide for greater fairness in contested case hearings.”<sup>299</sup> In particular, “[a]dministrative law judges that work for the Office of Administrative Hearings would not be subject to command influence from the agency head whose contested cases the administrative law judge is presiding over.”<sup>300</sup>

Under the central panel model in the Revised Model Act, adjudicators work for a separate office of administrative hearings headed by a chief administrative law judge.<sup>301</sup> The chief administrative law judge

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Article III courts without any agency review. 26 U.S.C. § 7482(a)(1) (Tax Court); 28 U.S.C. § 158 (Bankruptcy Court); 28 U.S.C. § 1295(a)(3) (Court of Federal Claims); 38 U.S.C. § 7292 (Court of Appeals for Veteran’s Claims).

297. See Rich & Goldstein, *supra* note 20, at 2 (“The central panel system is a framework to increase the judicialization of the state administrative process by seeking to keep ALJs separate from the agencies they serve . . .”).

298. REVISED MODEL STATE ADMIN. PROC. ACT §§ 601–607 (UNIF. L. COMM’N 2010). In its adoption of the central panel model, the Revised Model Act is similar to and based on “the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997).” See *id.* §§ 601–606 cmts. (referencing corresponding sections of the ABA model act).

299. *Id.* prefatory note at 6; see also *id.* § 601 cmt. (“States that adopt Article Six would provide for a separate hearing agency and would ensure impartiality and fairness in contested cases by separating the adjudication function from the prosecution and investigative functions.”).

300. *Id.* § 601 cmt.

301. For comprehensive discussion of the central panel model’s operation in the states that have adopted the Revised Model Act, see Rich & Goldstein, *supra* note 20.

is appointed by the governor, with the advice and consent of the Senate, and can be removed only for good cause.<sup>302</sup> The chief administrative law judge is, in turn, responsible for appointing ALJs and exercises administrative supervisory authority, including the power to discipline them pursuant to the state's merit system law and to remove them for good cause.<sup>303</sup> The Revised Model Act contemplates that an ALJ may be given final decisional authority, or that the judge may issue a recommended decision subject to a final determination by the agency head.<sup>304</sup> It further specifies that, "[e]xcept as otherwise provided by law . . . if a contested case is referred to the office by an agency, the agency may not take further action with respect to the proceeding, except as a party, until a recommended, initial, or final order is issued."<sup>305</sup>

The use of the central panel model for federal ALJs is not a new idea, and proposals to adopt one have surfaced periodically in the past. The so-called Heflin Bill, introduced in 1983 and again in 1993,<sup>306</sup> would have created a central panel of federal ALJs, but that bill was not adopted. Although some commentators supported the adoption of a federal central panel,<sup>307</sup> others (including leading

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302. REVISED MODEL STATE ADMIN. PROC. ACT § 602(a), (e).

303. See *id.* § 603(a), (d)(3). The chief administrative law judge may also remove ALJs pursuant to a reduction of force. *Id.* § 603(d)(4). The transition to an approach in which the chief ALJ would appoint central panel members should not cause undue administrative burdens. The statute creating the central panel could relocate currently appointed ALJs to the central panel. The chief judge would fill vacancies, but doing so would create no greater burdens than OPM currently bears.

304. See *id.* § 606(a) ("If the administrative law judge is delegated final decisional authority, the administrative law judge shall issue a final order. If the administrative law judge is not delegated final decisional authority, the administrative law judge shall issue to the agency head a recommended order in the contested case.").

305. *Id.* § 606(b).

306. S. 1275, 98th Cong., 129 CONG. REC. 12,116–19 (1983); S. 486, 103d Cong., 139 CONG. REC. 4064–67 (1993). For discussion of these bills, see Edwin L. Felner, Jr., *The Hidden Executive Branch Judiciary: Colorado's Central Panel Experience—Lessons for the Feds*, 14 J. NAT'L ASS'N ADMIN. L. JUDGES 95, 95 (1994); Victor W. Palmer & Edwin S. Bernstein, *Establishing Federal Administrative Law Judges as an Independent Corps: The Heflin Bill*, 6 W. NEW ENG. L. REV. 673 (1984); Malcolm C. Rich, *The Central Panel System and the Decisionmaking Independence for Administrative Law Judges: Lessons for a Proposed Federal Program*, 6 W. NEW ENG. L. REV. 643, 656–57 (1984).

307. See, e.g., Karen Y. Kauper, Note, *Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Corps Statute*, 18 U. MICH. J.L. REFORM 537, 538–39 (1985) (arguing for the creation of a federal central panel "to protect both the independence of the ALJs and the public interest"); Victor W. Palmer, *The Evolving Role of Administrative Law Judges*, 19 NEW ENG. L. REV. 755, 800 (1984) ("[The Heflin Bill] would rectify the critical problems inherent in the present ALJ/agency relationship . . . . A valid, independent administrative judiciary should emerge which will be responsive to the actual adjudicative needs and demands of agencies."); cf. Joseph J.

administrative law scholars) opposed it.<sup>308</sup> In 1992, for example, the Administrative Conference of the United States (ACUS) declined to recommend that the federal government create a central panel “at this time.”<sup>309</sup>

Ultimately, the question of whether to adopt a central panel model involves a balancing of competing considerations. The need for ALJ independence to ensure impartial adjudication must be balanced against the need for agency expertise and policy control. Whatever the appropriate balance may have been at the time of the APA’s adoption, when the Heflin Bill was under consideration, or when ACUS found it unnecessary to recommend an independent ALJ corps based on the central panel model, those decisions were premised on the assumption that ALJ independence was adequately protected through other means. That assumption is, quite simply, no longer true. Accordingly, it is appropriate to revisit the idea of adopting the central panel model for federal ALJs.

### C. INSTITUTIONAL DESIGN OF A FEDERAL CENTRAL PANEL

The key advantage of the central panel model is that ALJs would be housed within a specialized agency for administrative adjudication rather than in the agencies for which they adjudicate cases.<sup>310</sup> Nonetheless, there are numerous features of the central panel’s design that

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Simeone, *The Function, Flexibility, and Future of United States Judges of the Executive Department*, 44 ADMIN. L. REV. 159, 172–73 (1992) (“A unified corps by which judges are assigned to particular cases instead of being assigned by the particular department or agency would have the beneficent effect of removing the incongruous status and the public perception that such judges have an agency bias in favor of their controlling authority.”).

308. See, e.g., Paul R. Verkuil, Daniel J. Gifford, Charles H. Koch, Jr., Richard J. Pierce, Jr. & Jeffrey S. Lubbers, *Report for Recommendations 92-7, The Federal Administrative Judiciary*, in 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 779 (1992) (suggesting that the central panel model is a poor choice because of its lack of ALJ specialized expertise and increased cost of adjudication); Norman Zankel, *A Unified Corps of Federal Administrative Law Judges Is Not Needed*, 6 W. NEW ENG. L. REV. 723 (1984); Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 733–34 (2005), reprinted in 25 J. NAT’L ASS’N ADMIN. L. JUDGES 49, 107 (2005) (arguing that a central panel model would prevent ALJs from “participating in the evolution of administrative policy,” among other limitations). Professor Koch published a shorter version of the same basic analysis in Charles H. Koch, Jr., *Administrative Judges’ Role in Developing Social Policy*, 68 LA. L. REV. 1095 (2008).

309. The Administrative Conference of the United States concluded that “Congress should not at this time make structural changes . . . such as those in recent legislative proposals to establish a centralized corps of ALJs.” ADMIN. CONF. OF THE U.S., *supra* note 58, at 16.

310. See Rich & Goldstein, *supra* note 20, at 2 (describing the separation of ALJs and the agencies they serve in the central panel system).

must be considered, including the agency's location within the structure of government, the methods of appointment and removal of ALJs, and the role of the agencies whose cases the ALJs adjudicate. A properly designed central panel model could protect ALJ independence in a manner that is consistent with the constitutional requirements for appointment and removal of ALJs, while preserving agency expertise and policy authority and clarifying the appropriate scope and means of agency policy control over ALJ decisions.

### 1. Locating the Agency

An initial question would be where to locate a central panel of ALJs. Two options come immediately to mind: the panel could be located within the Department of Justice or be constituted as a free-standing entity. Although the Department of Justice might seem to be a natural fit, the creation of a freestanding agency is the superior option because it is less likely to be politicized.<sup>311</sup>

If the ultimate goal of creating a central panel is to promote ALJ independence, the institutional structure of the central panel should reinforce that goal. Locating the panel within the Department of Justice would expose it to the politicization of that department. Although the Attorney General and the Department of Justice may at times exhibit a strong commitment to the rule of law and assert sufficient independence to do so, in practice, those offices are political in character.<sup>312</sup> Given its broad power and importance, Presidents seek to control the Department of Justice by appointing political allies as Attorney General.<sup>313</sup> Placing the central panel within the Department of Justice would therefore place it under the control of a highly politicized principal officer.<sup>314</sup>

Although the creation of a freestanding agency is no guarantee against politicization, the limited policy authority and quasi-judicial character of the central panel would provide some measure of protection against politicization. If the central panel is freestanding, its head would be a principal officer to be appointed by the President with

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311. See *supra* note 284 (discussing recent agency politicization).

312. See, e.g., Katie Benner, Charlie Savage, Sharon LaFraniere & Ben Protess, *After Stone Case, Prosecutors Say They Fear Pressure from Trump*, N.Y. TIMES (Feb. 12, 2020), <https://www.nytimes.com/2020/02/12/us/politics/justice-department-roger-stone-sentencing.html> [<https://perma.cc/5H9P-FZN9>] (discussing concerns that the Department of Justice has become highly politicized).

313. *Id.*

314. The fact that those officials represent agencies in court when litigants adversely affected by agency decisions challenge them would create further tension between adherence to the rule of law and agency independence if the Attorney General were vested with supervising a central panel.

Senate consent.<sup>315</sup> Although the possibility of highly partisan political appointments cannot be discounted, it would be harder for Presidents to defend partisan political appointments to lead a quasi-judicial agency, and the Senate (and public) are more likely to demand the appointment of a qualified individual with an appropriate temperament. Conversely, while the Department of Justice's broad authority creates a strong incentive for Presidents to appoint loyal political allies to the leadership positions within the Department of Justice, the relatively narrow mandate and limited policy authority of the central panel's head would tend to diminish the incentive to politicize that appointment.

These considerations should not be overstated. In our hyper-partisan times, every appointment is prone to politicization.<sup>316</sup> Nonetheless, if the goal is ALJ independence, a freestanding central panel makes more sense than a central panel located within the Department of Justice.

## 2. Appointment and Removal

To avoid constitutional problems, the appointment and removal provisions for ALJs must comply with the Appointments Clause and avoid the dual good-cause removal problem. The appointment problem is relatively easy to address, provided that ALJs are inferior officers. The dual good-cause removal problem is more complicated but can be resolved with the proper institutional structure. In light of *Seila Law*, however, the constitutionality of single good-cause removal provisions for ALJs on the central panel may be in doubt.<sup>317</sup> These considerations interact with each other and have significant implications for other features of a central panel's institutional design.

The appointment of ALJs to the central panel should be merit-based and apolitical to the largest extent possible. In this respect, it would make sense to restore the competitive civil service selection process, with the understanding that the final appointment would be made by the head of the central panel.<sup>318</sup> Alternatively, it would be possible to provide for appointment by the federal courts,<sup>319</sup> following

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315. U.S. CONST. art. II, § 2.

316. See, e.g., Winder, *supra* note 284 (“[T]he president's political and ideological agendas and the agency head's interests and efforts are often strongly aligned, and this alignment moves executive action forward.”).

317. See 140 S. Ct. 2183, 2197 (2020) (holding invalid good-cause removal provisions for the Director of the CFPB).

318. See *supra* notes 51–59 (discussing civil service protections for ALJs); see also *supra* note 267 (discussing the restoration of civil service appointments for ALJs).

319. A court could not appoint the chief judge of the panel, however, because the chief judge would be a principal officer who could only be appointed by the President



the model of the Bankruptcy Courts and the appointment of independent counsels before the lapse of Title VI of the Ethics in Government Act.<sup>320</sup> Although we lean toward the civil service model, either approach would be superior to Executive Order 13,843. Either approach would be constitutionally permissible, provided that ALJs in the new model are inferior officers.<sup>321</sup> That question, in turn, will depend on other features of the panel's institutional design that establish a superior officer.

The removal provisions for ALJs must be carefully crafted to ensure strong protection for ALJ independence without violating the President's removal power. The good-cause requirements themselves should be clearly and strongly written to preclude the Solicitor General's narrowing construction, which is an extreme reading of the President's removal power for quasi-judicial officers that is not constitutionally required under current doctrine.<sup>322</sup> Strong good-cause removal requirements, however, may be problematic for two reasons. First, they increase the likelihood that the Court might hold that such provisions violate Article II (because the constitutional avoidance option is not available).<sup>323</sup> As noted above, we think a clear holding on this point is preferable to a weakening of good-cause removal protections through the application of the constitutional avoidance canon.<sup>324</sup>

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under the Appointments Clause. U.S. CONST. art. II, § 2. The only way to eliminate this problem would be to place the chief judge under the supervision of a superior, thereby converting the chief judge to an inferior officer. *Id.* But subjecting the chief judge to the supervision of an executive official would undermine the ALJ independence that a central panel is meant to protect.

320. 28 U.S.C. § 49 (providing for inter-branch appointment of independent counsel by a panel of three circuit court of appeals judges, including one from the D.C. Circuit, selected by the Chief Justice of the U.S. Supreme Court). Independent counsel was appointed under Title VI "to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal law." *Morrison v. Olson*, 487 U.S. 654, 660 (1988).

321. In *Morrison v. Olson*, the Supreme Court rejected the argument that appointment of executive branch officials by the courts of law violates separation of powers. 487 U.S. at 673–77 (1988). Nonetheless, it did acknowledge that such appointments might be invalid in particular circumstances "if there was some 'incongruity' between the functions normally performed by the courts and the performance of their duty to appoint." *Id.* at 676 (citing *Ex parte Siebold*, 100 U.S. 371, 398 (1880)). If, however, there is no such incongruity in the judicial appointment of a prosecutor (as the Court held in *Morrison*), it is doubtful that appointment of ALJs would be incompatible with the courts' judicial roles. *Id.* at 696–97.

322. See *supra* notes 212–20 and accompanying text (discussing the Solicitor General's Guidance Memorandum).

323. See *Seila L., LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2207 (2020) (finding that even a broad construction of the good-cause removal provisions in question failed under the doctrine of constitutional avoidance).

324. See *supra* note 269 (promoting the strengthening of the statutory language of

Second, even if good-cause removal provisions for ALJs survive a post-*Seila Law* challenge, strong provisions might undermine the characterization of ALJs as inferior officers. That problem, however, should not be prohibitive if ALJ decisions are reviewable de novo by the agency for which they adjudicate.<sup>325</sup> To the extent that *Seila Law* and the Appointments Clause cast doubt on good-cause removal protections for ALJs,<sup>326</sup> it is all the more important to house ALJs in a central panel rather than leave them in the agencies for which they conduct adjudications. In the absence of good cause for removal, institutional separation would be essential to prevent the conflict of interest that would otherwise arise from an agency's ability to remove ALJs that conduct adjudications on its behalf.

If ALJs are to be protected by good-cause removal provisions, however, it follows from *Free Enterprise Fund* that the dual good-cause removal problem must be avoided, which has implications for both the central panel itself and the process for determining good cause.<sup>327</sup> With respect to the central panel itself, the most constitutionally prudent path would be to allow the panel's head to be removable by the President at will.<sup>328</sup> This approach would also avoid any problems surrounding the removal of the panel's head under *Seila Law*.<sup>329</sup> Dual good-cause removal provisions might be constitutionally permissible,<sup>330</sup> and *Seila Law* might not apply to officers whose sole responsibility is to conduct adjudications,<sup>331</sup> but it would be risky to structure the central panel on those assumptions.

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good-cause removal protections).

325. See *supra* notes 85–90 and accompanying text (discussing factors lower courts consider when deciding whether agency adjudicators are principal or inferior officers, including being subject to de novo review).

326. See *supra* notes 202–07 and accompanying text (suggesting that *Seila Law*'s holding questions the validity of good-cause removal provisions for ALJs); *supra* notes 176–83 and accompanying text (highlighting that good-cause removal provisions may violate the Appointments Clause).

327. See 561 U.S. 477, 495 (2010) (holding unconstitutional dual good-cause removal provisions).

328. This would be a departure from the Revised Model Act, which provides for the direction of the central panel by a Chief Administrative Law Judge removable only for good cause. See REVISED MODEL STATE ADMIN. PROC. ACT § 602 (UNIF. L. COMM'N 2010).

329. See *supra* notes 202–06 and accompanying text (discussing the constitutionality of good-cause protections for principal officers at the head of agencies, as applied to the SSA Commissioner in *Seila Law*).

330. See *supra* notes 154–62 and accompanying text. It might be possible, however, to incorporate alternative removal provisions for the head of the central panel constituting the agency housing ALJs as an independent agency but providing that the good-cause removal provision for the agency head should be severed if the dual good-cause requirements are found to be unconstitutional.

331. See *supra* note 210 and accompanying text (arguing that if ALJs are inferior

Addressing the dual good-cause removal problem within the central panel may not be enough, however. There is at least a plausible argument that good-cause removal provisions for the MSPB or any other agency Congress might make responsible for determining whether good cause exists for the removal of ALJs would violate *Free Enterprise Fund*.<sup>332</sup> This problem is a difficult one to solve. Allowing the head of the central panel to make the removal determination and separating the central panel from the agency for which ALJs adjudicate would solve the problem and provide a modest degree of protection, but ALJs could still be exposed to politically driven removals from office. This concern might be alleviated somewhat by creating a cause of action in federal court by which ALJs could contest their removals.<sup>333</sup> Alternatively, it might be possible to finesse the issue by drafting the statute so as to clarify that the decision to remove is made by the head of the central panel, and that the role of the independent reviewing body is to verify that good cause exists, while at the same time limiting the deference that the reviewing body gives to the head of the central panel.

### 3. Central Panel ALJs and the Agencies

The principal objections to a central panel relate to the loss of expertise from specialization and the need for agency control of

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officers lacking policymaking authority, they may fall under *Seila Law* exceptions).

332. See *supra* notes 170–75 and accompanying text (discussing proper remedy if ALJ dual good-cause removal provisions violate *Free Enterprise Fund*'s holding that such provisions are incompatible with Article II).

333. It may not be necessary to create an explicit cause of action for ALJs to contest their removals. At least twice, the Supreme Court was willing to hear challenges to allegedly improper removals of executive officers filed in the Court of Claims even in the absence of such a statutory cause of action. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 618–19 (1935) (involving representatives for a deceased, removed official seeking to recover his salary from the date of his allegedly improper removal until his death); *Myers v. United States*, 272 U.S. 52, 106 (1926) (involving a removed official seeking his salary from the date of his removal to the end of his term). In neither case did the Court question its jurisdiction or the basis for the plaintiffs' cause of action. See *Humphrey's Ex'r*, 295 U.S. at 602–32; *Myers*, 272 U.S. at 106–08. The Court decided both cases, however, before it essentially eliminated the implied private right of action. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286–93 (2001) (holding there is no “free-standing private right of action” where Congress has not intended it). See generally Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 387–89 (1989) (discussing the Court's disavowal of its prior “broad willingness to assist in statutory implementation through the implication of rights of action”). Creation of an explicit statutory cause of action for ALJs to challenge their removal would eliminate any doubts about the existence of such an action and could also specify appropriate standards, procedures, and remedies.

policy.<sup>334</sup> The weight of these concerns may be overstated insofar as ALJ specialized expertise may be retained and agency policy control can be abused, as discussed above.<sup>335</sup> Thus, it would be important to structure the relationship between the central panel ALJs and the agencies for which they adjudicate in a manner that insulates ALJs from improper agency influence, but nonetheless takes advantage of expertise and allows the agency appropriate means of control over policy.

Specialized expertise can be retained if central panel ALJs specialize in adjudicating cases for a particular agency or agencies. This arrangement is feasible for agencies that employ a relatively large number of ALJs. Given the vast amount of disability adjudications,<sup>336</sup> the role of technical expertise, and the large number of ALJs involved,<sup>337</sup> it would be easy enough for the central panel to use dedicated Social Security ALJs. A similar arrangement would also be feasible for other agencies that employ a relatively large number of ALJs, such as the NLRB.<sup>338</sup> For agencies that use ALJs only occasionally, however, a pool of generalist ALJs would also be needed. Critically, however, the agency should not be able to choose (or reject) the ALJ assigned to adjudicate a particular case.<sup>339</sup>

The agency's legitimate need for control over policy could be addressed through several means. First and most directly, the agency (or an appellate body within the agency) should have the ability to decide a case in the first instance if it presents essential policy questions that the agency wishes to resolve, rather than automatically refer it to the

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334. See *supra* notes 308–12 (identifying leading critics of the central panel model).

335. See *supra* notes 233–42 (discussing agency policy abuse, particularly in the SSA); *infra* text accompanying notes 336–43 (proposing methods to retain ALJ expertise).

336. See *Disability Reviews*, *supra* note 233, at 6 (opening statement of Senator Levin) (indicating the growing number of cases reviewed each year by SSA ALJs).

337. See *supra* note 154 (identifying that as of March 2017, the SSA employed 1,655 of the 1,931 federal ALJs).

338. *Id.*

339. See REVISED MODEL STATE ADMIN. PROC. ACT § 604(2) (UNIF. L. COMM'N 2010) (providing that the chief judge of the central panel shall assign administrative law judges to adjudicate cases); *id.* § 605(b) (specifying that, subject to limited exceptions, "an agency may not reject a particular administrative law judge for a particular hearing").

central panel.<sup>340</sup> This option is currently available under the APA,<sup>341</sup> and it is also preserved in the Revised Model Act.<sup>342</sup> Similarly, the agency could retain the power to review the decisions of an ALJ, just as they do under current law.<sup>343</sup> This arrangement would allow the agency ample control over any policy matters embedded in adjudications, and it would also support the conclusion that ALJs are inferior officers.<sup>344</sup>

Likewise, agencies could continue to bind ALJs to follow agency policy through appropriate means. Most clearly, valid legislative rules (promulgated using notice and comment procedures) would be binding on the public, ALJs, the agency, and the courts. Similarly, the agency's precedential adjudications could also bind ALJs. Legislative rules and precedential adjudications can bind ALJs that are not part of the agency itself because they involve the exercise of delegated law-making authority. Moreover, these policies are vetted through rule-making or adjudicatory procedures and are transparent, in the sense that they are formally adopted and published by the agency.

Because ALJs are not part of the agency itself, however, the agency would not be able to use internal policies that are *de facto*

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340. If the agency chose not to resolve a case in the first instance, the central panel's jurisdiction would be mandatory. Likewise, if the agency did choose to resolve the case, it should not be allowed to delegate decisional responsibility to other officials within the agency.

341. See 5 U.S.C. § 557(b) ("When the agency did not preside at the reception of the evidence, the presiding employee . . . shall initially decide the case . . .").

342. See REVISED MODEL STATE ADMIN. PROC. ACT § 402(a) ("A presiding officer must be an administrative law judge assigned in accordance with Section 604(2), the individual who is the agency head, a member of a multi-member body of individuals that is the agency head, or, unless prohibited by law of this state other than this [act], an individual designated by the agency head."). The option of an agency head designating a person other than an ALJ or the agency head should not be available in the federal model.

343. See GLICKSMAN & LEVY, *supra* note 36, at 221–27 (discussing judicial review under the substantial evidence standard of review of agency decisions reversing ALJ factual findings). Although this power of review is, in principle, *de novo*, in practice the ALJ's decision is part of the record and the agency must explain why it is rejecting the ALJ's conclusions. *Id.* Providing such an explanation is especially difficult for credibility determinations. *Id.*

We do not think it should make a difference whether an ALJ's decision becomes the decision of the agency unless the agency reviews, or, as under NLRB regulations, the ALJ's decision is a recommended decision that automatically becomes the agency's decision if no one files any exceptions to it. See 29 C.F.R. §§ 101.11–101.12 (2019). In either case, the agency retains the authority to determine policy matters and the combination of the ALJ's limited authority and the agency's supervisory authority are consistent with characterizing ALJs as inferior officers.

344. See *supra* notes 282–87 and accompanying text (discussing need to ensure that central panel ALJs are inferior officers for purposes of the Appointments Clause).

binding to control ALJ adjudication. This limitation would mean that an agency could not bind central panel ALJs to nonlegislative rules that are not vetted through notice and comment, although such policies might warrant some deference in ALJ adjudications, just as courts afford them some deference. Critically, moreover, an agency would not be able to issue other, less formal guidance or instruction and punish ALJs who do not follow it. In other words, although agencies could control policy through legitimate means, the sort of improper influence that often plagues agency oversight of agency adjudicators would be minimized.

### CONCLUSION

Congress has repeatedly recognized the importance of independent administrative adjudication.<sup>345</sup> In adopting statutes such as the APA and the CSRA, Congress has created a carefully considered series of safeguards to shield ALJs from improper influence while conducting formal adjudications in which the government is a party.<sup>346</sup> At the same time, by allowing agencies to review the decisions of their ALJs, Congress reserved to those agencies control over the exercise of discretionary authority delegated to them under their organic statutes.<sup>347</sup> The resulting balance of ALJ independence and agency control of policymaking has protected the integrity of administrative adjudication for more than seventy-five years.

Recent events have upset, if not eviscerated, that balance. A combination of Supreme Court decisions that allow the President to exercise greater control over the appointment and removal of ALJs and executive branch actions that exempt ALJ appointments from the civil service hiring process and weaken good-cause removal requirements for ALJs<sup>348</sup> poses a serious threat to the independence of ALJs. The safeguards that have long shielded ALJs from pressure to conform their decisions to the political agenda of the agencies for which they work (and to the larger presidential administration) are crumbling.

These developments suggest a pressing need for a legislative response that restores ALJ independence while conforming to the constitutional requirements for appointment and removal of ALJs that

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345. *See supra* Part II.B (analyzing statutory protections for ALJ independence).

346. *See supra* note 11 and accompanying text (reviewing a brief legislative history of the APA and CSRA).

347. 5 U.S.C. § 557(b) (providing for de novo review of an ALJ's initial decision by an agency).

348. *See* Exec. Order No. 13,843, Excepting Administrative Law Judges from the Competitive Service, 83 Fed. Reg. 32,755 (July 13, 2018).

have emerged from recent judicial decisions.<sup>349</sup> There are various options to constitutionally reconstruct safeguards for ALJ independence. One would be to restore competitive civil service appointments for ALJs and strengthen good-cause removal requirements, but doing so may improperly infringe on presidential discretion.<sup>350</sup> Another possibility would be to vest authority to conduct administrative adjudication in either an Article III or an Article I administrative court, but, as indicated above, that option would also be problematic, albeit for different reasons.<sup>351</sup>

A third option stands out to us as the most promising. We favor the adoption of the central panel model that has been successfully used in many states.<sup>352</sup> ALJs would no longer work for the agencies whose cases they adjudicate, but rather for a freestanding agency headed by a chief ALJ. Appointments to the central panel would be merit-based, and good-cause removal would be within the domain of the chief ALJ, who would be removable by the President at will. To protect agency policymaking discretion, agencies could adjudicate cases themselves rather than refer them to the central panel, and they could review ALJ decisions. Agencies, however, would not be able to require ALJs to conform to policies that have not been adopted through binding mechanisms such as notice and comment rulemaking or precedential decisions.

The central panel model is an attractive way to restore the balance between ALJ independence and agency control of policymaking discretion that has long been a critical feature of administrative adjudication by the federal government.<sup>353</sup> Recent judicial decisions<sup>354</sup> and executive branch actions<sup>355</sup> have disrupted that balance in ways that call into question the integrity of administrative adjudication and its insulation from undue political influence. Safeguarding the impartiality of ALJs should be a goal to which all corners of the political spectrum can subscribe. Adopting the central panel model can help restore that important component of good governance.

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349. See *supra* Part II.B.

350. See *supra* notes 267–72 and accompanying text.

351. See *supra* notes 279–99 and accompanying text.

352. See *supra* note 20 (discussing the Revised Model Act).

353. See *supra* Part I.B.

354. See *supra* note 5 (discussing *Lucia*, *Free Enterprise Fund*, and *Seila Law*).

355. See Exec. Order No. 13,843, Excepting Administrative Law Judges from the Competitive Service, 83 Fed. Reg. 32,755 (July 13, 2018).