

# Resolving the ALJ Quandary

Kent Barnett\*

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\* Assistant Professor, University of Georgia School of Law. I appreciate the helpful comments from Ian Ayres, Rachel Barkow, Dan Coenen, Jacob Gersen, Tara Leigh Grove, Matt Hall, Michael Healy, Jeffrey Lubbers, Tuan Samahon, Michael Sant'Ambrogio, David Shipley, Mark Tushnet, Chris Walker, Adam Zimmerman, and participants at the 2012 Yale-Stanford-Harvard Junior Faculty Forum, the 2012 Junior Faculty Federal Courts Forum, and the University of Georgia and the University of Kentucky law-faculty workshops. I also appreciate the gracious assistance of the editorial staff at the VANDERBILT LAW REVIEW. An earlier draft of this Article was cited in JOHN M. ROGERS, MICHAEL P. HEALY & RONALD J. KROTOSZYNSKI, JR., ADMINISTRATIVE LAW 460 (3d ed. 2012).

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## INTRODUCTION

"I [was] . . . the equal of the gods, save only [t]hat I must die."

—Euripides<sup>1</sup>

Federal administrative law judges ("ALJs") understand Euripides's irony all too well.<sup>2</sup> They, along with Article I judges, are the demigods of federal adjudication. As both courts and ALJs have noted, the function of ALJs closely parallels that of Article III judges.<sup>3</sup>

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1. EURIPIDES, *HECUBA* 33 (tran. line 341–44) (John Harrison ed. & trans., Cambridge Univ. Press 2008) (quoting Princess Polyxena's speech, delivered before she is sacrificed).

2. ALJs have successfully lobbied for more prestigious titles, evolving from mere "examiners," to "hearing examiners," to "administrative law judges." Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 110 n.8 (1981); see also K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 HOW. L.J. 95, 123 (1995):

Naturally, the ALJs would like to think of themselves as judges or the functional equivalent of federal judges. In 1972, they persuaded the Civil Service Commission (now the OPM) to change their title from 'hearing examiner' to 'administrative law judge' for the purpose of enhancing their public image and prestige.

Yet, they are commonly referred to as ALJs, a designation that arguably diminishes their judicial status. They are not amused. See Lubbers, *supra*, at 109 n.1 (citing the August 1979 Federal Administrative Law Judges Conference newsletter); see also James P. Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges*, 6 W. NEW ENG. L. REV. 807, 814–15 (1984) (relaying how Third Circuit Judge Aldisert "noted" and dismissed "the past prejudice of some Article III federal judges, scholarly critics and attorneys who believe[d] that administrative law judges were second-class judges (if judges at all)" (citing *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 527–28 (3d Cir. 1981) (Aldisert, J., concurring))). Like Professor Lubbers, I use the ubiquitous acronym only for brevity.

3. See *Butz v. Economou*, 438 U.S. 478, 513 (1978):

[P]roceedings [before an ALJ] are adversary in nature. . . . They are conducted before a trier of fact insulated from political influence. . . . A party is entitled to present his

ALJs hear evidence, decide factual issues, and apply legal principles in all formal administrative adjudications under the Administrative Procedure Act (“APA”).<sup>4</sup> Indeed, they outnumber Article III judges<sup>5</sup> and decide more than two hundred and fifty thousand cases each year.<sup>6</sup> But they lack the defining characteristics of Article III deities. Article III judges are installed under the Appointments Clause,<sup>7</sup> enjoy tenure and salary protection during times of “good Behavior,”<sup>8</sup> and are not generally subject to reversal by the executive branch.<sup>9</sup> In contrast, ALJs are hired as mere employees by executive officials, receive more limited salary protection than Article III judges, and are subject to removal within the executive branch.<sup>10</sup> Moreover, the agencies for which ALJs work—often themselves parties to the proceedings—can reverse ALJs’ decisions in toto.<sup>11</sup> In Euripidean parlance, ALJs are equal to Article III judges, except for the Article III part.

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case by oral or documentary evidence . . . and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision.

(citations omitted); Robin J. Artz et al., *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, 95 (2009) (“ALJs are the functional equivalent of federal trial judges.”).

4. 5 U.S.C. §§ 553–54, 556–57 (2006) (detailing requirements for formal administrative rulemaking and adjudication). Although ALJs can also preside in formal rulemaking proceedings, *id.* §§ 553(c), 556–57, formal rulemaking is extremely rare, *see* Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 107 (2003) (“Because the impracticalities of formal rulemaking are well known, Congress rarely requires this technique, and courts avoid interpreting statutes to require it, even in the rare cases where the statute seems to do so.”). This Article concerns only ALJs’ duties in formal adjudications.

5. *Compare Judges and Judgeships*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited Jan. 14, 2013) (listing 874 total Article III judgeships), *with* Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3180–81 (2010) (Breyer, J., dissenting) (“[T]he Federal Government relies on 1,584 ALJs to adjudicate administrative matters in over 25 agencies.”).

6. *See* Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1346 n.18 (1992) (stating that ALJs decided more than two hundred and fifty thousand social security cases in 1990).

7. U.S. CONST. art. II, § 2, cl. 2.

8. U.S. CONST. art. III, § 1.

9. Federal agencies can reverse judicial statutory interpretations under certain circumstances. *See* Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 983–84 (2005) (permitting agencies to provide authoritative interpretations of ambiguous statutory language even after a contrary judicial interpretation).

10. *See generally* *infra* Part I.

11. *See* 5 U.S.C. § 557(b) (2006) (“On appeal from or review of the [ALJ’s] 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.”).

*The Structural Quandary*

These differences between ALJs and Article III judges do more than chisel a chip on ALJs' shoulders. They reveal material practical and constitutional tensions, if not constitutional violations, that the U.S. Supreme Court has recently revitalized. These tensions concern ALJs' appointments, the President's supervisory powers over ALJs, and ALJs' independence and impartiality. These three concerns are in tension, rendering their resolution difficult.

*First.* If, as five current Supreme Court Justices have now suggested,<sup>12</sup> ALJs are "inferior Officers" (not mere employees), the manner in which some are currently selected is likely unconstitutional.<sup>13</sup> The Appointments Clause in Article II of the U.S. Constitution requires that such officers be appointed in one of four ways: by (1) the President with the Senate's consent, (2) the President alone, (3) the courts of law, or (4) heads of departments.<sup>14</sup> ALJs, however, are selected by heads of *agencies*, only some of whom qualify as heads of *departments*.

*Second.* ALJs' job (or tenure) protections may improperly limit the President's implied power to remove and supervise executive-branch officers under Article II of the U.S. Constitution.<sup>15</sup> The agencies that select ALJs can remove them only for "good cause" and only with the consent of an independent federal agency, the Merit Systems Protection Board ("MSPB"), whose members the President can remove only for enumerated reasons. A recent U.S. Supreme Court decision, *Free Enterprise Fund v. PCAOB*, invalidated the use of "tiered" tenure protection (i.e., two layers of tenure protection between the President and the officer at issue) for inferior officers.<sup>16</sup> The four

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12. See *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3180–81 (2010) (Breyer, J., dissenting, joined by Stevens, Ginsburg & Sotomayor, JJ.) (asking whether the majority's holding that dual for-cause insulation is unconstitutional would affect ALJs, who might be considered "Officers"); *Freytag v. Comm'r*, 501 U.S. 868, 910 (1991) (Scalia, J., concurring in part and concurring in the judgment, joined by O'Connor, Kennedy & Souter, JJ.) ("[ALJs] are all executive officers." (emphasis omitted)).

13. See *infra* Part II.A.

14. U.S. CONST. art. II, § 2, cl. 2.

15. See *infra* Part II.B.

16. See *Free Enter. Fund*, 130 S. Ct. at 3164 (majority opinion) ("[T]he Act before us imposes a new type of restriction—two levels of protection from removal for those who

dissenting Justices in that decision noted that ALJs' two tiers of tenure protection (one for ALJs and one for the MSPB) would also appear to limit the President's supervisory power improperly.<sup>17</sup> In short, the Court's most recent foray into this area suggests that the removal regime for ALJs clashes with the President's executive authority.<sup>18</sup>

*Third.* At the same time, increasing presidential control over ALJs would create impartiality concerns under the Due Process Clause. Agencies are parties to proceedings before the same ALJs that they appoint and that they may remove for good cause (albeit subject to the MSPB's consent).<sup>19</sup> If ALJs lose one of their two tiers of tenure protection, either (1) agencies will be able to remove ALJs at will (and thus render the MSPB's extant tenure protection and role meaningless) or (2) agencies will be able to remove ALJs for cause with the consent of the MSPB, whose members the President can remove at will. The Supreme Court has strongly indicated that, despite some contrary scholarly opinions, the current ALJ model is sufficient under the Due Process Clause. But its recent decision concerning recusal of elected state-court judges, *Caperton v. A.T. Massey Coal Co.*,<sup>20</sup> casts doubt on this view. The agencies' ability to appoint ALJs and initiate their removal creates obvious incentives for ALJs to favor agency positions. Regardless of whether this partiality problem assumes an unconstitutional dimension, the current structure raises problems for ALJs, agencies, parties that appear before ALJs, and society as a whole.

Existing proposals to reform the ALJ system fail to identify, much less solve, these competing concerns.<sup>21</sup> For instance, simply permitting a department head (perhaps of a new independent agency) to appoint ALJs would resolve the appointment issue, but not fully address due process or presidential-supervision concerns. Likewise, providing ALJs increased tenure protection may resolve lingering independence concerns, but leave the President with insufficient supervisory power over ALJs, while not addressing the appointment issue at all. Conversely, reducing ALJ tenure protection may resolve

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nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way.").

17. See *id.* at 3181 (Breyer, J., dissenting) ("Does every losing party before an ALJ now have grounds to appeal on the basis that the decision entered against him is unconstitutional?").

18. U.S. CONST. art. II, § 3.

19. See *infra* Part II.C.

20. 556 U.S. 868 (2009).

21. See *infra* Part III.

presidential-supervision concerns, but damage ALJ independence and, once again, fail to address Appointments Clause concerns.

### *The Solution*

My proposed remedy is to permit the D.C. Circuit to appoint, discipline, and remove ALJs upon request from administrative agencies.<sup>22</sup> Permitting a “Court[] of Law” to appoint ALJs, who are at most “inferior Officers” within the executive branch, comports with the text of the Appointments Clause and Supreme Court case law.<sup>23</sup> To be sure, the Court has prohibited Congress from creating “incongruous” interbranch appointments.<sup>24</sup> Although the Court’s existing approach to incongruity is murky, I extract from it a three-part inquiry that unifies the incongruity principle with the separation-of-powers constraints that the Court has erected in this field. In short, courts should deem an interbranch appointment appropriate when (1) Congress has a significant justification for turning to its interbranch-appointment power, (2) the power to appoint (and an incidental power to remove) does not impede the appointing branch’s central functioning under the U.S. Constitution, and (3) the lack of appointment (and removal) power does not, likewise, impede the competing branch’s central functioning.

The D.C. Circuit’s appointment of ALJs satisfies these three criteria. First, it is significantly justified because it resolves the three constitutional concerns. It does so by properly placing the appointment power in a “court of law”; ending “tiered” removal protection within the executive branch for ALJs by appropriately giving the D.C. Circuit the power to remove ALJs, as consistent with existing interbranch-appointment doctrine and even the underlying rationale of *Free Enterprise Fund*; and limiting the executive branch’s role in appointing and removing the adjudicators for formal proceedings to which executive agencies are often parties. Second, the

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22. See *infra* Part IV.A.

23. U.S. CONST. art. II, § 2, cl. 2 (“[T]he Congress may by law vest the Appointment of such inferior Officers, as they think proper . . . in the Courts of Law . . .”).

24. See *Morrison v. Olson*, 487 U.S. 654, 675 (1988):

We do not mean to say that Congress’ power to provide for interbranch appointments of ‘inferior officers’ is unlimited. In addition to separation of powers concerns . . . Congress’ decision to vest the appointment power in the courts would be improper if there was some ‘incongruity’ between the functions normally performed by the courts and the performance of their duty to appoint.

interbranch appointment does not impede the central functioning of the D.C. Circuit. As the court that hears numerous administrative law cases and has the lowest judge-to-merits-decisions ratio among the circuit courts, the D.C. Circuit has the expertise and time to appoint and remove other adjudicators. Indeed, Article III courts currently perform the interbranch appointment and removal of Article I bankruptcy judges, as well as the intrabran­ch appointment and removal of magistrate judges and special masters. Third, the interbranch appointment does not impede the central functioning of the executive branch. The executive branch may still formulate all administrative policy that arises from formal adjudication by continuing to reverse ALJ decisions in toto under the APA.

Ultimately, this Article seeks to do three things. It seeks to identify the three competing concerns surrounding ALJs, suggest a workable statutory solution to a major problem in administrative law that recent Supreme Court decisions have brought into focus, and clarify the nature and benefits of Congress's interbranch-appointment power for the federal administrative state. To those ends, Part I provides a brief synopsis of current ALJ hiring, removal, and independence protections. Part II considers the constitutional questions surrounding ALJs' selection, removal, and independence to bring the tripartite quandary into clear view. Part III considers the limitations on prior solutions and scholarship in light of the quandary, most of which focus only on ALJ independence. And finally, Part IV provides a refined manner of analyzing the propriety of interbranch appointments and argues that an interbranch appointment of ALJs resolves the quandary. Even with a permissible interbranch appointment, ALJs certainly won't be gods. But a limited ALJ apotheosis, brought about by an interbranch appointment, should mitigate concerns that surround ALJs' place within our government of separated powers.

## I. ALJS' CURRENT SELECTION, REMOVAL, AND PROTECTIONS

A brief exposition of the current manner of ALJ selection, removal, and independence permits a better understanding of the theoretical and doctrinal concerns mentioned above. An interbranch-appointment remedy, as explained later, can adopt much of the current ALJ appointment and removal structure by reallocating various powers to effect the desired structural improvement.

### A. Current ALJ Selection

The appointment of ALJs, unlike that of Article III judges, does not require the President's nomination and the Senate's confirmation.<sup>25</sup> Instead, each federal agency selects ALJs "as are necessary" for the agency to conduct formal adjudicatory proceedings.<sup>26</sup> The President is not directly, if at all, involved in the selection of ALJs, and the Senate does not serve as a check on the agency's choice.

But agencies do not have carte blanche when selecting ALJs. Instead, the Office of Personnel Management ("OPM") creates and administers standards for ALJ selection for the approximately sixteen hundred federal ALJs.<sup>27</sup> Candidates must be licensed attorneys with at least seven years' experience and pass an examination that tests their ability to draft a decision and analyze relevant legal issues.<sup>28</sup> Military veterans receive five to ten preference points.<sup>29</sup> Based on their experiences, examination scores, and veteran statuses, the highest-scoring candidates are placed on a list.<sup>30</sup> Agencies, under what

25. See Harold Levinson, *The Status of the Administrative Judge*, 38 AM. J. COMP. L. (SUPP.) 523, 532–33 (1990) (contrasting the Article III appointment process with ALJ selection).

26. 5 U.S.C. § 3105 (2006).

27. See *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3180–81 (2010) (Breyer, J., dissenting) ("My research reflects that the Federal Government relies on 1,584 ALJs to adjudicate administrative matters in over 25 agencies."); Levinson, *supra* note 25, at 533.

28. VANESSA K. BURROWS, CONG. RESEARCH SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 2 (2010); Jesse Etelson, *The New ALJ Examination: A Bright, Shining Lie Redux*, 43 ADMIN. L. REV. 185, 191–93 (1991) (explaining and critiquing the ALJ written examination that requires candidates to draft a hypothetical opinion).

29. Veterans' Preference Act, 5 U.S.C. § 3309; 5 C.F.R. § 302.201 (2012). The OPM's scoring formulation for veterans led to protracted litigation and even temporary suspension of hiring ALJs from 1999 to 2003. BURROWS, *supra* note 28, at 3:

The litigation arose out of changes that OPM made in 1996 to the scoring formula that is used to rate and rank potential ALJs. These changes . . . resulted in a scoring system that . . . [gave] veterans a significant hiring advantage over non-veterans. As a consequence, non-veteran applicants for ALJ positions sued, claiming that the new scoring formula was unlawful.

See also *Meeker v. Merit Sys. Prot. Bd.*, 319 F.3d 1368, 1369–72 (Fed. Cir. 2003) (describing the litigation's journey to the Federal Circuit). ALJs and agencies have criticized the veterans' preference because an additional ten points based on veteran status can have a significant effect on the final list of candidates, whose scores range from eighty to one hundred points. See Lubbers, *supra* note 2, at 115–16 ("Since there is only a 20-point spread on scores among all ALJ eligibles (from 80 to 100), the addition of 5 to 10 veterans preference points to any score can change by many places an eligible's ranking on the register.").

30. See BURROWS, *supra* note 28, at 2 ("Applicants who meet the[ ] minimum qualification standards and pass the examination are then assigned a score and placed on a register of eligible hires.").



is known as the “Rule of Three,”<sup>31</sup> may then select from the three highest-ranking candidates.<sup>32</sup>

Agencies, perhaps unsurprisingly, have sought to avoid the Rule of Three. They have instead sought “selective certification.”<sup>33</sup> Selective certification permits an agency, “upon a showing of necessity and with the prior approval of OPM, . . . to appoint specially certified eligibles without regard to their ranking in relation to other eligibles . . . who lack the special certification.”<sup>34</sup> Numerous agencies routinely engaged in selective certification from the 1960s until the early 1980s, generally justified by needing ALJs with technical knowledge and experience.<sup>35</sup> Yet after substantial criticism that selective certification allowed agencies to hire ALJs with a more “pro-enforcement attitude,”<sup>36</sup> the OPM ended selective certification in 1984.<sup>37</sup> Much to ALJs’ alarm,<sup>38</sup> certain agencies have recently sought to obtain waivers from the OPM to engage in selective certification once again<sup>39</sup> and even appealed to Congress for legislative dispensation from the OPM’s refusal.<sup>40</sup>

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31. Artz et al., *supra* note 3, at 101.

32. See BURROWS, *supra* note 28, at 2–3 (“Agencies then select an ALJ from the top three available candidates, taking into account the location of the position, the geographical preference of the candidate, and veterans’ preference rules.”).

33. Lubbers, *supra* note 2, at 117.

34. *Id.*

35. See Artz et al., *supra* note 3, at 101; see also BURROWS, *supra* note 28, at 5–6 (overviewing the history of selective certification from before the APA’s enactment through the 1980s).

36. Lubbers, *supra* note 2, at 118.

37. See BURROWS, *supra* note 28, at 6 (“In 1984, OPM ended the selective certification procedure in Examination Announcement No. 318. Agencies were no longer allowed to formally require subject-matter expertise.”); see also 5 C.F.R. § 332.404 (2012) (requiring agency to select from the “highest three eligibles”).

38. See Artz et al., *supra* note 3, at 98, 101–02 (“We urge [the President-Elect] to appoint agency heads who will respect, uphold, and enforce the provisions of the APA regarding the federal agency administrative adjudication process. In recent years, agency heads have been making legislative efforts to erode . . . the APA provisions that ensure the independence of ALJ decision-making.”).

39. See BURROWS, *supra* note 28, at 6 (noting that the International Trade Commission (“ITC”) and the Social Security Administration (“SSA”) have sought selective-certification powers).

40. Artz et al., *supra* note 3, at 101–02 (noting that the ITC and the Federal Trade Commission (“FTC”) both sought legislation to permit them to evade the OPM’s refusal to permit selective certification). *But see* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-14, RESULTS-ORIENTED CULTURES: OFFICE OF PERSONNEL MANAGEMENT SHOULD REVIEW ADMINISTRATIVE LAW JUDGE PROGRAM TO IMPROVE HIRING AND PERFORMANCE MANAGEMENT 8–10 (2010) [hereinafter GAO-10-14] (reporting that the SSA and Health and Human Services officials were pleased with the quality of ALJ candidates, although they sought changes—such as by awarding

Despite the OPM's rejection of selective certification, ALJs are dissatisfied with the OPM. In a 2008 report to President-elect Obama, the Federal Administrative Law Judges Conference argued that the OPM should be divested of its authority to appoint and review ALJs.<sup>41</sup> The ALJs complained that the OPM eliminated the office that selected ALJs (by assigning that office's duties to other offices within the OPM), eliminated the requirement for ALJ candidates to have litigation experience,<sup>42</sup> altered the ALJ-exam schedule in a manner that rendered it "difficult for private sector attorneys to apply,"<sup>43</sup> and sought to reward ALJs based on an agency's political goals.<sup>44</sup> Ultimately, the ALJs reported that "the OPM . . . has sought to undermine ALJs[] independence and downgrade ALJs' level of experience and competence."<sup>45</sup> Partially in response to ALJs' concerns, the Government Accountability Office ("GAO") has recently recommended certain changes to Congress concerning ALJ hiring and supervision.<sup>46</sup>

### *B. Current ALJ Tenure Protections and Independence*

Once selected, ALJs have certain protections from political forces but limited independence in making final decisions. The APA provides for a separation of functions between ALJs and certain agency employees. ALJs may not perform investigative or prosecutorial functions or report to an employee who does, or have ex parte contacts concerning a fact at issue.<sup>47</sup> But heads of agencies can

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bonus points to eligible candidates—to ensure that the appointment considered "specialized knowledge").

41. See Artz et al., *supra* note 3, at 106 ("[W]e advocate the creation of a new independent agency . . . which would be responsible for the functions that the OPM has been performing, or should have been performing . . .").

42. *Id.* at 105–06.

43. *Id.* at 106.

44. See *id.* at 105 ("[T]he OPM has taken the position that ALJs are no different from other federal employees and should be covered by a 'pay for performance' system that measures performance by agency (i.e., political) goals. If implemented, OPM's position would result in inappropriate agency influence over the functions performed by ALJs . . .").

45. *Id.* at 106.

46. See GAO-10-14, *supra* note 40, at 26–28 (suggesting, among other things, that ALJs become more involved in hiring and personnel-management decisions).

47. 5 U.S.C. § 554(d)(1)–(2) (2006). Nevertheless, the ALJ may remain responsible to the head of the agency, although the head of the agency also oversees investigations and prosecutions. See *id.* § 554(d)(2)(C); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 346 (1991) (describing separation of powers for ALJs).

still set agency policy and supervise ALJs.<sup>48</sup> They have the authority to reverse ALJs' decisions in full, as to both fact and law.<sup>49</sup> Agencies, however, must provide some deference to ALJs' witness-demeanor observations<sup>50</sup> and consider the ALJs' initial decision during administrative appeal.<sup>51</sup>

If unsatisfied with their power to reverse ALJ decisions, agencies have a circumscribed ability to discipline and remove ALJs. Agencies may remove and generally discipline ALJs only for "good cause established and determined by the Merit Systems Protection Board" after a formal administrative hearing.<sup>52</sup> The MSPB members, like ALJs, also enjoy tenure protection because the President can remove them "only for inefficiency, neglect of duty, or malfeasance in office."<sup>53</sup> Otherwise, ALJs essentially have life tenure because they do not serve for a period of years in office.<sup>54</sup>

ALJs' effective life tenure, however, loses some of its sheen because of the ambiguity of the good cause standard that governs MSPB proceedings.<sup>55</sup> That standard has permitted removal for, among other things, being absent for extended periods, declining to set hearing dates, and having a "high rate of significant adjudicatory errors."<sup>56</sup> Moreover, the MSPB has indicated that insubordination can constitute cause, although the Board left unclear how specific the

48. 5 U.S.C. § 554(d)(2)(C) (exempting the "agency or a member or members of the body comprising the agency" from the separation-of-functions requirement).

49. See *id.* § 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."); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494–95 (1951) (explaining that the APA permits agencies to decline adopting an ALJ's recommendations).

50. Timony, *supra* note 2, at 811 (citing *Universal Camera*, 340 U.S. at 496; *E. Eng'g & Elevator Co. v. NLRB*, 637 F.2d 191, 197 (3d Cir. 1980)).

51. *Id.* at 811–12 (citing 5 U.S.C. § 557(c) (1982)).

52. 5 U.S.C. § 7521(a).

53. *Id.* § 1202(d).

54. See Verkuil, *supra* note 6, at 1344. Professor Verkuil argues that ALJs have more secure tenure than bankruptcy and magistrate judges because ALJs are not appointed to terms of office. See *id.* Although ALJs do not have to worry about an essentially standardless judicial reappointment, *cf.* Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 248 (2008) ("During 1998 to 2002, circuit courts reappointed over 90% of those bankruptcy judges applying for reappointment."), they can be removed under what appears to be a more liberal tenure-protection provision by another executive entity. See *infra* notes 55–62 and accompanying text.

55. *Soc. Sec. Admin. v. Goodman*, 19 M.S.P.R. 321, 325 (1984); Harold J. Krent & Lindsay DuVall, *Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 34 (2005) ("[T]he meaning of 'cause' is unclear . . .").

56. BURROWS, *supra* note 28, at 8 (quoting A GUIDE TO FEDERAL AGENCY ADJUDICATION 172 (Michael Asimov ed., 2003)).

agency's instructions and how overwhelming the agency's evidence of insubordination must be.<sup>57</sup>

In light of the uncertain governing removal standard, perhaps it is not surprising that more removal proceedings have been brought against ALJs than against Article III judges. Article III judges retain their appointments "during good Behavior"—a more demanding standard than good cause—and are removed only after the cumbersome interbranch-collaborative process of impeachment.<sup>58</sup> Only fifteen Article III judges have been impeached in more than two hundred years.<sup>59</sup> In contrast, agencies have brought more than twenty actions against ALJs from 1946 to 1992.<sup>60</sup> ALJs have noted these removal attempts—especially the fifteen of which occurred over a six-year period in the 1970s and 1980s<sup>61</sup>—and the Social Security Administration ("SSA") Commissioner's recent legislative proposal to obtain authority to "discipline" ALJs for undefined "offenses" without prior findings by the MSPB.<sup>62</sup>

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57. *Goodman*, 19 M.S.P.R. at 326, 331; *see also* Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 506 (1990) (criticizing MSPB's insubordination dicta and its "abysmal ignorance of statistics" in appearing to reject the Agency's productivity argument). The MSPB, earlier in its opinion, stated, "If the agency is basing its charge on reasons which constitute an improper interference with the performance by an ALJ of his or her judicial functions, the charge cannot constitute good cause." *Goodman*, 19 M.S.P.R. at 328.

58. U.S. CONST. art. III, § 1; U.S. CONST. art. I, §§ 2–3; *Goodman*, 19 M.S.P.R. at 326 (citing *McEachern v. Macy*, 341 F.2d 895 (4th Cir. 1965)) (holding that good cause standard has been more broadly interpreted than good-behavior standard); *Benton v. United States*, 488 F.2d 1017 (Ct. Cl. 1973); and *Chocallo v. Prokop*, C.A. No. 80–1053 (D.D.C. Oct. 10, 1980), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982)).

59. *Impeachments of Federal Judges*, FED. JUD. CTR., [http://www.fjc.gov/history/home.nsf/page/judges\\_impeachments.html](http://www.fjc.gov/history/home.nsf/page/judges_impeachments.html) (last visited May 16, 2011). Three of the impeached judges resigned before the Senate's impeachment trials concluded. *See id.*

60. BURROWS, *supra* note 28, at 9; James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1222 n.150 (2006) (citing Morell E. Mullins, *Manual for Administrative Law Judges*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES i, 116 (2004)). Social Security Commissioner Michael Astrue stated that fifty-eight ALJs have been disciplined since 2007, mostly for deciding too few cases. *See* David Ingram, *Social Security's Disability Judges Come Under Scrutiny*, THE BLT: BLOG OF LEGALTIMES (July 11, 2011, 5:14 PM), <http://legaltimes.typepad.com/blt/2011/07/social-securitys-disability-judges-come-under-scrutiny.html>. But one ALJ was placed on administrative leave based on his high approval of disability benefits. *See id.*

61. Bruff, *supra* note 47, at 348 (noting, in 1991, the "recent, sharp upturn in the frequency of [ALJ] removal attempts"); Timony, *supra* note 2, at 807 & n.2 (listing cases).

62. Artz et al., *supra* note 3, at 103–04.

## II. PRACTICAL AND CONSTITUTIONAL DISCOMFORT

Recent U.S. Supreme Court decisions either create or reenergize three significant issues surrounding ALJs' current selection and removal. First, does the method of ALJs' selection violate the Appointments Clause? Second, do ALJs' tenure protections improperly impede the President's supervisory powers? Finally, do ALJs' current tenure protections (or reduced protections, if required under Article II) create due process and fairness concerns? Scholars have typically limited themselves to addressing the appropriate balance between ALJ independence and subordination, but without considering the three separation-of-powers concerns that have come into sharper relief recently. Once the reader considers the competing concerns below, the limitations of previously proposed solutions and scholarship become apparent.

*A. Improper Appointments?*

The Appointments Clause governs the appointment of all "Officers of the United States."<sup>63</sup> Federal "[o]fficers" are those who "exercise significant authority pursuant to the laws of the United States."<sup>64</sup> They fall into two categories—principal and inferior officers.<sup>65</sup> Principal officers, most likely those who report directly to the President, must be nominated by the President and confirmed by the Senate.<sup>66</sup> But the so-called "Excepting Clause"<sup>67</sup> to the Appointments Clause gives Congress flexibility in the appointing of inferior officers,<sup>68</sup> that is, "officers whose 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>69</sup> or officers of lesser importance as measured by some function of their duties, tenure, and supervision.<sup>70</sup> Inferior officers may be appointed in one of

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63. U.S. CONST. art. II, § 2, cl. 2; *United States v. Germaine*, 99 U.S. 508, 509–10 (1878).

64. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam).

65. *Germaine*, 99 U.S. at 509 ("The Constitution for purposes of appointment very clearly divides all its officers into two classes [viz., 'primary' and 'inferior' officers].") (quoted in *Weiss v. United States*, 510 U.S. 163, 183 (1994) (Souter, J., concurring) (referring to officers as "principal and inferior officers"))).

66. *Edmond v. United States*, 520 U.S. 651, 659 (1997).

67. *Id.* at 660 (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627–28 (Max Farrand ed., 1911)).

68. U.S. CONST. art. II, § 2, cl. 2.

69. *Edmond*, 520 U.S. at 663.

70. *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988).

the following four ways, as Congress “think[s] proper”: in the same manner as principal officers, by the President alone, by a Court of Law, or by the Head of a Department.<sup>71</sup> The Appointments Clause does not apply to those who are “mere employees.”<sup>72</sup> A preliminary issue surrounding ALJs is whether they are inferior officers or mere employees.

If they are inferior officers, many ALJs’ appointments are likely improper. Although the Excepting Clause permits Congress to bestow the appointment power of inferior officers on department heads, Congress has not done so for all ALJs. Instead, Congress, through the APA, permits “[e]ach agency” to select its ALJs “as are necessary.”<sup>73</sup> Departments and agencies, despite their similarity, are not identical. An “agency” is a statutory term that refers to “each authority of the Government of the United States, whether or not it is within or subject to review by another agency,” save for a few enumerated exceptions.<sup>74</sup> But a “department” is a constitutional animal that refers to a “freestanding component of the Executive Branch, not subordinate to or contained within any other such component”<sup>75</sup> with a “distinct province, in which a class of duties are [sic] allotted.”<sup>76</sup> Because an agency need not have the two key characteristics of a department (independence and self-containment from other administrative entities), not all agencies that appoint ALJs are departments. Those ALJs selected by a nondepartment “agency” are not properly appointed under the Appointments Clause.<sup>77</sup>

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71. U.S. CONST. art. II, § 2, cl. 2.

72. *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) (per curiam) (citing *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890); *United States v. Germaine*, 99 U.S. 508, 510 (1878)).

73. 5 U.S.C. § 3105 (2006).

74. *Id.* § 551(1).

75. *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3163 (2010).

76. *Id.* at 3162 (quoting 1 N. WEBSTER, *Department Definition*, in *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (photo. reprint 1995) (1828) (def. 2)).

77. For each ALJ appointment, one must know which entity is appointing and whether that entity is a department. Justice Breyer prepared a list of agencies that employ ALJs in his dissent in *Free Enterprise Fund*. See *Free Enter. Fund*, 130 S. Ct. at 3214 app. C (Breyer, J., dissenting). Most federal ALJs work for the SSA, see *id.*, which is likely a department because it is independent and self-contained. See 42 U.S.C. § 901(a) (2006). But several of the other listed agencies—including the Food and Drug Administration, the Federal Energy Regulatory Commission, and the Drug Enforcement Administration, among others—may not qualify as departments. See Kent Barnett, *The Consumer Financial Protection Bureau’s Appointment with Trouble*, 60 AM. U. L. REV. 1459 (2011) (arguing that the Court’s definition of “department” does not clarify whether independence and self-containment are both necessary, or individually sufficient, characteristics for departmental status); see also *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000) (Randolph, J., concurring in part and concurring in the judgment) (noting that the FDIC abandoned its argument that the Office of Thrift Supervision, which selected ALJs,

But for the method of selection to acquire constitutional import, ALJs must be officers, not mere employees. To determine ALJs' status, one must decide whether ALJs "exercis[e] significant authority pursuant to the laws of the United States"<sup>78</sup> or serve as "lesser functionaries"<sup>79</sup>—an inquiry reminiscent of distinguishing High Baroque from Rococo.<sup>80</sup> Yet, the determination is important because a "defect in [an ALJ's] appointment [is] an irregularity which would invalidate a resulting order."<sup>81</sup>

ALJs appear to exercise significant authority under federal law. Their positions are established by law.<sup>82</sup> ALJs provide initial decisions that establish factual findings and apply agency regulations and policy.<sup>83</sup> ALJs have significant discretion to oversee discovery, issue subpoenas, and sanction parties in regulatory, enforcement, and licensing proceedings.<sup>84</sup> A party's violation of certain ALJ orders can lead to criminal penalties.<sup>85</sup> During administrative review, the agency must provide some deference to the ALJ's credibility findings and

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was a department). By adopting my solution in Part IV, *infra*, one can avoid this tedious, and perhaps ultimately indeterminate, inquiry into departmental status for those agencies appointing numerous ALJs.

Moreover, if various agencies are not departments, the approbation doctrine (i.e., a department head's approval cures a subordinate's otherwise unconstitutional appointment) will not likely salvage the otherwise unconstitutional appointments. The APA does not expressly permit department heads to approbate subordinate agencies' ALJ appointments, and thus any approbation would lack statutory authority. *See* Barnett, *supra*, at 1481 n.161 (citing *United States v. Smith*, 124 U.S. 525, 532–33 (1888); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393–94 (1868)).

78. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam).

79. *Id.* at 126 n.162 (citing *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890); *United States v. Germaine*, 99 U.S. 508, 510 (1878)).

80. *See, e.g., Free Enter. Fund*, 130 S. Ct. at 3178–82 (Breyer, J., dissenting); *Landry*, 204 F.3d at 1132–34. The Office of Legal Counsel has prepared a lengthy memorandum that addresses characteristics that distinguish employees from officers. Memorandum from Steven G. Bradbury, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to the General Counsels of the Executive Branch, Regarding Officers of the United States Within the Meaning of the Appointments Clause 3 (Apr. 16, 2007), *available at* <http://www.justice.gov/olc/2007/appointmentsclausev10.pdf>. The memo concludes that an officer must have been delegated sovereign authority in a "continuing" fashion. *See id.* But the drafters freely concede that "the Supreme Court has not articulated the precise scope and application of the Clause's requirements." *See id.*

81. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

82. *Landry*, 204 F.3d at 1133.

83. *See* Timony, *supra* note 2, at 812.

84. *Landry*, 204 F.3d at 1134 (comparing similar duties to special trial judges within the U.S. Tax Court, whom the Supreme Court in *Freytag v. Commissioner*, 501 U.S. 868, 882 (1991), held were inferior officers); Timony, *supra* note 2, at 812–13.

85. *See* Timony, *supra* note 2, at 813.

consider the ALJ's decision.<sup>86</sup> Within some agencies, these findings are generally final.<sup>87</sup>

In light of others whom the Supreme Court has deemed inferior officers, ALJs' authority seems more than sufficient to provide similar status. The Court has held that district-court clerks, thousands of clerks within the Treasury and Interior Departments, an assistant surgeon, a cadet-engineer, election monitors, federal marshals, military judges, Article I judges, and the general counsel for the Transportation Department are inferior officers.<sup>88</sup> Perhaps, then, it is not surprising that five current Justices have suggested that ALJs also rise to this level.<sup>89</sup>

But Congress and the D.C. Circuit (the last court to have its say on the issue) may think otherwise. Congress referred to ALJs in the APA as "presiding employee[s],"<sup>90</sup> although this reference might be understood as a lingering indignity from the ALJs' "hearing examiner" past.<sup>91</sup> Likewise, the D.C. Circuit held in *Landry v. FDIC* that ALJs appointed by the Office of Thrift Supervision were employees, despite their significant authority, because they have no statutory authority to issue final opinions.<sup>92</sup> The majority concluded that the Court in *Freytag v. Commissioner* held that special trial judges for the U.S. Tax Court ("STJs") were inferior officers only because they had the power to issue final decisions.<sup>93</sup> The majority acknowledged that the *Freytag* Court stated that it would not have altered its conclusion even if the STJs' nonfinal decisionmaking powers were less significant.<sup>94</sup> But the *Landry* majority held that the *Freytag* Court would not have then mentioned the STJs' final decisionmaking powers (which were not

86. *See id.* at 811–12.

87. *See id.* at 812.

88. *See* *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3179 (Breyer, J., dissenting) (citing cases).

89. *See id.* (Breyer, J., dissenting, joined by three other justices); *Freytag*, 501 U.S. at 920 (1991) (Scalia, J., concurring in part and concurring in judgment, joined by Kennedy, J.). *But see* *Free Enter. Fund*, 130 S. Ct. at 3160 n.10 (majority opinion joined by Scalia and Kennedy, JJ.) (suggesting, in dicta, that ALJs may be employees).

90. 5 U.S.C. § 557(b) (2006); *see also id.* § 554(d) (referring to ALJs as "[t]he employee who presides"). *But see id.* § 556(b)(3) (referring to ALJs as "administrative law judges").

91. *See supra* note 2.

92. *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000); *see also* Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 71 (1979) (describing ALJs' inability to issue final decisions).

93. *Landry*, 204 F.3d at 1134.

94. *Id.* (quoting *Freytag*, 501 U.S. at 882).



employed in the *Freytag* case) unless those powers were “critical to the Court’s decision.”<sup>95</sup>

Judge Randolph dissented in *Landry* and had the better argument. As he demonstrated, the *Freytag* Court’s discussion of the STJs’ finality power was part of an alternative holding,<sup>96</sup> provided after the Court had announced its conclusion that “a special trial judge is an inferior Office[r] whose appointment must conform to the Appointments Clause.”<sup>97</sup> The authority to issue final decisions thus was not a necessary criterion. Indeed, federal magistrate judges, like ALJs, provide only initial decisions that a district court may review de novo, and they have long been deemed “inferior Officers” subject to appointment by “Courts of Law.”<sup>98</sup> Moreover, had ALJs the power to issue final decisions, they well could be transformed into principal officers, whose “work [would not be] directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”<sup>99</sup> Indeed, the Supreme Court in *Edmond v. United States* held that the judges of the Coast Guard Court of Criminal Appeals were inferior, not principal, officers because they “have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.”<sup>100</sup> The agencies’ power to overrule, in other words, merely establishes ALJs’ status as inferior officers.

Aside from this substantial constitutional concern, the ALJ-selection process is less than satisfactory to ALJs, agencies, and those affected by agency adjudication. ALJs have complained about the OPM’s lack of interest in the selection process and recently revised selection criteria,<sup>101</sup> and scholars have complained about the

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95. *Id.* (quoting *Freytag*, 501 U.S. at 882).

96. *Id.* at 1142 (Randolph, J., concurring in part and concurring in judgment).

97. *Freytag*, 501 U.S. at 881.

98. *Landry*, 204 F.3d at 1143 (Randolph, J., concurring in part and concurring in judgment) (citing *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352–54 (1931); *Rice v. Ames*, 180 U.S. 371, 378 (1901); *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 545 (9th Cir. 1984) (en banc)). *But see* Stacy M. Lindstedt, *Developing the Duffy Defect: Identifying Which Government Workers Are Constitutionally Required to Be Appointed*, 76 MO. L. REV. 1143, 1178–80 (2011) (arguing that a government worker should be deemed to have “significant authority” (as required for status as an “officer”) only if that worker’s actions are “final,” as that term is understood under the APA).

99. *Landry*, 204 F.3d at 1142 (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)).

100. *Edmond*, 520 U.S. at 665.

101. *See* Artz et al., *supra* note 3, at 105–06.

overbearing impact of the veterans' preference.<sup>102</sup> The agencies, too, have felt constrained by the Rule of Three and have sought a greater role in selecting ALJs with expertise in the agencies' subject matters.<sup>103</sup> Accordingly, even if current ALJ selection does not violate the Appointments Clause, key actors in the selection process—particularly ALJs and the agencies—are dissatisfied with the current regime.

*B. Improperly Impeding Presidential Supervision?*

ALJs' tenure protection also presents a substantial constitutional question after *Free Enterprise Fund v. PCAOB*.<sup>104</sup> The Court's 5-4 decision in that case invalidated Congress's use of two layers of tenure protection to shield Public Company Accounting Oversight Board ("PCAOB") members from the President's removal.<sup>105</sup> The SEC could appoint and remove PCAOB members.<sup>106</sup> One (implied) tenure-protection provision protected members of the SEC from the President's at-will removal,<sup>107</sup> and a second (statutory) tenure-protection provision protected PCAOB members from the SEC's at-will removal.<sup>108</sup> The Court invalidated this scheme because the two tiers of tenure protection together unconstitutionally impinged the President's supervisory power by preventing him from holding the SEC responsible for PCAOB's actions in the same manner as he could hold the SEC accountable for its other responsibilities.<sup>109</sup>

As Justice Breyer argued in his dissent, *Free Enterprise Fund* suggests that ALJs' tenure protections are also in jeopardy.<sup>110</sup> Like PCAOB members, two tiers of tenure protection shield ALJs from the President's control. As for the first tier, ALJs may be removed only for good cause,<sup>111</sup> meaning that "[ALJs] [a]re not to be . . . discharged at the whim or caprice of the agency or for political reasons."<sup>112</sup> That good

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102. See, e.g., Lubbers, *supra* note 2, at 115–16 (describing how a ten-point increase for certain veterans (1) substantially impacts eligible candidates' ordering because the scores have only a twenty-point range and (2) limits the number of women candidates).

103. See *supra* notes 34–40 and accompanying text.

104. *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138 (2010).

105. *Id.* at 3147.

106. *Id.*

107. *Id.* at 3148–49.

108. *Id.* at 3148.

109. *Id.* at 3154.

110. *Id.* at 3180–81 (Breyer, J., dissenting).

111. 5 U.S.C. § 7521(a) (2006).

112. *Ramspeck v. Fed. Trial Exam'rs Conf.*, 345 U.S. 128, 142 (1953).

cause must be established by the MSPB,<sup>113</sup> whose members are shielded from the President's at-will removal by a second tier of tenure protection.<sup>114</sup> (Indeed, a third tier of tenure protection may exist if the agency, such as the SEC, that may seek removal is independent and has its own tenure protection.<sup>115</sup>) Justice Breyer argued that the majority's decision suggested that "every losing party before an ALJ now ha[s] grounds to appeal on the basis that the decision entered against him is unconstitutional."<sup>116</sup> The majority responded that its "holding does not address . . . [ALJs]," while suggesting that ALJs may be permitted additional protections based on their ambiguous officer/employee status or their adjudicative, as opposed to policymaking, functions.<sup>117</sup>

The majority's proposed distinctions<sup>118</sup> are unsound as stated, devaluing the dicta for lower courts and rendering Justice Breyer's premonition all the more foreboding. First, the majority suggests, without explanation, that Congress may limit the President's supervisory power over employees to a greater degree than officers.<sup>119</sup> That the President needs supervisory control over policymakers, however, does not mean that he should have less, as opposed to equal, control over those who perform mostly ministerial, yet often still discretionary and important, tasks. The President should be able to oversee all people who implement executive policy because doing so is necessary for the President to take care that the law is faithfully executed.<sup>120</sup> After all, it would be odd, at the very least, if the

113. 5 U.S.C. § 7521(a).

114. *Id.* § 1202(d).

115. See *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 701 n.9 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("[Independent agency] is the term that traditionally has been applied . . . to agencies . . . whose heads are not removable at will."), *rev'd*, 130 S. Ct. 3138 (2010).

116. See *Free Enter. Fund*, 130 S. Ct. at 3181 (Breyer, J., dissenting) (noting that the holding does not specifically address this issue).

117. *Id.* at 3160 n.10 (majority opinion). I previously suggested another manner of limiting the majority's opinion to prevent the invalidation of ALJs' tenure protections. See Kent Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1397–99 (2012) (arguing that the particular combination of tenure protections for ALJs does not impermissibly interfere with the President's supervisory power).

118. Despite the majority's eschewal or rejection of functionalism in *Free Enterprise Fund*'s discussion of the President's removal power, see Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1602 (2012); *infra* note 191 and accompanying text, these distinctions concerning ALJs are conspicuously functional.

119. *Free Enter. Fund*, 130 S. Ct. at 3160 n.10.

120. Compare generally *id.* (invalidating tenure protection for inferior officers whom a department head of an independent agency appointed), with *Myers v. United States*, 272 U.S. 52,

President were to have more control over cabinet members confirmed by the Senate than the President's own administrative assistants.

Second, the President does not necessarily need less supervisory authority over ALJs merely because they engage in adjudication.<sup>121</sup> After all, "agencies use adjudication to form policy."<sup>122</sup> Indeed, certain agencies, such as the National Labor Relations Board ("NLRB"), create policy primarily through adjudication, not rulemaking.<sup>123</sup> Moreover, as Justice Breyer pointed out in his dissent, the PCAOB members, like ALJs, also exercised adjudicatory powers provided by statute, but the majority invalidated their tenure protection anyway without mentioning those powers.<sup>124</sup> Nevertheless, as discussed in Parts IV.C.1 and IV.C.3 of this Article, ALJs' sole adjudicatory function—in formal proceedings—should permit Congress to limit the President's supervisory power over ALJs without undermining the majority's decision.<sup>125</sup>

Ultimately, like the selection methods for ALJs, ALJs' tiered-tenure-protection provisions may or may not prove to be constitutional. But at the very least, the Court has flagged a serious issue concerning ALJs' potentially excessive tenure protection. And this question, like the appointments question, can be resolved without awaiting a definitive answer from the Supreme Court.

### *C. Insufficient Impartiality?*

Whether or not the Court would invalidate ALJs' tenure protection, their limited independence raises impartiality, and thus due process, concerns. Scholars have disagreed as to whether ALJs are

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173–74 (1926) (approving of Civil Service protections, despite invalidating tenure protection for inferior officers appointed by department heads of executive, as opposed to independent, agencies).

121. *Free Enter. Fund*, 130 S. Ct. at 3160 n.10.

122. Bruff, *supra* note 47, at 356; *accord* SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947).

123. See John L. Gedid, *ALJ Ethics: Conundrums, Dilemmas, and Paradoxes*, 11 WIDENER J. PUB. L. 33, 38 n.23 (2002) (explaining how in its first fifty years of existence the NLRB made all its decisions through adjudication and did not promulgate a single rule).

124. *Free Enter. Fund*, 130 S. Ct. at 3177 (Breyer, J., dissenting).

125. Although ALJs for a handful of agencies may (but rarely do) preside over formal rulemaking proceedings, *see supra* note 4, their function is nearly identical in these proceedings because they help prepare a formal record and, at times, provide an initial decision. *See, e.g.*, Jim Rossi, *Final, But Often Fallible: Recognizing Problems with ALJ Finality*, 56 ADMIN. L. REV. 53, 60 (2004). Because the function of ALJs is essentially unchanged and ALJs are essentially bound by the same APA requirements for both formal adjudication and rulemaking, *see* 5 U.S.C. §§ 556, 557 (2006), their limited and rare ability to preside over rulemaking should not require additional presidential supervisory power.

sufficiently independent to ensure their impartiality. Some Supreme Court decisions, for their part, strongly suggest that ALJs' independence suffices under the Due Process Clause, but their limited rationales are not wholly satisfying. The Court's recent decision in *Caperton v. A.T. Massey Coal Co.*,<sup>126</sup> however, may suggest that the method of ALJs' appointment and removal provides too little independence. Although *Caperton* concerned state judicial elections, its reasoning and concern over impartiality applies equally, if not with more strength, to administrative adjudication.

My purpose here is not to describe or critique fully the numerous arguments in academic literature concerning the nature and breadth, whether normative or descriptive, of ALJ independence. What follows, instead, is a brief synthesis of the arguments concerning ALJ impartiality, a critical review of often-invoked Supreme Court decisions, and an assessment of the impact that *Caperton* and *Free Enterprise Fund* may have on the due process issue. As with the ALJ appointment and presidential-supervision concerns, the purpose here is merely to identify the significant constitutional concern, not to resolve whether a constitutional violation exists.

### 1. Brief Overview of the Impartiality Debate

Due process demands impartiality and fairness.<sup>127</sup> Independence can further these values, but the amount of independence necessary will depend upon the interest at issue and the extent of the decisionmaker's authority.<sup>128</sup> Because an ALJ has a role in accomplishing "an agency task," as opposed to reviewing the other branches' actions, she "cannot be entirely impartial."<sup>129</sup> The question

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126. 556 U.S. 868 (2009).

127. See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (outlining situations in which the probability of actual bias on the part of the decisionmaker is constitutionally intolerable); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279–87 (1975) (describing the elements of a fair hearing); Krent & DuVall, *supra* note 55, at 9–10 (stressing the importance of impartial adjudications for ALJs); Christopher B. McNeil, *The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change*, 53 ADMIN. L. REV. 475, 479 (2001) (explaining that the hearing must be at a meaningful time in a meaningful manner to fulfill the fundamental due process requisite of providing "an opportunity to be heard").

128. See Moliterno, *supra* note 60, at 1214 (citing Stephen B. Burbank, *What Do We Mean by "Judicial Independence"?*, 64 OHIO ST. L.J. 323, 325 (2003)) (arguing that independence is also not "an all-or-nothing" proposition and that it is useful only to the extent that it furthers impartiality and separation of powers).

129. Gedid, *supra* note 123, at 54; see also *id.* at 38 ("ALJs are not impartial and neutral in the same sense as Article III judges, but frequently have a role in developing and applying agency policy.").

is, then, whether ALJs are sufficiently independent to ensure sufficient impartiality.

Some aspects of ALJ selection and removal suggest insufficient independence to guarantee impartiality. The agency has the ability to select the ALJ candidate (from the three submitted candidates) whom it believes will be most sympathetic to agency positions.<sup>130</sup> The ALJ, perhaps regardless of his or her background or predisposition to agency views, becomes inculcated with agency prerogatives and concerns.<sup>131</sup> The agency often serves as a party to an administrative proceeding and can initiate an ALJ's removal.<sup>132</sup> Indeed, this "[r]emoval authority has always been associated with control: It is the sine qua non of effective supervision—the guarantee that subordinates will take direction."<sup>133</sup> This concern over the removal power becomes more urgent if ALJs' tenure protections are invalidated, as Justice Breyer fears, because the MSPB's review of an agency's at-will removal of an ALJ would be meaningless.<sup>134</sup> Finally, ALJs have indicated that agencies are perceived to interfere with ALJ decisions, and twenty-six percent of ALJs for the SSA have complained of Agency pressure to rule differently.<sup>135</sup> An ALJ's inculcation,

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130. But the agency's power seems similar to the President's in selecting Article III judges. The President often selects judicial candidates who are likely to share the President's judicial or political philosophy. And, indeed, the Senate and the President can select candidates whom they perceive as favoring the federal government's position.

131. Pillai, *supra* note 2, at 124–25; *see also* Bruff, *supra* note 47, at 352 (“[T]hose who work within an agency are subject to a multitude of open or subtle socializing pressures that do not reach a separate institution.”).

132. *See* Krent & DuVall, *supra* note 55, at 34–35 (discussing how agencies oversee the conduct of ALJs to ensure competence and civility, and can remove ALJs for good cause).

133. Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 421 (2001) (citing *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)); *accord* Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3157 (2010) (“The President has been given the power to oversee executive officers; he is not limited . . . to persuading his unelected subordinates to do what they ought to do without persuasion. In its pursuit of a ‘workable government,’ Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.” (internal quotation marks, alterations, and citations omitted)).

134. *See supra* Part II.B.

135. Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 280 (1994) (discussed in Moliterno, *supra* note 60, at nn.94 & 108); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Value of Procedural Due Process*, 95 YALE L.J. 455, 499 (1986) (“Evidence suggests that various agencies have used the possibility of removal as a tool for coercing decisions that are consistent with the agency’s wishes.”); *see also* Redish & Marshall, *supra*, at 477 (“[I]f the adjudicator is himself an integral part of the governmental body on the other side of the case, then it is likely that his decision will be based on considerations other than the merits as developed by the evidence.”).

appointment, and limited tenure protections create, the argument goes, both apparent and actual bias concerns.<sup>136</sup>

But ALJs have significant indicia of independence that support their impartiality. The OPM, after scoring ALJ candidates, limits agencies' discretion in selecting candidates.<sup>137</sup> The agencies can only initiate removal proceedings; they must convince another independent agency that good cause exists for the ALJ's removal.<sup>138</sup> This tenure protection appears meaningful because, despite numerous attempts, agencies have convinced the MSPB to remove only five ALJs as of 2006.<sup>139</sup> Indeed, "it is generally understood [based on statutory and constitutional restrictions] that presidential supervision . . . should steer clear of interference in adjudications, no matter who performs them."<sup>140</sup> The APA promotes this understanding by limiting the ALJs' ex parte contacts with parties,<sup>141</sup> limiting the duties that the agency can assign ALJs,<sup>142</sup> restricting those who can directly supervise ALJs,<sup>143</sup> restricting the agencies' ability to award "merit" pay or provide a performance rating,<sup>144</sup> and expressly requiring ALJs to act impartially.<sup>145</sup>

Indeed, indicia of independence may be irrelevant to, or at least unnecessary for, impartiality. Only nine percent of non-SSA ALJs report feeling pressured to rule differently.<sup>146</sup> And administrative judges ("AJs"), who lack ALJs' structural protections and preside over informal administrative adjudications,<sup>147</sup> had *less* anxiety over their impartiality and independence than ALJs.<sup>148</sup> Surely, the argument

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136. Gedid, *supra* note 123, at 40 (citing Pillai, *supra* note 2, at 124–25).

137. See *supra* notes 27–32 and accompanying text.

138. See *supra* note 52 and accompanying text.

139. Moliterno, *supra* note 60, at 1222 n.150.

140. Bruff, *supra* note 47, at 350.

141. 5 U.S.C. §§ 554(d)(1), 557(d) (2006).

142. *Id.* § 554(d)(2).

143. *Id.*

144. *Id.* § 5372.

145. *Id.* § 556(b) ("The functions of presiding employees . . . shall be conducted in an impartial manner.").

146. Moliterno, *supra* note 60, at n.108 (citing Koch, *supra* note 135, at 278).

147. See, e.g., Philip G. Peters, Jr., *Health Courts?*, 88 B.U. L. REV. 227, 262 & n.249 (2008) (citing RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 309 (4th ed. 2004)) (stating that informal adjudication is often presided over by AJs with lower pay and less independence from the agency).

148. See Koch, *supra* note 135, at 279. If ALJs lack sufficient indicia of independence, then impartiality concerns over AJs, who lack ALJs' protections, would be even graver and threaten much of the federal administrative state. Moreover, such a conclusion would also seem to bring Article I judges' impartiality into question because they have independence that is similar to ALJs. Although certain concerns underlying my proposal also apply to AJs and Article I judges, I

goes, the APA's statutory protections and statistical evidence satisfy the minimal standards of due process, especially in light of the Supreme Court's ready acceptance of most administrative procedures<sup>149</sup> and the indication from the AJs' responses that independence has little effect on an administrative adjudicator's self-perception of impartiality.

## 2. Reassessing Existing Doctrine

Not surprisingly, scholars have disagreed as to whether ALJs have sufficient indicia of impartiality.<sup>150</sup> Despite the absence of scholarly consensus, Professor Harold Bruff has stated that "the Supreme Court has upheld this general arrangement against due process attack."<sup>151</sup> Three Supreme Court decisions routinely come to the APA's defense in a Constitution-based impartiality challenge: *Ramspeck v. Federal Trial Examiners Conference*,<sup>152</sup> *Butz v. Economou*,<sup>153</sup> and *Withrow v. Larkin*.<sup>154</sup> Although certain of these

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do not include them here because they do not likely face the same Appointments Clause problems and because other factual distinctions exist between them and ALJs.

149. Verkuil, *supra* note 6, at 1347–51.

150. Compare, e.g., Krent & DuVall, *supra* note 55, at 4 n.11 ("[T]he APA protections insulate ALJs far more than due process dictates."), McNeil, *supra* note 127, at 511 ("[D]ue process jurisprudence . . . [dispels] the notion that the measure of due process to which litigants are entitled in administrative proceedings includes an independent adjudicator possessed of salary and tenure protection . . ."), and Verkuil, *supra* note 6, at 1347–51 (arguing that ALJs need only so much independence as to ensure their impartiality and suggesting that impartiality exists), with 2 ROSCOE POUND, JURISPRUDENCE 442–43 (1959) (contending that relationship between agency and ALJ creates actual and apparent bias), Gedid, *supra* note 123, at 40 ("[T]here is a strong argument that . . . for ALJ independence to exist, the ALJ cannot be 'beholden' to the agency for which she works for compensation, tenure, and/or conditions of employment." (citing Richard B. Hoffman & Frank P. Cihlar, *Judicial Independence: Can It Be Without Article III?*, 46 MERCER L. REV. 863, 864–65 (1995))), Levinson, *supra* note 25, at 537–38 (noting uncertainty as to ALJs' impartiality), Lubbers, *supra* note 2, at 110 (stating that "ALJs . . . are subject to doubts about their independence due in part to their employment," but not resolving whether ALJs are sufficiently independent or impartial), Redish & Marshall, *supra* note 135, at 499, 504 (arguing that ALJs need salary and tenure protection similar or identical to Article III judges to preserve due process), Timony, *supra* note 2, at 828 (concluding that agencies' ability to proceed against an ALJ creates an "appearance of impropriety"), and 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, 544 (1985).

151. Bruff, *supra* note 47, at 346 (referring to *Withrow v. Larkin*, 421 U.S. 35 (1975)); *id.* at 347 ("Most administrative adjudication is not very vulnerable to constitutional invalidation under the due process clause."); see also Verkuil, *supra* note 6, at 1350–51.

152. 345 U.S. 128 (1953).

153. 438 U.S. 478 (1978).

154. 421 U.S. 35 (1975). In *Weiss v. United States*, the Supreme Court upheld the use of military judges despite their lack of a fixed term in office or lifetime tenure. See 510 U.S. 163, 179–81 (1994). But *Weiss*'s applicability to the civil administrative state is indeterminate. On one



decisions strongly suggest that ALJs are sufficiently impartial in fact and appearance, scholars have not considered the impact of the decisions' limitations, especially after *Caperton* and *Free Enterprise Fund*.

*Ramspeck*, for instance, has limited relevance. In *Ramspeck*, ALJs challenged certain rules governing ALJs, which the precursor to the OPM and the MSPB (the Civil Service Commission) promulgated under the APA.<sup>155</sup> No constitutional question was posed or answered. In rejecting the ALJs' contention that reductions in force were impermissible under the APA, the Court stated that Congress intended ALJs "not to be paid, promoted, or discharged at the whim or caprice of the agency or for political reasons."<sup>156</sup> And the Court referred to ALJs as "partially independent"<sup>157</sup> and "semi-independent subordinate hearing officers."<sup>158</sup> But these descriptions of congressional intent do not answer whether Congress successfully effectuated its intent, whether the protections provide sufficient impartiality, or whether the protections offend the President's supervisory power.

The two remaining cases, however, are more germane. In *Butz*, an individual brought suit against certain Department of Agriculture officials who took part in an administrative adjudication.<sup>159</sup> He asserted several causes of action, including those premised on violations of the Due Process Clause.<sup>160</sup> The sole issue that the Supreme Court resolved concerned the nature of immunity to which the various officials were entitled.<sup>161</sup> As in *Ramspeck*, the Court did not decide whether ALJs have sufficient impartiality, but it hinted as much. In determining that ALJs were entitled to absolute judicial immunity, the Court stated that ALJs were "functionally comparable" to judges<sup>162</sup> and listed the APA's panoply of protections to "guarantee

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hand, the Court's opinion suggests that lifetime or termed tenure is unnecessary for adjudicators who are subject to removal by the executive branch. On the other hand, the Court refused to apply *Mathews v. Eldridge*, 424 U.S. 319 (1976), because that case applied in civil contexts, suggesting that *Mathews*'s three-part balancing test may require more.

155. See *Ramspeck*, 345 U.S. at 134 (outlining the arguments of each party).

156. *Id.* at 142.

157. *Id.* at 131.

158. *Id.* at 132.

159. *Butz v. Economou*, 438 U.S. 478, 481–82 (1978).

160. See *id.* at 482–83.

161. See *id.* at 485 (rejecting the United States' argument that federal officials are immune from damages liability even if the violation was knowing, was deliberate, and infringed constitutional rights).

162. *Id.* at 513; accord *Ass'n of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984).

[ALJs'] independence."<sup>163</sup> Indeed, absolute immunity "preserv[ed ALJs'] independent judgment."<sup>164</sup> Nevertheless, the decision does not discuss (at least in any detail) the power of removal and the internal pressures that weigh on ALJs as agency officials despite the powerful force that the *Free Enterprise Fund* Court would later understand the removal power to have,<sup>165</sup> much less explain why the APA's protections are sufficient to ensure impartiality.

*Withrow* likewise suggests that ALJs have sufficient impartiality, but it, too, is not dispositive. In *Withrow*, a doctor challenged the ability of a licensing board to preside over a nonadversary, investigatory hearing and also a later adversary, merits hearing.<sup>166</sup> The Court unanimously upheld the arrangement. The Court noted that it sought to "prevent even the probability of unfairness"<sup>167</sup> and that a challenge to the administrative structure would have to "overcome a presumption of honesty and integrity in those serving as adjudicators,"<sup>168</sup> in light of "a realistic appraisal of psychological tendencies and human weakness."<sup>169</sup> But the Court found no problem because the board was merely determining whether a full hearing was necessary, much like a judicial officer rendering a probable cause determination, without deciding whether a regulatory violation actually occurred.<sup>170</sup> And the Court indicated that the Due Process Clause does not require separated investigative and adjudicatory functions for agency members.<sup>171</sup>

*Withrow* does not fully address the plight of ALJs. The Court's opinion, like that in *Butz*, does not address the effect of the removal power on an adjudicator's impartiality. Indeed, it does not address ALJs at all. Instead, *Withrow* concerns the heads of agencies.<sup>172</sup>

Perhaps one might argue that if agency heads can investigate, prosecute, adjudicate, and overrule ALJs' opinions in toto, there should be little concern over their subordinates' impartiality. But that argument overlooks ALJs' functional judicial status and the different

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163. *Butz*, 438 U.S. at 514.

164. *Id.*

165. *See supra* Part II.B (discussing significance of *Free Enterprise Fund*).

166. *Withrow v. Larkin*, 421 U.S. 35, 39–41 (1975).

167. *Id.* at 47.

168. *Id.*

169. *Id.*

170. *See id.* at 53–58 (explaining why board's behavior was acceptable).

171. *See id.* at 52 (explaining that case law, and federal and state courts, support this contention).

172. *See id.* at 55 n.20 (noting that the Agency employee actually performed the investigation and an assistant attorney general presented the evidence to the board).

expectations that parties have before a judge as opposed to an agency member.<sup>173</sup> The ALJ is a neutral individual whose opinion the agency must review, and the ALJ's neutrality and opinion have a meaningful procedural and substantive effect. Although the agency can (but rarely does) reverse an ALJ's decision, the substance of the ALJ's opinion may matter for judicial review under the APA. The courts will review only agency decisions adverse to a nonagency party (because if the party prevails before the agency, the agency will not appeal its own adverse decision, which it has the power to reverse, to the courts). The ALJ's opinion—especially as to facts and credibility—helps the court determine the matter with the additional help of an educated neutral's view.<sup>174</sup> The ALJ's proceedings and opinion also provide an administrative procedure to help protect fundamental rights in adjudication and thereby create for the parties the reasonable expectation of a fair, impartial proceeding. In short, the ALJ's place within the federal administrative apparatus does not mean that impartiality and its concomitant indicia of independence are irrelevant.

### 3. *Caperton* and *Free Enterprise Fund*'s Impact on Existing Doctrine

Even if *Ramspeck*, *Butz*, and *Withrow* together established that ALJs have sufficient impartiality, the Court's more recent decision in *Caperton* may suggest otherwise. Indeed, *Caperton* does what those decisions did not: it focuses on adjudicators' selection and removal,

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173. The *Withrow* Court also referred to *Richardson v. Perales*, 402 U.S. 389, 410 (1971). See *Withrow*, 421 U.S. at 49–50. In *Perales*, the Supreme Court rejected a social security claimant's argument that the ALJ's duty to develop the record in nonadversarial hearings violated the Due Process Clause. The Court held that doing so would "assume[] too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." See *Perales*, 402 U.S. at 410. This conclusion is sound because the ALJ was not an advocate for the Agency; the Agency was unrepresented. But the *Perales* Court's reasoning is not satisfying. The Court merely offers unsupported conclusions that (1) the procedures are "working well" and (2) the procedures satisfy due process because the government, which creates, implements, and potentially benefits from the procedures, has made them ubiquitous. See *id.* Moreover, like *Butz* and *Withrow*, *Perales* does not address whether a sharp Damoclean sword of removal dulls the ALJ's impartiality. Perhaps the better support for sufficient impartiality is found in *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("We agree . . . that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker.").

174. See, e.g., *Novelty, Inc. v. DEA*, 571 F.3d 1176, 1180–81 (D.C. Cir. 2009) (Henderson, J., concurring) ("The DEA is the ultimate fact finder but '[t]he agency's departures from the [ALJ's] findings are vulnerable if they fail to reflect attentive consideration to the [ALJ's] decision.' " (quoting *Greater Bos. Tel. Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970))); *Bos. Edison Co. v. FERC*, 885 F.2d 962, 968–69 (1st Cir. 1989); see *infra* note 195 (explaining that courts carefully view agency findings contrary to ALJ factual findings).

albeit in the judicial-election context. In *Caperton*, the president of a corporate defendant, which was in the process of appealing an unfavorable verdict, had contributed three million dollars to have Justice Benjamin elected to the West Virginia Supreme Court of Appeals.<sup>175</sup> Justice Benjamin defeated the incumbent justice by fewer than fifty thousand votes.<sup>176</sup> In response to recusal motions, Justice Benjamin said that he had no actual bias and that there was no allegation of a quid pro quo arrangement.<sup>177</sup>

The U.S. Supreme Court held that due process required Justice Benjamin's recusal.<sup>178</sup> Evidence of a quid pro quo agreement or of actual bias was unnecessary.<sup>179</sup> Instead, the Court was "concerned with a more general concept of interests that tempt adjudicators to disregard neutrality."<sup>180</sup> The Court was looking not necessarily for *Withrow's* "probability of unfairness,"<sup>181</sup> but instead an "unconstitutional 'potential for bias.'" <sup>182</sup> The Court suggested that such bias exists

when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. . . . [S]imilar fears of bias can arise when—without the other parties' consent—a man chooses the judge in his own cause.<sup>183</sup>

Applying this standard, the Court noted that the president of the defendant-corporation knew that the appeal from an unfavorable verdict was pending, the election was decided by fewer than fifty thousand votes, and the president's contributions had a significant and disproportionate impact on the election.<sup>184</sup> Because of this, the Court found "a serious, objective risk of actual bias that required

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175. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873 (2009).

176. *See id.* (noting Justice Benjamin received 382,036 votes while his rival received 334,301 votes).

177. *See id.* at 872–75, 886 (reviewing facts of case).

178. *See id.* at 884–87 (explaining reasons for holding).

179. *See id.* at 884–85 (arguing that risk of bias was substantial enough).

180. *Id.* at 878.

181. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

182. *Caperton*, 556 U.S. at 881 (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 465–66 (1971)). The Court enunciated another standard besides the "probability of unfairness" and the "unconstitutional potential for bias." The Court also indicated that it was looking for "the probability of actual bias [that] rises to an unconstitutional level." *Id.* at 887. Perhaps these three standards can be reconciled. The "probability of actual bias" may be the same as the "probability of unfairness," with the unfairness being the actual bias. The "potential for bias" may be unconstitutional only when it rises to the level of the probability of actual bias.

183. *Id.* at 870.

184. *Id.* at 885–86.

Justice Benjamin’s recusal” because it appeared that the defendant “ch[ose] the judge in [its] own cause.”<sup>185</sup>

Although the Court discussed its decision within the judicial-election context,<sup>186</sup> its reasoning seems even more compelling when applied to ALJs. *Caperton* appears to consider a party’s impact on a judge’s selection and perhaps the effect that a losing party could have to punish the judge who it helped place on the bench in future judicial elections. West Virginia voters directly chose Justice Benjamin. Nevertheless, the corporate defendant’s disproportionate contributions’ indirect impact on the election created an “unconstitutional potential for bias.” The government, like the defendant in *Caperton*, is frequently a party to proceedings before the ALJ. But the government *directly* chooses the ALJ from a list of three candidates presented to it. If agencies obtain the ability to engage in selective certification, their ability to appoint is even more unbounded. In either case, the agency directly and literally “chooses the judge in [its] own cause,” without, as in the case of federal judges, any approval from another branch. Moreover, the agency is the party that can initiate removal proceedings against the ALJ, not merely indirectly fund opposition forces in a later election. Indeed, it is not even the government in general that selects ALJs and initiates removal proceedings; it is the very agency that appears before the ALJ. Because the agency’s role in selecting and removing the ALJ is much more direct than in *Caperton*, it is difficult to see how an “unconstitutional potential for bias” does not exist for federal ALJs if *Caperton* applies outside of the judicial-election context.

Moreover, as discussed previously in Part II.B, *Free Enterprise Fund* suggests that the President must have sufficient supervisory power over all members of the executive branch so that the President can be held accountable for what his or her agents do. To ensure the President’s supervisory power, the Court has begun limiting tenure protections for executive officials, such as the PCAOB members.<sup>187</sup> If the Court were to follow suit with ALJs and permit the President or a principal officer to remove ALJs for any reason, it is difficult to see how an “unconstitutional potential for bias,” or indeed a “probability of actual bias” would not exist. The President or a supervising officer could, despite potential political backlash, have the ALJ find facts or

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185. *Id.* at 886, 902.

186. *Id.* at 881–82 (“This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.”).

187. *See* *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3161 (2010) (agreeing with the government that unconstitutional tenure provisions are severable).

apply law in certain ways. Indeed, the Supreme Court has held that “one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will.”<sup>188</sup> A challenge to the President’s supervision of ALJs may not be merely a theoretical matter, given the Court’s recent, solicitous reception to separation-of-powers challenges.<sup>189</sup>

Functional limitations on the President’s supervisory power—such as the understood ability of ALJs to act without agency interference<sup>190</sup> and ALJs’ APA protections—may be less, if at all, relevant to due process and removal-power inquiries after *Free Enterprise Fund*. That decision strongly suggests that practical indicia of independence or control are normally immaterial to the President’s removal-power inquiry because the Court rejected Justice Breyer’s functional inquiry that considered other, more meaningful methods of presidential control, such as rulemaking powers.<sup>191</sup> Instead, the Court looked only to the President’s removal power and held that the lack of sufficient removal power in the PCAOB scheme alone impeded the President’s supervisory power.<sup>192</sup> Supervision is merely the flipside to independence. If the removal power is significant and apparently necessary for adequate presidential supervision, the removal power should have a similar, inverse impact on independence and impartiality. The limited ability of Congress after *Free Enterprise Fund* to rely on functional methods of control and independence is what, in part, may render the ALJ’s quandary so difficult to solve.

Finally, the agency’s ability to overrule an ALJ on both fact and law does not mean that an ALJ’s decision is meaningless.<sup>193</sup> The

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188. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935).

189. See generally *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (holding that bankruptcy court lacked authority under Article III to enter judgment on state-law counterclaim); *Free Enter. Fund*, 130 S. Ct. at 3150–51 (deciding separation-of-powers issues on interlocutory review); *Ryder v. United States*, 515 U.S. 177, 182–83 (1995) (discussing claim, based on Appointments Clause of Article II of the Constitution, that there was a “trespass upon the executive power of appointment”).

190. See *supra* note 140 and accompanying text; cf., e.g., Russell L. Weaver, *Management of ALJ Offices in Executive Departments and Agencies*, 47 ADMIN. L. REV. 303, 321 (1995) (“ALJs who serve at agencies that have non-ALJ administrators repeatedly indicated that those administrators have not attempted to interfere with their decisional independence.”).

191. See *Free Enter. Fund*, 130 S. Ct. at 3155–56 (refuting dissent’s position); *id.* at 3170–73 (Breyer, J., dissenting) (discussing how the SEC controls PCAOB’s adjudicatory and rulemaking authority).

192. See *id.* at 3158–59 (discussing threat posed by insufficient removal power); see also *id.* at 3156–57 (discussing Framers’ view of importance of removal power).

193. See 5 U.S.C. § 557(b) (2006) (describing ALJ’s initial decision authority); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494–97 (1951) (explaining importance of findings of

ALJ's credibility findings can be very significant, affecting whether substantial evidence exists for an agency's contrary decision on administrative appeal.<sup>194</sup> Indeed, courts review with a more careful eye agency findings that are contrary to ALJs' factual findings.<sup>195</sup> Considering appellate courts' more deferential review of final agency action as compared to lower court factual findings,<sup>196</sup> ALJs' impartiality may be even more important than Article III judges' impartiality.

Despite concerns over ALJ impartiality and despite *Caperton* and *Free Enterprise Fund's* contrary suggestion, the Supreme Court may not find a due process violation, given its wariness of upsetting long-standing administrative practices.<sup>197</sup> But the absence of constitutional infirmity does not mean that the current administrative system is in excellent health. These concerns, like those that surround ALJs' selection and removal, support finding a new process of ALJ selection and removal that all interested constituencies can champion.

### III. OTHER PROPOSED, YET INCOMPLETE, REFORMS

Scholars and ALJs have proposed various changes to ALJs' selection, removal, and independence. Some of the most promising proposals, discussed below, include the creation of a unified ALJ corps with a newly established supervising agency, ALJ self-regulation, and even the provision of Article III protections to ALJs. But these proposals fail to consider, much less resolve, all three separation-of-powers issues surrounding ALJs. Each of these proposals thus has—befitting ALJs' current demigod status—an Achilles heel.<sup>198</sup>

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examiner); Moliterno, *supra* note 60, at 1225 (acknowledging weight of authority given to ALJ decisions).

194. See *Universal Camera Corp.*, 340 U.S. at 496–97 (noting legislative committee reports emphasize importance of ALJ decisions); see also *Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1079–81 (9th Cir. 1977) (refusing to enforce NLRB's order and reversing an ALJ's determination that relied exclusively on testimony that the ALJ discredited).

195. *Penasquitos Vill., Inc.*, 565 F.2d at 1078 (referring to *NLRB v. Tom Johnson, Inc.*, 378 F.2d 342, 344 (9th Cir. 1967), and *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 499 (2d Cir. 1967)).

196. See *Dickinson v. Zurko*, 527 U.S. 150, 162–63 (1999) (explaining that the “‘substantial evidence’ standard [for review of agency decisions] . . . is somewhat less strict than the [clearly erroneous standard for the review of lower court factual findings]”); accord *Chen v. Mukasey*, 510 F.3d 797, 801 (8th Cir. 2007) (“The substantial evidence standard . . . is more deferential than the ‘clearly erroneous’ standard . . .”).

197. See *Richardson v. Perales*, 402 U.S. 389, 410 (1971).

198. In fairness to these proposals' advocates, I am not aware of any scholarship that directly examines all three problems. Moreover, the problematic nature of the ALJs' tiered-

### A. Unified Corps

Perhaps the most popular remedial proposal is for a unified ALJ corps (sometimes referred to as an ALJ central panel), appointed and supervised by an existing or newly created independent agency.<sup>199</sup> Under this proposal, ALJs are not appointed by or assigned to a specific agency. Instead, a corps of ALJs, whose members an independent agency appoints, hears cases from various agencies.<sup>200</sup> Some of the central-panel proposals would permit ALJs to issue final decisions.<sup>201</sup>

A federal ALJ corps, however, does not likely resolve the three separation-of-powers concerns. The independent agency's appointment of ALJs would likely comply with the Appointments Clause because the independent agency, if "not subordinate to or contained within any other [executive] component," would constitute a "department."<sup>202</sup> But the presidential-supervision concerns remain because, without further changes to the current appointment process, two tiers of tenure protections would continue to shield ALJs from the President's control. The appointing agency would be independent because of tenure protection for its head.<sup>203</sup> And ALJs presumably would likewise

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tenure protections, among other things, did not arise in any substantial way until June 2010 with *Free Enterprise Fund*.

199. See, e.g., Lubbers, *supra* note 2, at 123–24 (discussing intensified movement for a unified administrative trial court or centralized corps of judges); Moliterno, *supra* note 60, at 1227–33 (articulating support that the proposal for a central panel has received); Scalia, *supra* note 92, at 79 (explaining improper influence issue could be resolved with a unified ALJ corps). Similarly, the Federal ALJ Conference has proposed transferring the OPM's selection assistance of ALJs and other responsibilities to a new independent agency, the Administrative Law Judge Conference. See Artz et al., *supra* note 3, at 105–07 (discussing history and reasons for proposal); see also Krent & DuVall, *supra* note 55, at 38–40 (suggesting creation of an independent oversight agency and discussing California's Agency that oversees judicial conduct). But doing so would not address any of the three stated concerns because it merely transfers currently existing powers from one independent agency—that ALJs think has generally ignored them—to another more sympathetic one. This transfer does not have heads of departments actually appoint ALJs, alter the President's supervisory power, or address ALJ independence.

200. See McNeil, *supra* note 127, at 480 (pointing out consistency of independence of ALJs with due process requirements); Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 568 (2001) (describing how corps of ALJs promotes adjudicative independence).

201. See Moliterno, *supra* note 60, at 1230 (comparing a central panel of ALJs to Article III judges).

202. See *supra* note 75 and accompanying text (defining "department").

203. See *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 701 n.9 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("[Independent agency] is the term that traditionally has been applied . . . to agencies . . . whose heads are not removable at will."), *rev'd* 130 S. Ct. 3138 (2010).



receive the tenure protection that they currently possess.<sup>204</sup> If one or both of the tenure-protection provisions are invalidated, substantial due process concerns may exist because the new appointing and removing agency—which may not be independent after a tiered-tenure-protection analysis—may attempt to influence ALJs’ decisions improperly.<sup>205</sup> Moreover, even if the tenure protections are permissible under Article II, any attempt to give ALJs the power to issue final decisions places policy control within the ALJs, not the agencies themselves, and thus limits the President’s ability to ensure that the law is faithfully executed.<sup>206</sup>

Yet, even if an ALJ central panel did cure all three problems, a federal ALJ corps is not likely in the offing. Numerous states have created ALJ corps,<sup>207</sup> which have received universal praise.<sup>208</sup> Many members of the committee that proposed the federal APA to Congress advocated an ALJ corps.<sup>209</sup> And since then, many scholars, committees, members of the bar, a congressman, and ALJs have joined the unsuccessful crusade.<sup>210</sup> Even so, by 1992 the

204. See 5 U.S.C. § 7521 (2006) (listing possible actions against ALJs); MODEL ACT CREATING A STATE CENTRAL HEARING AGENCY § 1–6(a)(3), (a)(4) (1997) (listing reasons for removal).

205. See *supra* notes 187–89 and accompanying text (explaining probable bias that may occur if President could remove ALJs for any reason); see also Edwin L. Felter, Jr., *Special Problems of State Administrative Law Judges*, 53 ADMIN. L. REV. 403, 417 (2001) (proposing that ALJ corps is “removable only for good cause and, then, only after notice and an opportunity to be heard by an impartial tribunal”); Krent & DuVall, *supra* note 55, at 45 (explaining that ALJs in certain states, such as Texas, can be removed at will by the Chief ALJ).

206. Cf. Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana’s Administrative Procedure Act*, 59 LA. L. REV. 431, 463 (1999) (noting separation-of-powers problems that arose when Louisiana permitted ALJs to issue final decisions from which a losing agency could not appeal).

207. Rossi, *supra* note 200, at 568; see Patricia E. Salkin, *Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Judicial Conduct for the Administrative Judiciary*, 11 WIDENER J. PUB. L. 7, 13 n.18 (2002) (listing twenty-four states that have adopted central panels).

208. See Moliterno, *supra* note 60, at 1229 (citing Thomas E. Ewing, *Oregon’s Hearing Officer Panel*, 23 J. NAT’L ASS’N ADMIN. L. JUDGES 57, 89 (2003); Allen C. Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75, 78 (1994); Bruce H. Johnson, *Strengthening Professionalism Within an Administrative Hearing Office: The Minnesota Experience*, 53 ADMIN. L. REV. 445, 446 (2001)). Nonetheless, a common criticism of the ALJ corps is that agencies lose the efficiency and specialized knowledge that exists when ALJs are housed within individual agencies. See, e.g., Pierce, *supra* note 57, at 516.

209. See Moliterno, *supra* note 60, at 1227.

210. See Lubbers, *supra* note 2, at 123–24 (explaining the LaMacchia Committee’s 1973 recommendation for study of an ALJ corps and former ABA President Bernard Segal’s advocacy for an independent ALJ corps in 1976); *id.* at 124 (advocating “increased scrutiny” for the ALJ corps proposal); Moliterno, *supra* note 60, at 1229 (collecting scholarly and ALJ proposals); see also GAO-10-14, *supra* note 40, at 22 (“The ALJ Corps option was proposed repeatedly in

Administrative Conference of the United States ("ACUS") recommended that Congress *not* create an ALJ corps.<sup>211</sup> Given the ACUS's lack of support for an ALJ corps and the proposal's failure to gain political traction after more than sixty years, the proposal to create a federal ALJ corps appears moribund.

### *B. Self-Regulation*

Another set of proposals grants ALJs the power to self-regulate. Other professions, such as Article III judges, lawyers, and physicians, regulate the conduct of their members.<sup>212</sup> Indeed, because Federal Judicial Councils monitor judicial behavior, Congress has largely avoided regulating judges.<sup>213</sup> Under one general proposal, ALJs would be permitted to create an ethics code,<sup>214</sup> investigate alleged ALJ wrongdoing, and impose sanctions for inappropriate conduct.<sup>215</sup> Under another self-regulation proposal, a new independent agency of ALJs would assume the OPM's current ALJ-selection-assistance duties, improve the formal administrative adjudicatory process, and ensure compliance with ethical standards.<sup>216</sup>

These proposals do not address appointment, removal, or impartiality concerns. Neither proposal alters ALJs' current questionable method of selection by heads of agencies who are not heads of departments. Neither appears to alter ALJs' two tiers of tenure protection or the existing removal mechanisms, and thus neither proposal gives the ALJs more than the power to recommend or impose certain adverse action against a derelict ALJ. Because ALJs' selection and removal are essentially left unaltered under both proposals, self-regulation would have a minimal impact on impartiality concerns. The failure to consider the selection bias, the agency-view inculcation, and threat of removal renders the

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Congress between 1983 and 1995."); Scalia, *supra* note 92, at 79 (discussing ALJ corps's beneficial effect on efficiency and likely detrimental effect on accountability and supervision); Timony, *supra* note 2, at 819 (discussing Senator Heflin's 1983 bill to create a unified corps).

211. See Moliterno, *supra* note 60, at 1228 (referring to PAUL R. VERKUIL ET AL., ADMIN. CONF. OF THE U.S., THE FEDERAL ADMINISTRATIVE JUDICIARY 1059 (1992)).

212. Krent & DuVall, *supra* note 55, at 43–45.

213. *Id.* at 43.

214. ALJs' unsettled ethical duties are a perennial subject of academic discussion. See generally Salkin, *supra* note 207, at 7–32; Ronnie A. Yoder, *The Role of the Administrative Law Judge*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 321, 321–48 (2002); Diana Gillis, Note, *Closing an Administrative Loophole: Ethics for the Administrative Judiciary*, 22 GEO. J. LEGAL ETHICS 863, 863–76 (2009).

215. Krent & DuVall, *supra* note 55, at 43.

216. See Artz et al., *supra* note 3, at 106–07.

promulgation and enforcement of an ethics code an ineffective tool to improve actual and perceived ALJ impartiality.

### C. Article III Protections

A third suggestion provides ALJs essentially the same tenure protections that Article III judges enjoy. To combat agency pressure on ALJ decisionmaking, two prominent scholars have proposed giving ALJs lifetime salary protection and permitting their removal only through a statutory-impeachment process.<sup>217</sup> This proposal should remedy any lingering due process concerns, even after *Caperton* and *Free Enterprise Fund*, because ALJs would have the same independence as Article III judges, although that independence would arise from statutory, not constitutional, law.<sup>218</sup>

But this proposal does not resolve appointment or supervision concerns. The proposal fails to alter ALJs' selection, leaving heads of agencies, as opposed to departments, to select some ALJs.<sup>219</sup> Moreover, it would exacerbate presidential-supervision concerns. To be sure, this reform would remove one tier of tenure protection and thus may, at a superficial level, solve the problem presented in *Free Enterprise Fund*. Yet removal through impeachment completely deprives the executive branch of power to seek an ALJ's removal because the House of Representatives, not the executive branch, initiates impeachment proceedings.<sup>220</sup> Thus, even if this proposal resolves due process

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217. See Redish & Marshall, *supra* note 135, at 499; see also *id.* at 504 (“[D]ue process is inadequately protected when an individual must depend on an adjudicator who lacks salary and tenure protection (such as most state court judges and all ALJs) to protect an entitlement to a life, liberty, or property interest.”). Redish and Marshall’s proposal is vague as to whether the salary and tenure protections are lifetime protections. They do not use the term “lifetime,” but they do mention the protections and then state that “ALJs would then be shielded from such pressures in much the same way that article III judges are.” See *id.* at 499.

218. See U.S. CONST. art. III, § 1. But others have concluded that Article III protections are unnecessary under due process jurisprudence. See McNeil, *supra* note 127, at 511; Daniel J. Meltzer, *The Judiciary’s Bicentennial*, 56 U. CHI. L. REV. 423, 433 (1989) (suggesting that salary and tenure protections may render judges more political, not apolitical).

219. See *supra* notes 73–77 and accompanying text.

220. If the proposed statutory impeachment models constitutional impeachment, the House of Representatives would impeach ALJs, and the Senate would preside over the trial and decide whether to convict. See U.S. CONST. art. II, § 4; art. I, §§ 2–3. The President has no role in the impeachment process. Although the Supreme Court in *United States v. Perkins*, 116 U.S. 483, 483–85 (1886), held that Congress could limit the incidental removal power when a department head appoints an inferior officer, the removal of the cadet-engineer in *Perkins* had to proceed through a court martial, an organ of the executive branch. It is far from clear that Congress could permit a department head to appoint and then usurp the removal power through a statutory-impeachment process, leaving the President or department head without any role in the sole removal process.

concerns, it leaves unaddressed Appointments Clause problems and presidential-supervision difficulties of the highest magnitude.

#### IV. AN INTERBRANCH-APPOINTMENT REMEDY

These proposals, even if incomplete or politically unpalatable, demonstrate the widespread sense that ALJs are not operating, to paraphrase Voltaire's Dr. Pangloss, in the best of all possible worlds.<sup>221</sup> In the spirit of creating a better administrative world, I propose that Congress assign the power to appoint (and the incidental power to discipline and remove) ALJs to the "Courts of Law," namely the U.S. Court of Appeals for the D.C. Circuit. I first briefly outline the key portions of my statutory proposal for the D.C. Circuit to appoint and discipline ALJs. I then further explain why I have structured the proposal as I have to resolve the three constitutional questions and address agencies' and ALJs' concerns. Although, as discussed above, other structural proposals have tended to disappear into the political ether, my proposal may be able to gain more traction because it gives, through a relatively simple statutory change, both agencies and ALJs some, but not all, of what they want.

##### *A. General Mechanics of an ALJ Interbranch Appointment*

Under a new statute and its implementing rules, the D.C. Circuit should appoint, discipline, and remove ALJs. The court has the knowledge, time, and logistics to do so. It is widely considered the most influential court on matters of administrative law, routinely reviewing numerous important administrative law cases, including ALJs' decisions.<sup>222</sup> The court also has a substantially lighter caseload

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221. See e.g., VOLTAIRE, *CANDIDE* 84 (ch.1, ll. 42–44) (Librairie Nizet 1959) (1759).

222. See, e.g., GORDON BERMANT ET AL., *FED. JUDICIAL CTR., THE CASES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 3–4* (1982) (estimating that forty-five percent of "high burden agency cases" are filed in the D.C. Circuit); John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 554 (2010) ("[T]he D.C. Circuit . . . hears a disproportionate share of the United States' administrative law cases.") (citing John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 376–77 (2006) ("One-third of the D.C. Circuit appeals are from agency decisions. That figure is less than twenty percent nationwide.")); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1103 n.14 (2001) (citing Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1202 (1992); Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 621 & n.2 (1994)) (noting that D.C. Circuit decides nearly one-third of all direct appeals from federal agencies).

than all other federal circuits.<sup>223</sup> With the administrative assistance of the Administrative Office of the United States Courts (“AOC”), its judges have the capacity for the administrative duty of selecting and disciplining ALJs. The Circuit also has the added benefit of a prime location. Like numerous ALJs, most agencies, and the AOC, the D.C. Circuit is based in D.C.

The selection process could proceed much in the same way that it does now. ALJ candidates could continue to take the preliminary examination that the OPM currently administers under the D.C. Circuit’s auspices, with the AOC’s administrative support.<sup>224</sup> After the examination, with the AOC’s assistance, the D.C. Circuit could then assign each candidate a score based on his or her examination, experience, and qualifications, much as the OPM does now.<sup>225</sup> Through a notice-and-comment procedure that the courts of appeals currently use for bankruptcy-judge candidates,<sup>226</sup> the court could then solicit comments on the three highest-scoring candidates. The agency for which the ALJ would work would, like other interested parties, be able to provide comments and indicate its preferred candidate from one of the three candidates.

But the agency, unlike other interested parties, could also submit its own candidate and thereby create a roster of four

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223. The D.C. Circuit decided 173 cases on the merits per active judge in 2010. In comparison, the national average was 459. Relatively small circuits decided more cases on the merits per judge: 502 for the Eighth Circuit, 415 for the First Circuit, and 242 for the Tenth Circuit. See *Federal Court Management Statistics December 2010: Courts of Appeals*, U.S. COURTS, <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsa2010Dec.pl> (last visited Nov. 30, 2012) (select circuit for report at prompt); see also Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 562 n.63 (2002) (referring to Jonathan Groner, *Circuit Pick Caught in the Middle: GOP Senator Questions Need to Fill Vacancy*, LEGAL TIMES, June 1, 2000, at 1); John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species*, 8 J. APP. PRAC. & PROCESS 123, 126 (2006). Indeed, the relatively light caseload may explain what some view as the D.C. Circuit’s “unusually intrusive approach to administrative law.” See Richard J. Pierce, Jr., Comment, *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110, 1126 (1995). Although some have attributed the D.C. Circuit’s smaller caseload to the complexity of its cases, see, e.g., Bruff, *supra* note 222, at 1236, I am skeptical. In my admittedly anecdotal experience, death-penalty, prisoner-rights, and habeas cases can be extremely time-consuming, with large records and inadequate briefing. The D.C. Circuit hears few of these cases. See U.S. COURTS, *supra* (select D.C. Circuit at prompt).

224. See *supra* notes 27–28 and accompanying text.

225. See *supra* notes 28–29 and accompanying text.

226. See, e.g., Official Notice, Sixth Circuit Judicial Council, Office of the Circuit Exec. (May 29, 2011), available at [http://www.ca6.uscourts.gov/internet/documents/TNM\\_Public\\_Notice.pdf](http://www.ca6.uscourts.gov/internet/documents/TNM_Public_Notice.pdf) (request for comment on bankruptcy-judge candidates).

candidates.<sup>227</sup> If the agency submits a candidate for consideration, interested parties could then provide comments on the agency's submitted candidate. After considering the examination and the received comments, the D.C. Circuit would appoint the ALJ from the list of three or four candidates, under what I refer to as a new "Rule of Three or Four." Each agency would retain the authority to determine the number of ALJs that it needs.<sup>228</sup>

Agencies, among others, could request that the D.C. Circuit discipline or remove an ALJ for "inefficiency, neglect of duty, or malfeasance," the same standard that governs bankruptcy judges<sup>229</sup> and numerous other federal adjudicators.<sup>230</sup> Per statute, any agency complaint concerning an ALJ would be placed on a "fast track" that requires the D.C. Circuit to decide the matter within two months. Prompt resolution would ensure that agencies are able to have incompetent or malfeasant ALJs removed promptly. Agencies would retain a right to suspend ALJs immediately when the agency "considers that action necessary in the interests of national security," with limited judicial review.<sup>231</sup> Other "interested parties," as the term is understood under the APA (§ 554(c)), could also seek ALJs' removal or discipline.<sup>232</sup> The D.C. Circuit itself would have no power to discipline or remove an ALJ *sua sponte*.

By vesting the D.C. Circuit with appointment and removal power, the D.C. Circuit would become another actor responsible for

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227. See GAO-10-14, *supra* note 40, at 9–10 (stating that agencies seek more influence over selection process, including ability to select candidates with specialized knowledge).

228. See 5 U.S.C. § 3105 (2006). My proposal concerns the future appointment of ALJs. As for current ALJs, I would suggest "grandfathering" them into the new system by permitting the D.C. Circuit to appoint them summarily. See 35 U.S.C. § 6(c) (2006) (prescribing a similar appointment process for improperly appointed administrative patent judges). This "grandfathering" would ease the administrative difficulties with appointing so many incumbent ALJs. But, as with other solutions to prior improper appointments, it would not resolve whether decisions made prior to D.C. Circuit's appointment are valid. See *id.* § 6(d).

229. See 28 U.S.C. § 152(e) (2006).

230. See *infra* note 337 and accompanying text. Although the Court in *Bowsher v. Synar* suggested that removal under this provision could permit removal for "any number of actual or perceived transgressions," 478 U.S. 714, 729 (1986), the Court in *Free Enterprise Fund* suggested, without referring to *Bowsher*, that the provision for removal provided only narrow grounds for removal, see *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3157–58 (2010). These narrower grounds for removal limit the discretion of the removing party—here the D.C. Circuit—and thus limit the D.C. Circuit's control or supervision over the ALJs.

231. See 5 U.S.C. § 7532.

232. Agencies would still decide motions for ALJ bias. See *id.* § 556(b). If the court became inundated with frivolous motions from "interested parties" whom the ALJ likely ruled against, the Court, per statute, could adopt rules that permit single judges to decide whether a complaint is sufficiently substantial to be referred to a panel for decision. Cf. FED. R. APP. P. 27(c) (permitting single circuit judge to decide motions).

ALJs. The D.C. Circuit would replace the MSPB's role in removing and disciplining ALJs and the OPM's and agencies' role in hiring ALJs. Nevertheless, the OPM would continue to share responsibilities concerning increased ALJ pay, temporary assignments, and ensuring ALJ decisional independence. Indeed, because the AOC, not the OPM, would assist the D.C. Circuit with ALJ hiring, the OPM should be able to focus on ALJ performance and decisional independence.<sup>233</sup>

As discussed below, these changes to ALJ selection will resolve (or at least substantially mitigate) the appointment, removal, and impartiality concerns discussed in Part II. Moreover, to Dr. Pangloss's relief, this system will also provide a much better world, if not the best possible one, for ALJs and agencies even if the constitutional concerns above do not amount to constitutional violations.

### *B. Clarifying Limits on Interbranch Appointment and Removal*

As described below, the D.C. Circuit's appointment of ALJs is constitutional and resolves the appointment issue surrounding ALJs. Depending on whether ALJs are inferior officers or employees, the Appointments Clause's text either permits my proposed interbranch appointment or is otherwise irrelevant. The Supreme Court has, however, limited Congress's ability to permit the "Courts of Law" to appoint executive-branch officers under incongruous-appointment or separation-of-powers theories. Under these perhaps distinct but incestuous theories, the appointment must not improperly impede the functioning of the judicial and executive branches. Congress can very likely satisfy the inquiry if it vests the D.C. Circuit with the interbranch appointment of ALJs. As part of my analysis below, I propose a three-part inquiry to simplify and clarify the Court's current, partially redundant, and vague incongruous-appointment analysis.

#### 1. The Appointments Clause

If ALJs are inferior officers, the Excepting Clause expressly permits Congress, "as [it] think[s] proper," to vest their appointment

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233. Indeed, because many of the OPM's and MSPB's duties would be transferred to the AOC, federal administrative cost should remain approximately the same. See Krent & DuVall, *supra* note 55, at 42 (discussing possible increased administrative costs that may arise from creating a new independent agency to oversee ALJs). Likewise, the direct judicial decision concerning ALJ discipline and removal—instead of judicial review of administrative action—should save administrative costs.

in “Courts of Law.”<sup>234</sup> The D.C. Circuit is a “Court[] of Law,”<sup>235</sup> and thus the Clause’s text expressly permits the D.C. Circuit to appoint ALJs.

Even if ALJs are instead employees, appointments by the D.C. Circuit should not offend the Constitution. The Supreme Court has been clear that the Appointments Clause does not apply to the appointment of employees and has thus suggested that Congress has wide latitude in deciding how employees are selected.<sup>236</sup> Although Congress’s power to create interbranch-*employee* appointments is unresolved and has been rarely considered,<sup>237</sup> Congress can likely create such appointments, subject at most to the same separation-of-powers concerns surrounding interbranch-officer appointments.<sup>238</sup> After all, even Congress’s enumerated and plenary power to create an administrative bureaucracy does not permit Congress to act in ways that trample upon the separation of powers.<sup>239</sup> Courts can respect the

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234. U.S. CONST. art II, § 2.

235. See *Freytag v. Comm’r*, 501 U.S. 868, 888–89 (1991) (holding that “Courts of Law” refer to legislative and Article III courts); *Morrison v. Olson*, 487 U.S. 654, 678–80 (1988) (assuming that Special Division, comprised of Article III judges, was a “Court of Law”); *Rice v. Ames*, 180 U.S. 371, 378 (1901) (holding that Congress could, under the Appointments Clause, vest appointment in “the [d]istrict or [c]ircuit courts”).

236. *Freytag*, 501 U.S. at 880 (“If we . . . conclude that a special trial judge is only an employee, petitioners’ challenge fails, for such ‘lesser functionaries’ need not be selected in compliance with the strict requirements of Article II.”).

237. I have uncovered only two papers that have, in limited fashion, discussed the topic. See Richard A. Epstein, *Executive Power in Political and Corporate Contexts*, 12 U. PA. J. CONST. L. 277, 288–89 (2010); Emily E. Eineman, Note, *Congressional Criminality and Balance of Powers: Are Internal Filter Teams Really What Our Forefathers Envisioned?*, 16 WM. & MARY BILL RTS. J. 595, 613 (2007). I have uncovered no relevant judicial decisions.

238. The fact that the Constitution provides express authority for only interbranch appointments of inferior officers, but not employees, should not be troubling. The Excepting Clause empowers and limits Congress. It allows Congress to use more efficient officer-appointment mechanisms, but it requires Congress to appoint officers in a manner expressly stated in the Appointments Clause. Compare *Morrison*, 487 U.S. at 673–75, with *Buckley v. Valeo*, 424 U.S. 1, 133–36 (1976) (per curiam). The Necessary and Proper Clause should provide Congress all the authority that it needs to create interbranch-employee appointments when establishing the administrative state. The separation of powers (but not the Appointments Clause) provides the proper boundary for those appointments. Cf. *Buckley*, 424 U.S. at 135–36 (explaining that Necessary and Proper Clause does not permit Congress to ignore other constitutional limitations). The separation-of-powers concerns should be very similar, if not identical, for employee and inferior-officer appointments. In both instances, Congress cannot impair the central functioning of the judicial or executive branch by giving the former the appointment power. See *Morrison*, 487 U.S. at 691.

239. See *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3155–56 (2010) (stating that Congress must account for presidential oversight in creating a “vast and varied federal bureaucracy”); Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 316 (2002) (“Congress’s



separation of powers in evaluating employee-selection schemes in the same manner as they do in assessing inferior-officer appointments—that is, by considering the appointment method’s effect on both judicial and executive integrity, as discussed in Part IV.B.2. Accordingly, whether ALJs are ultimately deemed employees or officers, Congress’s interbranch-appointment powers should be equivalent, and the courts’ inquiry should account for the same underlying concerns.

## 2. Doctrinal Incongruity Limitations

Despite the fact that the Appointments Clause does not appear to forbid interbranch appointments, the Supreme Court has imposed limits on their use. After a false start in the mid-1800s, the Supreme Court has repeatedly held that Congress has substantial discretion in creating interbranch appointments, so long as the appointment is neither incongruous nor offensive to the separation of powers. But, as I discuss below, this “incongruity” limitation is ill defined and partially redundant.

In 1839, the Court in *Ex Parte Hennen* appeared to condemn interbranch appointments. There, the Court upheld a district court’s appointment of a court clerk.<sup>240</sup> Although the case did not involve an interbranch appointment, the Court stated that “[t]he appointing power . . . was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged.”<sup>241</sup>

Forty years later, the Court substantially limited *Hennen*’s dictum. In *Ex Parte Siebold*, the Court upheld the judiciary’s interbranch appointment of election supervisors.<sup>242</sup> Although the Court referred to *Hennen* in observing that “[i]t is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain,” the Court also declared that “there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases

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powers are explicitly enumerated, and its powers are further limited through the separation of powers into three federal branches.”).

240. 38 U.S. (13 Pet.) 230, 261–62 (1839).

241. *Id.* at 257–58. Professor Amar has endorsed the *Ex Parte Hennen* view, arguing that if the Founders had sought to permit interbranch appointments, one would have expected “considerably more discussion” on the topic. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 808 (1999).

242. 100 U.S. 371, 398–99 (1879).

to determine to which department an office properly belonged.”<sup>243</sup> As a result, the locus of power to appoint inferior officers rests “in the discretion of Congress,”<sup>244</sup> thereby preventing “endless controversies.”<sup>245</sup>

Although recognizing Congress’s interbranch-appointment power, the Supreme Court limited that power by advancing an ambiguous incongruity principle. The Court first noted that courts in past cases had properly refused to issue advisory administrative decisions concerning veterans’ benefits and claims against the U.S. Army in Florida.<sup>246</sup> The Court then stated:

[I]n the present case there is no such incongruity in the duty required as to excuse the courts from [appointing inferior officers]. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depository of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.<sup>247</sup>

The Court appears to have meant that an interbranch appointment will be proper as long as the party defending the appointment demonstrates that the appointment would (1) not interfere with the judicial branch’s key function to resolve cases under Article III and (2) not rest *more* appropriately in the executive branch based on some function of propriety, competence, and convenience.<sup>248</sup>

*Siebold*’s ambiguity was not lost on scholars or courts. Some observers suggested that the decision should be limited to the appointment of congressional-election officers (over which Congress has distinct powers under Article I)<sup>249</sup> or to instances in which the

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243. *Id.* at 397; see also *Hobson v. Hansen*, 265 F. Supp. 902, 912–14 (D.D.C. 1967) (three-judge panel) (saying in dicta that *Siebold* contradicts an understanding of *Hennen* that proscribes interbranch appointments).

244. *Siebold*, 100 U.S. at 397.

245. *Id.*

246. *Id.*

247. *Id.*

248. Perhaps the Court intended a narrower limiting principle. The Court speaks of “*such* incongruity.” *Id.* To what does “*such*” refer? The Court had not previously referred to “incongruity” in its preceding discussion, but it had referred to the courts’ proper refusal to provide advisory administrative opinions to the executive branch. *Id.* The Court then stated that it had a constitutional duty to appoint inferior officers “when required thereto by law,” and that “there is no such incongruity in the duty [to appoint.]” *Id.* Yet if the Court were merely suggesting that incongruity existed only when the Court was assigned a function that the Constitution forbade (such as providing advisory opinions), then it is unclear why the Court went on to discuss the propriety, efficiency, and competency of the appointment.

249. See Wiener, *supra* note 133, at 425–26.

President's central powers were not at issue.<sup>250</sup> But others concluded that *Siebold* imposed only minor constraints on interbranch appointments. For instance, a three-judge district court stated in dicta that the incongruity inquiry does not create "an affirmative requirement that the duty of the officer be related to the administration of justice. It is a negative requirement that the duty may not have 'such incongruity' with the judicial function as would void the power sought to be conferred."<sup>251</sup>

In *Morrison v. Olson*, the Supreme Court rejected an incongruity-based attack but otherwise failed to clarify the doctrine's dimensions.<sup>252</sup> There, the Court upheld the ability of the Special Division (a specialized Article III court comprised of Article III judges) to appoint an independent prosecutor.<sup>253</sup> In doing so, the Court held that Congress had the power to create interbranch appointments, subject to separation-of-powers and incongruity concerns mentioned in *Siebold*.<sup>254</sup> The Court suggested that problems would arise if (1) "such [appointment] had the potential to impair the constitutional functions assigned to one of the branches," and (2) incongruity exists between the courts' normal functions and their duty to appoint.<sup>255</sup> Under this partially redundant two-part inquiry (because each part looks to the courts' functioning), the interbranch appointment of independent counsel was deemed not incongruous. The Court had earlier permitted the courts to appoint prosecutors,<sup>256</sup> Congress sought to resolve "the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers,"<sup>257</sup> and Congress had rendered the appointing judges ineligible to

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250. See *In re Sealed Case*, 838 F.2d 476, 494 (D.C. Cir. 1988), *rev'd sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988) ("We think it must be incongruous if an officer of one branch is authorized to appoint an officer of another branch who is assigned a duty central to the constitutional role of that other branch."); cf. Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079, 1159 (1988) (contending that *Morrison* rejected the understanding of the majority in *In re Sealed Case*).

251. *Hobson v. Hansen*, 265 F. Supp. 902, 914 (D.D.C. 1967) (three-judge panel). Judge Wright, in dissent, took a more expansive view of the incongruity limitation. He disapproved of the judicial appointments of board-of-education members because such extrajudicial activities are an "unwanted diversion from what ought to be the judge's exclusive focus and commitment: deciding cases." *Id.* at 923 (Wright, J., dissenting).

252. 487 U.S. 654, 659–734 (1988).

253. See *id.*

254. See *id.* at 673–76.

255. *Id.* at 676.

256. See *id.*

257. *Id.* at 677.

participate in matters concerning the independent counsel.<sup>258</sup> Of significance for present purposes, the Court's analysis did not stop there. It went on to reject an argument that the entire statutory scheme, including its appointment provision, violated the separation of powers.<sup>259</sup> *Morrison* is the Court's last word on interbranch appointments.<sup>260</sup>

### 3. Refining Incongruity Limitations

To bring the Court's interbranch-appointment-power analysis into sharper focus, I propose ordering it into three steps. As explained below, these steps are consistent with interbranch-appointment decisions and combine *Morrison*'s overlapping separation-of-powers and incongruity inquiries into one "incongruity analysis." The first step requires determining whether a significant reason for the interbranch appointment exists. The second step considers whether the interbranch appointment impedes the central functioning of the appointing branch, usually the judiciary. And the third step considers whether the appointment impedes the central function of the competing branch, usually the executive branch.

The first step asks whether Congress has a significant justification to create an interbranch appointment, such as minimizing conflicts of interest in the appointment of a prosecutor to investigate the executive branch's high-ranking members.<sup>261</sup> This justification recognizes the Court's long-standing appreciation for functional concerns that lead Congress to implement interbranch appointments.<sup>262</sup> At the same time, this inquiry can help to ensure

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258. *See id.*

259. *See id.* at 685–96.

260. *See* Samahon, *supra* note 54, at 258–66. Professor Tuan Samahon has argued that if the Court's decision in *Edmond v. United States* overruled *Morrison*'s test for determining who are inferior officers, "[i]t precludes interbranch appointments pursuant to the Excepting Clause" because usually officers are subordinate to those who appoint them. *See id.* at 267. Samahon recognizes, however, that lower courts have continued to reconcile *Edmond* and *Morrison*. *See id.* at 258–64. Moreover, lower courts since *Edmond* have affirmed Congress's power to create interbranch appointments. *See* *United States v. Hilario*, 218 F.3d 19, 27 (1st Cir. 2000); *United States v. Moreau*, CR 07-0388 JB, 2008 WL 4104131, at \*38–39 (D.N.M. Apr. 3, 2008).

261. *See Morrison*, 487 U.S. at 677. Another significant justification, as mentioned in *Ex Parte Siebold*, is that difficulty of telling whether a certain inferior officer rests within a particular branch. *See Ex Parte Siebold*, 100 U.S. 371, 397 (1879). But such ambiguity, while sufficient, is not necessary because federal courts have upheld the interbranch appointments of U.S. Attorneys and independent counsel, who are plainly executive officers.

262. *See Morrison*, 487 U.S. at 677 (considering Congress's interest in intrabranh conflicts of interest); *Siebold*, 100 U.S. at 397 (considering convenience of interbranch appointment and the appointing branch's competence to appoint).

that Congress is not unnecessarily deviating from the general “law or rule” in *Hennen* and *Siebold* that Congress should vest the appointment of an inferior officer within the “department of government to which the official to be appointed most appropriately belonged.”<sup>263</sup> For instance, Congress would not appear to have a significant reason for permitting courts to appoint deputy agency heads because they are policymakers for which no conflicts of interest are readily apparent.

A significant justification, however, does not mean a necessity.<sup>264</sup> Such a strict requirement would deprive Congress of the substantial discretion it has to decide how the appointment power should be distributed “as [it] think[s] proper” under the Excepting Clause.<sup>265</sup> Indeed, if necessity were required, then the Court should not have approved the interbranch appointments of commissioners in *Go-Bart Importing Co. v. United States*,<sup>266</sup> prosecutors in contempt proceedings in *Young v. United States ex rel. Vuitton et Fils S.A.*,<sup>267</sup> or election supervisors in *Siebold*.<sup>268</sup> In short, requiring necessity would substantially limit Congress’s discretion that the Constitution expressly grants. Asking whether a significant reason undergirds an interbranch appointment, along with the other two steps, should ensure that Congress uses its interbranch-appointment-vesting discretion thoughtfully, not as a weapon to wound one of the other branches or to aggrandize its own power. Although the “significant justification” inquiry admittedly suffers from indefiniteness,<sup>269</sup>

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263. *Siebold*, 100 U.S. at 397 (quoting *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839)). In a decision concerning only the separation-of-powers context (and not appointments), the Court spoke similarly, refusing to permit “the Judicial Branch . . . [to] be assigned [or] allowed ‘tasks that are more properly accomplished by [other] branches.’” *Mistretta v. United States*, 488 U.S. 361, 383 (1989).

264. *See Moreau*, 2008 WL 4104131, at \*35 (rejecting any necessity requirement). *But see* Wiener, *supra* note 133, at 432 (suggesting that interbranch appointment of independent counsel was permissible because “[t]he raison d’être of the Independent Counsel was to create an officer not appointed by the executive branch”).

265. *See Moreau*, 2008 WL 4104131, at \*35 (highlighting Congress’s broad direction to vest appointment power under the Excepting Clause).

266. 282 U.S. 344, 354 (1931).

267. 481 U.S. 787, 800 (1987).

268. *Siebold*, 100 U.S. at 397.

269. *See generally* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297 (1997) (arguing that the U.S. Supreme Court should create a methodology to provide guidance on which purposes will be deemed “compelling” or “important” in tiered-scrutiny analysis). I have purposefully not used the terms “compelling,” “important,” or “legitimate” to describe the adequate justification; the incongruity analysis might unintentionally acquire the patina of the Court’s tiered-scrutiny, equal-protection analysis. *See id.* at 306.

limiting acceptable justifications for interbranch appointments to mitigating structural concerns (such as with ALJs) or ambiguities over the branch to which an inferior officer should be assigned (such as with federal marshals) is a reasonable place to start. A significant-justification inquiry strikes the appropriate balance of respecting Congress's prerogative while ensuring that Congress does not abuse its discretion.<sup>270</sup>

The second and third steps relate to one another and ask whether the interbranch appointment undermines the central functioning of either the judicial or executive branches.<sup>271</sup> In *Morrison*, the Court posed the question whether the interbranch appointment has the "potential to impair the constitutional functions assigned to one of the branches."<sup>272</sup> This seemingly general separation-of-powers inquiry has a specialized cast in the interbranch-appointment context, which generally concerns the relationship between the judicial and executive branches.<sup>273</sup>

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270. Compare *United States v. Hilario*, 218 F.3d 19, 27 (1st Cir. 2000) ("It is not for the courts to determine the best or most efficient repository for a power of appointment vis-à-vis inferior officers. . . . Congress's choice always deserves appreciable deference.") (citing *Siebold*, 100 U.S. at 397–98), and *Moreau*, 2008 WL 4104131, at \*37 (stating that the Constitution grants Congress "considerable discretion"), with *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) (suggesting that Congress is entitled to less deference when an interbranch appointment is at issue), and Ronald J. Krotoszynski, *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 421–23, 476–78 (1997) (arguing that redistributions of powers between the judicial branch and the other branches, as opposed to redistributions between the executive and legislative branches, are more suspect because judges are not politically accountable). Notably, Congress has not appeared to abuse its interbranch-appointment authority. Congress currently permits only one interbranch appointment: the district courts' appointment of U.S. Attorneys in very limited circumstances. See *Moreau*, 2008 WL 4104131, at \*8 (quoting *Wiener*, *supra* note 133, at 363).

271. Many have criticized the central or "core executive" function inquiry from *Morrison*. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 559–60 (1994); Stephen L. Carter, Comment, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 105–07 (1988). My purpose here is not to propose an inquiry that is contrary to Supreme Court precedent; my goal is merely to refine it. Those who do not approve of *Morrison*'s formulation should rest easy with its application here. The Supreme Court has, so far, not again uttered or applied the standard, including in *Free Enterprise Fund*, suggesting that the *Morrison* standard, if not abrogated, may be best understood as limited to the interbranch-appointment context.

272. *Morrison*, 487 U.S. at 677; see also *id.* at 684 (asking whether the Ethics in Government Act threatens "the 'impartial and independent federal adjudication of claims within the judicial power of the United States'" (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986))).

273. Other interbranch-appointment combinations are possible. For instance, the judiciary appoints (and removes) Article I bankruptcy judges, who are members of the legislative branch. See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594, 2626–27 (2011) (Breyer, J., dissenting). But the interbranch nature of the appointment may be less troubling because the legislature cannot appoint under the Appointments Clause.

This inquiry ensures that, even with a significant purpose, an interbranch appointment does not impede the central functioning of the executive or judicial branches. After all if an interbranch appointment, whatever its purposes, greatly impedes one of the affected branches, the appointment may be unsuitable. For instance, after the scandal concerning the forced resignations and removals of U.S. Attorneys during the George W. Bush Administration,<sup>274</sup> Congress could decide that the courts, rather than the executive branch, would be better stewards of the appointment and removal powers concerning these “ministers of justice.” Despite Congress’s attempt to remedy a potentially serious structural problem, transferring to the courts the full-time duty to appoint and remove U.S. Attorneys would likely impede the central functioning of the executive branch—to set prosecutorial policy throughout the country—by hindering presidential control over an important executive function in all districts in the United States. And the U.S. Attorneys’ appointment and removal by the courts could impede the central functioning of the judicial branch by bogging it down in ongoing political battles over law-enforcement policies and personnel. Although the existing, default appointment and removal scheme for U.S. Attorneys may present structural challenges, an interbranch appointment would likely be more problematic by impeding the central functioning of two branches. In other words, these final steps ensure that Congress doesn’t choose a cure that is worse than the disease.

By engaging in this three-part inquiry, courts can simplify the currently amorphous and redundant separation-of-powers and incongruity analyses. The Court’s interbranch-appointment and separation-of-powers analyses consider both the appointing and the affected branches, but in confusing and redundant ways.<sup>275</sup> My

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274. See, e.g., Dan Eggen & Paul Kane, *Gonzales: “Mistakes Were Made,”* WASH. POST (Mar. 14, 2007), [http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13/AR2007031300776\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13/AR2007031300776_pf.html).

275. See *Morrison*, 487 U.S. at 676. The Court’s separation of powers inquiry is at least partially redundant with the interbranch-appointment inquiry. The latter considers the effect of the appointment on both the appointing and nonappointing branches, and the former considers the effect of an appointment on either the nonappointing branch or both the nonappointing and appointing branches. Compare *Morrison*, 487 U.S. at 675 (referring to separation of powers as an “addition[al]” issue to incongruity and suggesting that separation of powers focuses only on the nonappointing branch), with *Mistretta v. United States*, 488 U.S. 361, 385, 389 (1989) (considering both the affected branch and the appointing branch for its separation-of-powers analysis). Thus, under either separation-of-powers formulation, the two inquiries overlap at least in part. See Wiener, *supra* note 133, at 436 & n.338; see also *United States v. Moreau*, No. CR 07-0388, 2008 WL 4104131, at \*17 (D.N.M. Apr. 3, 2008).

proposed three-part inquiry, following recent lower-court opinions, avoids these problems by considering the effect on both branches as part of a compressed incongruity analysis.<sup>276</sup>

### *C. Propriety of Interbranch Appointments of ALJs*

Interbranch appointments of ALJs should be deemed proper under the refined incongruity limits. Not only does a significant reason for the interbranch appointment of ALJs exist, but the D.C. Circuit's appointments of them will not impede the central functioning of either the judiciary or the executive branch.

#### 1. Significant Purpose for Interbranch Appointment of ALJs

As to the first of the three inquiries, a significant justification supports the interbranch appointment of ALJs: the resolution or mitigation of the ALJ separation-of-powers quandary. Vesting the D.C. Circuit with the power to appoint ALJs remedies the existing Appointments Clause problem by channeling ALJ appointments, in keeping with its text, to "Courts of Law."<sup>277</sup> And an interbranch appointment remedies, in perhaps an unconventional way, the existing concerns as to the proper balance of executive supervision and ALJ impartiality.

#### *a. Mitigating Presidential-Control Concerns*

With the appointment power in the D.C. Circuit's hands, the President loses any constitutional power he may have had to remove ALJs. This counterintuitive effect arises because the power to remove is incident to the power to appoint, unless Congress has placed the removal power elsewhere.<sup>278</sup> Courts have consistently applied this

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276. See *United States v. Hilario*, 218 F.3d 19, 26–29 (1st Cir. 2000) (rejecting challenge to judicial appointment of U.S. Attorneys in a combined incongruity and separation-of-powers analysis); see also *In re Sealed Case*, 838 F.2d 476, 533 (D.C. Cir. 1988) (Ginsburg, R.B., J., dissenting), *rev'd sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988) ("An inter-branch appointment would indeed fail the test of congruity if it violated the separation of powers doctrine.").

277. Resolving an appointments concern alone is not a significant reason for an interbranch appointment. Were it otherwise, Congress's power to create interbranch appointments would be essentially unlimited.

278. See, e.g., *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3161 (2010); *Burnap v. United States*, 252 U.S. 512, 515 (1920) ("The power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint."); *In re Hennen*, 38 U.S. (13 Pet.) 230, 259–60 (1839) (noting that officers serve at the discretion of the appointing power).



principle in the intrabranch-appointment context, albeit without significant discussion of the interbranch nature of the appointment and principally in the context of interbranch appointments of Article I or Article IV inferior officers.<sup>279</sup> And, indeed, the judiciary currently has the incidental, interbranch-removal power over Article I bankruptcy judges.<sup>280</sup> To be sure, in the context of judicial interbranch appointments of Article II inferior officers, courts have stressed the executive branch's ability to remove prosecutors whom courts had appointed.<sup>281</sup> But courts have never held that the executive branch must have the power to remove those officials, much less have the same kind of supervisory power over officials who exercise only impartial, adjudicatory powers.<sup>282</sup>

Nor should courts impose any such limit by relying on *Free Enterprise Fund*. If the President or agency head permissibly lacks removal power, *Free Enterprise Fund*'s ambiguous limitation on tiered-tenure protections becomes inapposite by its own terms. That decision invalidated one of two tenure protections that limited the executive branch's implied removal power. Here, only one tier of tenure protection exists between the D.C. Circuit and ALJs, leaving

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279. See *Reagan v. United States*, 182 U.S. 419, 424 (1901) (considering commissioners (i.e., justices of the peace in Indian Territory) appointed by judges); *Hobson v. Hansen*, 265 F. Supp. 902, 913 n.13 (D.D.C. 1967) (citing *In re Hennen*, 38 U.S. (13 Pet.) 230, 257–58 (1839)) (considering appointment of D.C. school-board members); cf. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 354 & n.2 (1931) (upholding interbranch appointment of commissioners, with mostly judicial and some executive functions, and indicating that they were subordinate to appointing judges). The court likewise suggested the same incidental removal power exists with the appointment of executive-branch inferior officers, such as perhaps ALJs. *Myers v. United States*, 272 U.S. 52, 126 (1926) (“[T]he power of appointment to *executive office* carries with it, as a necessary incident, the power of removal.” (emphasis added)); see *id.* at 161 (same for “inferior executive officers”).

280. See 28 U.S.C. § 152(e) (2006). To be precise, Congress has authorized the Judicial Councils—composed of Article III district and circuit judges—within each circuit to remove bankruptcy judges. The circuit courts themselves have only the appointment power under § 152.

281. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 682–83 (1988) (deciding whether judicial power to remove an executive officer infringed upon the executive branch); *Hilario*, 218 F.3d at 27 (noting judges cannot remove interim United States Attorneys they appoint); *United States v. Moreau*, CR 07-0388, 2008 WL 4104131, at \*38–39 (D.N.M. Apr. 3, 2008) (same).

282. Although *Morrison* relied upon the Attorney General's “most important[]” removal authority over independent counsel, see 487 U.S. at 696, the Court never said that such power was required. Professor Krent argues that *Morrison* determined that “some form of removal authority was constitutionally required.” Harold J. Krent, *Federal Power, Non-Federal Actors: The Ramifications of Free Enterprise Fund*, 79 FORDHAM L. REV. 2425, 2436 (2011) (referring to *Morrison*, 487 U.S. at 695–96). His inference is reasonable but not compelled. In light of the Court's consistent treatment of the removal power as incident to the appointment power and the meaningfully different functions of various inferior officers, a more limited interpretation of *Morrison* makes more sense if, as I attempt to do here, one seeks to reconcile the Court's Appointments Clause jurisprudence.

the President no implied removal power. Thus *Free Enterprise's* holding does not apply. Vesting the removal power within the D.C. Circuit is a constitutional means of avoiding *Free Enterprise Fund's* holding that applies to tiered-tenure protections within the executive branch.<sup>283</sup>

Even if *Free Enterprise Fund* is understood to stand more broadly for strongly endorsing or generally requiring the President's power to remove executive officers, the rationale in *Free Enterprise Fund* does not extend to ALJs. The Court stated that the removal power ensures that the President has the power to supervise unelected subordinates, not merely to persuade them "to do what they ought to do without persuasion."<sup>284</sup> But, when the government is a party to what is meant to be an impartial formal proceeding, the ALJ, as an impartial decisionmaker, should not decide in the government's favor unless the government persuades it to do so. A contrary result—that the President can obtain a desired result from an ALJ without persuasion—would lead to significant due process concerns and undermine the very purpose of ALJs. In fact, the Court in *Wiener v. United States* upheld implicit limits on the President's removal power over adjudicators by relying on Congress's ability to render adjudicators "entirely free from the control or coercive influence, direct or indirect"<sup>285</sup> and, as the Court said that it took for granted, the President's inability to interfere with any specific adjudication.<sup>286</sup> In short, although the President may not have to persuade an agency to implement a certain policy, he (or an agency) must do just that—under the APA and under the U.S. Constitution—during formal administrative adjudication. The Court's doctrine supports this normative view grounded in due process. Whereas removal may be a

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283. ALJs do not morph into principal officers if the D.C. Circuit, as opposed to an agency head, can remove them. The Court in *Edmond v. United States*, 520 U.S. 651, 663 (1997), said, "[I]nferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." The judges of the D.C. Circuit, who received presidential nomination and senatorial confirmation, can remove ALJs under limited circumstances. And agency heads, who (in probably every case) were also similarly nominated and confirmed, can reverse ALJs' decisions as to fact and law. Cf. Amar, *supra* note 241, at 807 (contending that subordination, not removability, is the relevant inquiry for inferior-officer status). The court's significant, but limited, removal power and agency heads' substantial supervision over ALJ decisionmaking would render ALJs no more than inferior officers.

284. *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3157 (2010).

285. *Wiener v. United States*, 357 U.S. 349, 355–56 (1958) (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935)).

286. *Id.* at 356.

necessary tool for presidential supervision over policymakers,<sup>287</sup> it should not be necessary for presidential supervision of impartial adjudicators appointed by another branch.<sup>288</sup>

Finally, the lack of one form of presidential control—the removal power—should not be troubling, given the other forms of executive supervision and direction.<sup>289</sup> The executive branch, after all, retains a prominent place in the removal decisionmaking process because agencies can initiate ALJ-removal proceedings. Thus, unlike the proposal that granted ALJs Article III protections, my proposal does not suffer the infirmity of completely denuding the executive branch from the removal of an executive officer. As explained in Part IV.E, the President retains tools aside from initiating removal proceedings to have sufficient supervisory authority over ALJs’ policy decisions.<sup>290</sup>

### *b. Mitigating Impartiality Concerns*

Judicial appointment and removal cures or mitigates the ALJ impartiality concerns, including the concerns that arise from *Caperton*. Because the agency is no longer “choos[ing] the judge in [its]

287. See *Free Enter. Fund*, 130 S. Ct. at 3159 (“The Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it.”).

288. But see Jeffrey A. Wertkin, *A Return to First Principles: Rethinking ALJ Compromises*, 22 J. NAT’L ASS’N ADMIN. L. JUDGES 365, 401 (2002) (stating prior to *Free Enterprise Fund* that “after-the-fact correction of a single decision supplies insufficient control”). I distinguish between those that perform only adjudicative functions, such as ALJs, and those who sometimes (or, at least, are permitted to) promulgate rules, such as agency heads. An interbranch appointment and an incidental removal of policymakers create more troubling separation-of-powers concerns for both the executive and judicial branches. See *infra* Part IV.D–E.

289. Professor Jonathan Entin has concluded that the removal power has limited actual significance, but its rhetoric and the Court’s holdings have significant symbolic consequences. Jonathan L. Entin, *Synecdoche and the Presidency: The Removal Power as Symbol*, 47 CASE W. RES. L. REV. 1595, 1602–03 (1997). Perhaps, then, the Court’s formal focus on the removal power, as opposed to other forms of administrative control or independence, has assumed inflated importance. See, e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 30 (2010) (arguing that scholars should focus on practical limitations on agency independence). A functional approach to executive control that looks beyond the removal power makes the most sense in cases, such as with ALJs, where the removal power creates other constitutional tensions.

290. My proposal may not satisfy unitary executive theorists because the President cannot remove ALJs. But those theorists’ dissatisfaction would transcend my particular proposal and extend to the Court’s removal-powers doctrine and any limits arising from due process. This doctrine has already tacitly approved of the interbranch-removal power, see *supra* note 279, and significantly limited presidential removal power, see generally *Free Enter. Fund*, 130 S. Ct. at 3138. My purpose here is to provide a workable solution that accounts for both normative and doctrinal problems, not to challenge or provide a new normative theory of the President’s supervisory powers.

own cause,”<sup>291</sup> any “probability of unfairness”<sup>292</sup> or “unconstitutional ‘potential for bias’” should not exist under *Caperton*’s standard.<sup>293</sup> The D.C. Circuit can also help ensure that the ALJs have a broad array of experiences within and outside the agency and thereby reduce the likelihood that ALJs come from the farm team that is the agency’s enforcement division with undue sympathy for agency-enforcement, especially highly partisan policy, positions. The D.C. Circuit, with careful consideration of an agency’s needs, will likely be more concerned than a selecting agency with indicia of a candidate’s impartiality. As with the transfer of removal power to the D.C. Circuit, the transfer of appointing power enhances, at the very least, the perception of fairness. And, as *Caperton* makes clear, perceptions concerning impartiality matter.<sup>294</sup>

Likewise, by placing the removal decision in another branch, those appearing before ALJs will feel more confident that the executive branch—whether in the form of the President, the agency, or any other executive actor—is not directing the actions of a marionette ALJ, especially in cases in which credibility is key and an ALJ’s decision receives increased deference.<sup>295</sup> That the President’s and agency’s actual removal power is currently very limited is largely beside the point. The perception that the President and agency have more control over ALJs than impartial courts is a powerful force that creates the appearance of unfairness that appears to drive, as *Caperton* makes clear, the Supreme Court’s due process inquiry. Vesting the removal power in the D.C. Circuit largely mitigates the appearance of improper agency control over ALJs.<sup>296</sup>

In short, an interbranch-appointment mechanism serves a significant purpose: it resolves, or at least substantially mitigates, the appointment, removal, and impartiality concerns that now surround

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291. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009).

292. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

293. *Caperton*, 556 U.S. at 881 (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 465–66 (1971)).

294. *See id.* at 888–89 (noting that state recusal requirements for appearance of impropriety will limit due process challenges).

295. *See Krent & DuVall*, *supra* note 55, at 29–33 (explaining agency’s deference to ALJ credibility determinations); Timony, *supra* note 2, at 811–12 & nn.28–29 (same); *supra* notes 49–50 and accompanying text (same).

296. This Article does not consider whether, aside from impartiality, the ability of the executive branch to overrule an ALJ decision creates a due process problem. The Supreme Court’s decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (instructing lower courts to defer to agency, as opposed to ALJ, decisions), strongly suggests not.

ALJs. And it does so better than other appointment solutions under the Excepting Clause by way of a simple transfer of duties. For instance, if the President alone or a nonindependent executive department appointed and removed ALJs, the ALJ would have only one tier of tenure protection, and that good cause tenure protection would provide the removing executive party with significant discretion.<sup>297</sup> Vesting the same powers in a new or current independent department (whose members, because of their independence, the President could remove only for cause) would then, as now, leave the President's removal power in jeopardy because two tiers of tenure protection would exist between the President and the ALJs. The competing concerns underlying ALJs' place in the federal bureaucracy render an interbranch appointment appropriate and demonstrate that the executive branch is not an equally, much less a more, appropriate repository of the appointment (and thus the incidental removal) power.<sup>298</sup>

## 2. Judicious Appointments

Congress can use an interbranch appointment to end ALJs' separation-of-powers quandary without impeding the central functioning of the judicial branch. Article II expressly gives the courts of law, if they have Congress's blessing, the power to appoint inferior officers.<sup>299</sup> The courts routinely appoint officials with solely adjudicatory powers—magistrate judges, special masters, and bankruptcy judges, for instance.<sup>300</sup> Indeed, the courts of appeals themselves appoint (and have the power to remove) bankruptcy judges for their respective circuits, and this appointment qualifies as

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297. The default appointment mechanism of nomination and confirmation would likely provide ALJs additional authority within the federal bureaucracy. See Nina A. Mendelson, *Another Word on the President's Statutory Authority Over Agency Action*, 79 FORDHAM L. REV. 2455, 2478 (2011) (emphasizing the importance of Senate-confirmed appointments to agency authority). But such an appointment for ALJs would leave the removal power with the President, see *Myers v. United States*, 272 U.S. 52, 119, 162 (1926) (recognizing the President's incidental removal power), and thus not eradicate impartiality concerns. Thus, even if Congress could only use an interbranch appointment when a default appointment was less suitable, an interbranch appointment for ALJs would be permissible because it provides a more comprehensive remedy for concerns surrounding ALJs. Moreover, traditional appointment of sixteen hundred ALJs would be an onerous mode of appointment.

298. See *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (explaining that the court should not perform tasks better suited to other branches); *Ex Parte Siebold*, 100 U.S. 371, 397 (1879) (explaining the court's appointment power under Article II).

299. U.S. CONST. art. II, § 2, cl. 2.

300. See 28 U.S.C. §§ 152, 631 (2006) (authorizing court appointment of bankruptcy and magistrate judges, respectively).

interbranch because bankruptcy judges are Article I judges.<sup>301</sup> ALJs also adjudicate, albeit in cases in which their decisions advance the policies of an agency, as opposed to those of Congress, the federal common law, or the Constitution.<sup>302</sup> Accordingly, granting the D.C. Circuit power to appoint adjudicators generally, by itself, almost certainly does not impede the central functioning of the judicial branch—that is, to decide disputes.

ALJs' status as executive, as opposed to judicial, officers does not alter this conclusion. The Supreme Court has never invalidated an interbranch appointment; therefore, which appointments are inappropriate is generally unknown. But one recognized possibility is that an interbranch appointment is inappropriate when it "thrust[s] courts into partisan, political battles."<sup>303</sup> Whatever fears may exist when the judiciary appoints independent counsel, interim U.S. Attorneys, or other executive inferior officers should be absent for judicial appointment of ALJs. ALJs are meant to be neutrals who do not create or advocate particular policies, much less those identified with certain political parties. Indeed, if ALJ selection is currently partisan, vesting the appointment power in the D.C. Circuit should mitigate the partisanship because the D.C. Circuit, like other courts, routinely selects impartial adjudicators from a candidate pool. Because agencies themselves continue to have the power to set policy, the courts would not select policymakers. Instead, they would appoint those who have a duty to find facts and apply the agency's regulations and organic acts to disputes before them. This is, at the very least, a quasi-judicial function that judges understand and can determine with no less competence than agencies.<sup>304</sup>

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301. See 28 U.S.C. § 152 (conferring authority on U.S. courts of appeals to appoint bankruptcy judges); *Stern v. Marshall*, 131 S. Ct. 2594, 2611 (2011) (holding that bankruptcy courts are not "adjuncts of Article III courts"); *id.* at 2624 (Breyer, J., dissenting) (same).

302. See *Butz v. Economou*, 438 U.S. 478, 513–14 (1978) (stating that ALJs were "functionally comparable" to judges); Moliterno, *supra* note 60, at 1209 (noting that ALJs do not overrule the actions of the two elected branches).

303. Wiener, *supra* note 133, at 426; see Amar, *supra* note 241, at 809 (arguing that appointment of independent counsel "risks politicizing the judiciary"); Wiener, *supra* note 133, at 430–31 (arguing against the judicial appointment of U.S. Attorneys for this reason). *But compare* *Mistretta v. United States*, 488 U.S. 361, 393 (1989) ("We do not believe . . . that the significantly political nature of the [U.S. Sentencing] Commission's work renders unconstitutional its placement within the Judicial Branch."), *with id.* at 396 ("Nor do the [Sentencing] Guidelines . . . involve a degree of political authority inappropriate for a nonpolitical Branch.").

304. See, e.g., *Mistretta*, 488 U.S. at 396 ("This is not a case in which judges are given power . . . in an area in which they have no special knowledge or expertise." (quoting *Morrison v. Olson*, 487 U.S. 654, 676 n.13 (1988) (internal quotation marks omitted))).

The D.C. Circuit's ability to receive comments from interested parties helps assuage fears of partisanship and inadequate information.<sup>305</sup> Controversy arose when a judge on the Special Division discussed who should serve as independent counsel in the Whitewater Matter with Republican senators.<sup>306</sup> As Professor Ronald Krotoszynski has suggested, a public notice-and-comment period would allow judges to obtain advice from numerous interested parties without resorting to ex parte contacts that could easily create the appearance of partisan appointments.<sup>307</sup> These comments would be much like amicus briefs with which the D.C. Circuit is all too familiar. Receiving comments—publicly filed briefs, of sorts, from interested persons—helps “maintain[] the dignity of Article III courts”<sup>308</sup> by allowing them to decide in a manner that is both familiar and transparent.

Likewise, ALJs' status as executive officers does not meaningfully distinguish them from the other adjudicators (i.e., bankruptcy judges and magistrate judges) whom appellate courts currently appoint for purposes of the Exceptions Clause. Bankruptcy judges are Article I judges, and magistrates are Article III inferior officers. Unlike ALJs, who are executive officers, these other adjudicators cannot be reversed by the executive branch. But the executive branch's ability to reverse an ALJ's decision should not be troubling because that branch has the same or greater power over other executive officials occasionally appointed by the judiciary (such as U.S. Attorneys).

The fact that ALJs, even if executive officers, are not also officers of an Article III court is relevant, but not dispositive. Courts have found it relevant, for instance, that prosecutors are not only executive officers, but also officers of the court.<sup>309</sup> Yet, ALJs' lack of a dual-officer capacity does not mean that interbranch appointment of

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305. See Amar, *supra* note 241, at 809 (“Judges will not be good at picking prosecutors because they have inadequate information and weak incentives.”); Krent & DuVall, *supra* note 55, at 42 (arguing that those outside of an ALJ's agency lack familiarity with that agency's “law”).

306. See, e.g., Amar, *supra* note 241, at 809 (mentioning the “partisan bickering” resulting from the judge's meeting); Krotoszynski, *supra* note 270, at 447–55 (discussing Starr's appointment and subsequent challenge to Judge Sentelle's ex parte meeting).

307. Krotoszynski, *supra* note 270, at 474.

308. *Id.* at 475.

309. See *United States v. Hilario*, 218 F.3d 19, 27 (1st Cir. 2000) (describing dual role of U.S. Attorneys as officers of the court); cf. *Ex Parte Siebold*, 100 U.S. 371, 397 (1879) (describing dual role of federal marshals). But see *United States v. Moreau*, No. CR 07-0388 JB, 2008 WL 4104131, at \*38 (D.N.M. Apr. 3, 2008) (“[An appointed U.S. Attorney] is not part of the judiciary, nor has he ever been.”).

ALJs is improper. Unlike prosecutors, who exercise purely executive functions (even when serving as officers of the court), ALJs exercise only adjudicative functions, and the courts routinely review their decisions. Courts' and ALJs' shared function gives the former the competence to appoint the latter. In other words, the ALJs' similar function to courts more than compensates for ALJs' lack of dual-officer status within two branches.

Perhaps, however, appointing a large cadre of ALJs would require the D.C. Circuit to forsake its central function of deciding cases. After all, the appointment of an independent counsel, election supervisors, U.S. Attorneys, or even bankruptcy judges is a relatively rare event.<sup>310</sup> In contrast, the federal administrative state has more than sixteen hundred ALJs. The large number of ALJs (almost double the 874 Article III judgeships<sup>311</sup>) creates the possibility that appointing ALJs, not deciding cases, will become a full-time job for the D.C. Circuit judges.

Yet, Congress can mollify this legitimate concern. The average annual number of ALJ appointments will likely rest around fifty-six,<sup>312</sup> certainly more than other interbranch appointments, but still a manageable number. Congress can largely mitigate any burden on the D.C. Circuit by permitting it to appoint ALJs in three-judge panels.<sup>313</sup> Assuming that the Court has nine active judges (and may have up to eleven active judges),<sup>314</sup> the Court could establish at least three panels for each year, with each panel appointing approximately nineteen

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310. For instance, the D.C. Circuit is charged with appointing only one bankruptcy judge to a fourteen-year term. 28 U.S.C. § 152(a)(1)–(2) (2006). Even the elephantine Ninth Circuit must appoint only sixty-eight bankruptcy judges to fourteen-year terms. *See id.* (listing the number of judges each individual district must appoint). And the district courts can appoint a U.S. Attorney only if political-appointment mechanisms have failed. *See Wiener, supra* note 133, at 366 (explaining the appointment process).

311. *See Federal Judgeships*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited Jan. 23, 2013) (listing 874 total Article III judgeships).

312. Although I was unable to find any statistics concerning the average ALJ tenure, the GAO has reported that “the ALJ program has experienced a low annual retirement rate, ranging from 2 to 5 percent from 2002 through 2006.” GAO-10-14, *supra* note 40, at 13. For ease of discussion, I have estimated a retirement rate of 3.5 percent and applied that to the number of ALJs provided in Justice Breyer’s dissent in *Free Enterprise Fund*, rounded up to the nearest hundred (sixteen hundred). *See Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3213 app. C (2010) (Breyer, J., dissenting) (“According to data provided by the Office of Personnel Management, reprinted below, there are 1,584 administrative law judges (ALJs) in the Federal Government.”).

313. *Cf.* 28 U.S.C. § 46(b) (permitting three-judge panels to decide cases).

314. 28 U.S.C. § 44(a) (permitting eleven judges on the D.C. Circuit). For ease of discussion, I rely on the assumption that the D.C. Circuit will have at least nine active judges because the D.C. Circuit had nine judges during the time period relevant for the data underlying the 2010 judge-to-decision ratio.



ALJs per year (or fewer if senior judges are permitted and willing to assist their active colleagues on additional panels).<sup>315</sup> If each appointment is treated like a decision on the merits by *each* judge on the panel (meaning that each appointment is weighed more heavily than decisions on the merits because each appointment “counts” three times, one for each judge), participating in nineteen appointment decisions increases each active D.C. Circuit judge’s judge-to-merits-decision ratio, based on data from 2010, from 1:173 to 1:192. This ratio is still significantly below the same ratio for other courts with relatively light caseloads (e.g., 1:242 for the Tenth Circuit, 1:293 for the Sixth Circuit, 1:319 for the Seventh Circuit, and 1:415 for the First Circuit) and the national ratio of 1:459.<sup>316</sup> Because the D.C. Circuit would continue to have the lightest caseload of all federal circuits even when appointing ALJs, any argument that the appointing of ALJs will improperly burden the D.C. Circuit “from accomplishing its constitutionally assigned functions”<sup>317</sup> is difficult to accept.

Even if one disagrees with my educated guess over the number of appointments or its burden on the D.C. Circuit, other remedies exist for managing the number of appointments. Perhaps if ALJs reduce their average tenure or if agencies need a greater number of ALJs, my suggested average annual number of fifty-six ALJ appointments may be too low. Or appointing ALJs may be unduly burdensome merely because appointing would now potentially constitute approximately eleven percent of each active D.C. Circuit judge’s duties or because the D.C. Circuit’s docket is more time consuming and complex than I expect. If these objections turn out to be well founded, relatively

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315. The D.C. Circuit has several senior judges. See U.S. COURT OF APPEALS: D.C. CIRCUIT, <http://www.cadc.uscourts.gov/> (last visited Jan. 23, 2013) (click on “Judges” tab to see listing of judges). If three agreed to assist with ALJ appointments and thereby create a fourth panel, each panel would appoint approximately fourteen ALJs per year.

316. See *supra* note 223 (documenting the caseloads of the U.S. Courts of Appeals). The AOC has released similar data from 2011, but this more recent data does not vary materially from the 2010 data and thus does not alter my conclusions above. *U.S. Court of Appeals—Judicial Caseload Profile*, U.S. COURTS, [http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2011/Appeals\\_FCMS\\_Profiles\\_December\\_2011.pdf&page=3](http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2011/Appeals_FCMS_Profiles_December_2011.pdf&page=3) (last visited Jan. 23, 2013). For instance, although the 2011 relevant ratio for the D.C. Circuit increases from 1:173 to 1:203 (based largely on the court having one fewer judge), the national ratio increases by an even greater degree from 1:459 to 1:496.

317. *Mistretta v. United States*, 488 U.S. 361, 396 (1989) (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977)). Similarly, the AOC’s assistance to the D.C. Circuit should not be problematic. The Supreme Court has already indicated its support of the AOC’s existence and “myriad responsibilities.” *Id.* at 388–89. Indeed, the AOC’s duties in administering the ALJ examination, compiling the agency and third-party comments, and otherwise assisting the D.C. Circuit ensure that the judges’ appointing of ALJs does not interfere with their central function of deciding cases.

simple solutions exist. Congress could allow three-judge panels within all of the federal circuit courts to appoint ALJs and rotate the appointing duty among the active judges of the circuits in random order, based on either each circuit's caseload or the number of ALJs working within each circuit, as determined by the AOC. Although I have proposed turning to the D.C. Circuit based on its administrative law expertise, its location, and its light caseload, diluting the appointing burden throughout all of the federal circuit courts is another way of achieving the benefits of an interbranch appointment without improperly impeding the D.C. Circuit or other "Court of Law's" judicial function.<sup>318</sup>

Finally, that the D.C. Circuit may review the decisions from ALJs that they have appointed is a virtue, not a vice. Some litigants and scholars have argued that an interbranch appointment is improper when a court sits in judgment of decisions by those it appoints, such as prosecutors. The appointment becomes improper, the argument goes, because the judiciary forsakes its appearance of impartiality.<sup>319</sup> But this argument proves too much. Judges decide or review cases in which they have selected, for instance, defense counsel for the indigent, bankruptcy judges, magistrates, and special masters (all of whom could be the judges' former law clerks) without impugning their impartiality.<sup>320</sup> Therefore, it is difficult to see why their review of a decision by an ALJ—chosen for his or her ability to be impartial, not for particular policy preferences that the agency can reverse—would be problematic, especially when the APA requires the court to review the decision of the agency, not the ALJ.<sup>321</sup> Indeed, the D.C. Circuit's awareness that it may have to review decisions from the

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318. The appointing judges are not likely to identify themselves as managers or employers, as opposed to adjudicators (and thereby undermine their judicial function). No such identification has been alleged to occur, despite judicial appointment of numerous other officials, including prosecutors, public defenders, bankruptcy judges, magistrate judges, mediators, and various clerks of court.

319. See *United States v. Hilario*, 218 F.3d 19, 28–29 (1st Cir. 2000) (conceding judicial appointment of prosecutors could adversely affect the court's impartiality); *United States v. Moreau*, No. CR 07-0388 JB, 2008 WL 4104131, at \*38 (D.N.M. Apr. 3, 2008) (examining possibility that such appointments could diminish the integrity of the courts); Wiener, *supra* note 133, at 431–32 (arguing judges lack impartiality and the prosecutors they appoint lack accountability). The *Morrison* Court also noted that the Special Division's members lacked the ability to participate in any proceedings concerning the independent counsel that they had nominated. 487 U.S. 654, 683–84 (1988). But ALJs' limited ability to make final policy determinations, nonpolitical role, and independence from the judiciary (which cannot set its jurisdiction or refer matters to the ALJ, as in *Morrison*) should mitigate any concern that may arise from the D.C. Circuit's review of ALJ decisions.

320. See, e.g., *Hilario*, 218 F.3d at 29 (referring to appointment of defense counsel).

321. 5 U.S.C. § 557(b) (2006).

ALJ may help provide the D.C. Circuit incentive to appoint the best candidates.<sup>322</sup>

### 3. Improved Functioning of the Executive Branch

Despite the executive branch's loss of power to appoint and remove ALJs, interbranch appointment and removal do not impede that branch's central functioning.<sup>323</sup> First and foremost, agency heads continue to have the power to reverse an ALJ decision under the APA and thus control federal administrative policy.<sup>324</sup> Agencies, too, continue to have discretion over matters concerning ALJs under my proposal. For instance, not only do they continue to decide the number of ALJs needed to carry out agency missions,<sup>325</sup> but they also can comment on ALJ candidates and submit their own candidates for judicial consideration.<sup>326</sup> Indeed, the proposed "Rule of Three or Four," unlike the current "Rule of Three," acts as a suitable substitute for selective certification by permitting the agency to ensure, especially if the "Veterans' Preference" leads to three candidates without sufficient expertise, that at least one candidate has certain necessary

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322. See Amar, *supra* note 241, at 809 (arguing that judges lack incentive to make excellent interbranch appointments). Admittedly, the possibility of the D.C. Circuit reviewing a particular ALJ's decision is slight; the other circuits review numerous administrative orders. Yet, the D.C. Circuit is likely to be sufficiently considerate to its sister courts to try to appoint impartial, well-trained ALJs.

323. See *In re Sealed Case*, 838 F.2d 476, 494–95 (D.C. Cir. 1988), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988) (asking whether appointment undermines the President's ability to make policy choices); see also Blumoff, *supra* note 250, at 1160–61:

The requirement of some congruity also undermined the *Sealed Case* court's 'Chicken Little' concern [that a limited incongruity principle would essentially permit the court to appoint all inferior officers if Congress sought to impede the executive's prerogative] . . . . The Supreme Court noted that Congress could make no such delegation when the courts lacked special competence of the subject matter.

324. 5 U.S.C. § 557(b); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 495 (1951). The Supreme Court in *Bowsher* stated that "[o]nce an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey." *Bowsher v. United States*, 478 U.S. 714, 726 (1986). This formulation is not entirely accurate in the interbranch-removal context of ALJs. ALJs will fear the D.C. Circuit judges, who can remove them under a heightened tenure-protection provision. But they must obey agency policies and general conceptions of impartial adjudication. Their refusal to do so would be relevant to any removal decision.

325. See 5 U.S.C. § 3105 (empowering agencies to appoint as many ALJs as necessary); see also Morrison v. Olson, 487 U.S. 654, 695 (1988) (considering Special Division's inability to name independent counsel without AG's request when approving of interbranch appointment of independent counsel).

326. See *supra* Part IV.A (outlining the agency's participation in selecting ALJs under this proposal).

experience.<sup>327</sup> Agencies may also seek the nearly immediate removal of an ALJ, on a “fast track,” if the agency can establish “inefficiency, neglect of duty, or malfeasance.”<sup>328</sup> And agencies can immediately remove an ALJ who presents a national-security risk.<sup>329</sup> Such abilities provide ample agency supervision over ALJs and the smooth functioning of the executive branch.

The transferred removal power from the executive branch to the D.C. Circuit—and thus the limited sharing of ALJ supervision between the two branches—should not trouble the executive branch because it has, as a practical matter, lost nothing. Its removal powers were already substantially limited. Currently, agencies cannot simply remove an ALJ. Instead, they must persuade an independent agency (the MSPB) to remove an ALJ.<sup>330</sup> Likewise, under my proposal, the agency must continue to persuade an independent entity to remove an ALJ. Under both the current and the proposed removal schemes, the President and the agency lack the ability to decide the removal question and the ability to influence the MSPB’s or the D.C. Circuit’s decision directly because of each body’s protection from removal.<sup>331</sup> Both scenarios also provide ALJs a judicial forum. Although the current scenario provides deferential judicial review of the MSPB’s decision in the Federal Circuit,<sup>332</sup> my proposal permits the agency to have speedier resolution of removal disputes because the D.C. Circuit decides the issue in the first instance. Moreover, even if the ALJs, as the lower-level officers in their tiered-tenure scheme, lost their tenure protection under a *Free Enterprise Fund* analysis,<sup>333</sup> the MSPB would continue to have substantial tenure protection that would prevent direct presidential interference with the MSPB’s decision. At bottom,

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327. See *supra* note 29 and accompanying text (explaining the “Veteran’s Preference” in ALJ qualification and related expertise problems under the current system).

328. See *supra* note 229 and accompanying text (explaining the standard of removal for ALJs); *infra* note 337 and accompanying text (same).

329. See *supra* note 231 and accompanying text (explaining immediate removal option).

330. 5 U.S.C. § 7521(a) (establishing that removal of an ALJ is permissible “only for good cause established and determined by the Merit Systems Protection Board”); *id.* § 1202(d) (shielding members of the MSPB from the President’s at-will removal).

331. Cf. *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3171 (2010) (Breyer, J., dissenting) (discussing the analogous inability of the President to remove members of the Public Company Accounting Oversight Board directly where the removal decision was vested in SEC commissioners who were themselves removable only for cause).

332. See *Bush v. Lucas*, 462 U.S. 367, 387 nn.33 & 35 (1983) (citing 5 U.S.C. § 7703) (highlighting that “the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from the MSPB”).

333. *Free Enter. Fund*, 130 S. Ct. at 3164 (declaring unconstitutional the two tiers of tenure protection for PCAOB members).

agencies would simply petition a different, albeit perhaps more, independent body under my proposal.

But at the same time, the proposed tenure-protection standard for ALJs seeks to strike the proper balance between ALJ impartiality and executive supervision. Although Congress intended to ensure ALJ impartiality with good cause tenure protection,<sup>334</sup> the good cause standard has consistently been interpreted to permit removal of other federal officials based on insubordination.<sup>335</sup> Such a standard suggests, contrary to congressional intent, that ALJs are required to follow agency heads' direction on how to decide matters. Were it otherwise, the term "insubordination" would assume a different meaning for ALJs than for other federal officials, without any textual support for the distinction.<sup>336</sup> The proposed "inefficiency, neglect of duty, and malfeasance" standard—the ubiquitous protection for federal adjudicators<sup>337</sup>—provides more specific grounds for removal than the good cause standard and thereby further constrains the removing party's discretion.<sup>338</sup> This proposed standard would not permit removal based on insubordination.<sup>339</sup> But, happily for the executive branch, it makes clear that inefficiency is a proper ground for removal that, with proper judicial interpretation, should permit removal based on, say, an unjustified low number of decided cases (as

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334. See *Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 131–32, 142 (1953) ("Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof.").

335. See *Nagel v. Dep't of Health & Human Servs.*, 707 F.2d 1384, 1387 (Fed. Cir. 1983) (citing *Boyle v. United States*, 515 F.2d 1397, 1402 (Ct. Cl. 1975); *Burton v. United States*, 404 F.2d 365 (Ct. Cl. 1968)); see also *May v. U.S. Civil Serv. Comm'n*, 230 F. Supp. 659, 661 (W.D. La. 1963).

336. See *Soc. Sec. Admin. v. Goodman*, 19 M.S.P.R. 321, 330–31 & n.11 (1984) (suggesting that insubordination was a proper ground for removal of ALJs, but also suggesting that removal based on substantive decisions was improper); Barnett, *supra* note 117, at 1397–98 n.231. Perhaps an ALJ is charged with being impartial and thus cannot be insubordinate for failing to defer to the agency's wishes. But even so, the vague good cause standard provides the agency much discretion in finding other more palatable, if insincere, grounds for removal.

337. See, e.g., 5 U.S.C. § 1202(d) (MSPB members); 10 U.S.C. § 942(c) (2006) (similar standard for judges on the U.S. Court of Appeals for the Armed Forces); 26 U.S.C. § 7443(f) (2006) (similar standard for tax-court judges); 28 U.S.C. § 152(e) (2006) (similar standard for bankruptcy judges); 28 U.S.C. § 631 (similar standard for magistrate judges).

338. See Barnett, *supra* note 117, at 1373–82 (arguing that "good faith" standard is more open-ended than other removal standards and thus provides the removing party more discretion to decide appropriate grounds for removal); see also Timony, *supra* note 2, at 821 (referring to judicial interpretation of good cause as "broad and expanding").

339. See Barnett, *supra* note 117, at 1373–82.

compared to other ALJs).<sup>340</sup> Whatever minimal supervisory power the agency loses under the proposed removal standard as a practical matter, the proposed standard mitigates impartiality concerns that could arise under a broad reading of good cause,<sup>341</sup> provides more specific grounds for removal,<sup>342</sup> treats ALJs like other federal adjudicators (both those within and without Article III), and makes clear that agencies may seek removal based on an ALJ's unjustified inability to control his or her docket (i.e., inefficiency).<sup>343</sup>

The complete transfer of removal power from the executive to the judicial branch may give one pause. After all, the Supreme Court in *Morrison* was not only troubled by the Special Division's limited ability to terminate the independent counsel, but the Court also relied upon the Attorney General's limited ability to remove the independent counsel when upholding the interbranch appointment of the independent counsel.<sup>344</sup> And perhaps the executive branch's need for the removal power is at its apex when the executive branch does not appoint the officer in question. Under the proposal here, the executive branch's removal power is fully removed, and the judiciary has a more robust removal power than in *Morrison*.

But, in the ALJ context, the problems themselves provide the solutions. As previously discussed, an interbranch-appointment-and-removal power cures the supervision and impartiality concerns in a manner that executive-branch removal would flout. In other contexts, the concerns that Congress sought to address did not require the transfer of the removal power. For instance, the interbranch appointment of the independent counsel mitigated an intrabran-

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340. See generally *Nash v. Bowen*, 869 F.2d 675 (2d Cir. 1989) (approving, in an ambiguous opinion, controversial productivity initiative for ALJs within the SSA). Professor Richard Pierce has opined that the productivity standard became toothless based on MSPB decisions and reconsideration within the SSA. See Richard Pierce, *What Should We Do About Administrative Law Judge Decisionmaking?* 15–16 (George Washington Univ. Law Sch. Pub. Law Research Paper No. 573, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1890770](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1890770).

341. See Timony, *supra* note 2, at 822 (“Such broad and amorphous standards may impinge on judicial independence . . .”).

342. See *id.* at 824 (advocating use of clearer removal standard).

343. See *id.* at 826–28 (discussing removal based on low productivity).

344. See *Morrison v. Olson*, 487 U.S. 654, 682–83 (1988); *id.* at 692 (“This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the ‘faithful execution’ of the laws.”); *id.* at 695–96 (discussing the ways in which the Attorney General could supervise the Independent Counsel, including limited, “for cause” removal power). Moreover, the majority in *Free Enterprise Fund* suggested that the President's removal power was central to the President's supervisory power. See Krent, *supra* note 282, at 2426, 2437 (“But, to the majority, the removal authority was talismanic . . .”).

conflict of interest in having someone appointed to investigate the executive branch itself, and the interbranch appointment of U.S. Attorneys provides a last-ditch solution to ensure prosecutorial continuity while the elected branches fight over a successor. But with ALJs, the transfer of the removal power is part of the solution.

This problem-as-solution rationale would likely be insufficient to justify the transfer of the removal power if it were not also for ALJs' unique role within the executive branch. As previously mentioned, the underlying rationale of *Free Enterprise Fund's* focus on the removal power was that the President should not be required to persuade executive officers. But ALJs exist to be persuaded. The executive branch does not need the power to remove ALJs, as opposed to other executive inferior officials who could make policy decisions, to protect its political prerogative. In short, the removal power is not always a necessary means of supervision. Moreover, the President's ability to overturn ALJ decisions and seek an ALJ's removal quickly permits him or her to have sufficient supervisory power to ensure the central functioning of the executive branch. Indeed, the lack of executive-branch removal power gives ALJs and the administrative bureaucracy within the executive branch an increased perception of impartiality and thus more public legitimacy. The removal power's "talismanic" quality<sup>345</sup> loses its mythical force in a purely adjudicatory context, where other methods of supervision can and should suffice. The executive branch, in other words, may completely lose the power to remove ALJs, but it still has significant methods of supervising and directing them.<sup>346</sup>

Finally, because the President should be deemed to have sufficient supervisory power over ALJs, the D.C. Circuit's power to remove them should not transform ALJs into inferior Article III officers. Under my proposal, the executive branch and the D.C. Circuit, to be sure, share oversight of ALJs—the former through supervision of policy and the latter through its limited removal power. But ALJs, as between the executive and judicial branches, fit better within the executive branch because they help formulate executive

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345. See Krent, *supra* note 282, at 2437; see also *supra* note 289 (referring to scholarship arguing that courts should focus on other indicia of administrative independence and executive control).

346. To be sure, the Supreme Court may take a more formal view of supervision by requiring, as the form of supervision, that the President have the power to remove subordinates. If so, my proposal would likely impede the President's supervisory powers, and the quandary would remain unresolved. A more functional understanding of supervision is likely necessary, and not inconsistent with current precedent, to resolve the quandary surrounding ALJs.

policy through their initial decisions, and the executive branch can control that policy by reversing those decisions. The judiciary's oversight is limited to removing ALJs for narrow causes upon others' requests, including that of the executive branch. Indeed, as the Article III courts' removal power over bankruptcy judges suggests,<sup>347</sup> the judiciary's power to remove an officer should not, by itself, render that officer as one within Article III. In short, the D.C. Circuit's limited removal power as a form of ALJ oversight does not, without more, render ALJs Article III officers, in light of ALJs' function and greater oversight from the executive branch.

As the Court recognized in *Mistretta* when quoting James Madison:

'Separation of powers . . . [d]oes not mean that these [three] departments ought to have no *partial agency* in, or no *controul* over the acts of each other,' but rather 'that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted.'<sup>348</sup>

Vesting the power to appoint and remove ALJs in an Article III court falls far short of vesting the whole executive power in the judiciary because the judiciary has no policymaking power whatsoever. The executive branch has the ability to make policy at every turn and continue "to take Care that the Laws are faithfully executed."<sup>349</sup> Here, as elsewhere, "constitutional principles of separated powers are not violated . . . by mere anomaly or innovation."<sup>350</sup>

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347. See *Stern v. Marshall*, 131 S. Ct. 2594, 2627 (2011) (Breyer, J., dissenting); *id.* at 2619 (holding that bankruptcy courts are not adjuncts of Article III courts).

348. *Mistretta v. United States*, 488 U.S. 361, 380–81 (1989) (quoting THE FEDERALIST NO. 47, at 325–26 (James Madison) (J. Cooke ed., 1961) (emphasis in original)). Indeed, even Justice Scalia may agree in the context of an interbranch appointment. The lone dissenter in *Mistretta* (and *Morrison*), Justice Scalia chided the majority for citing Madison for the point that the boundaries between the three branches were porous. He argued instead that

[Madison's] point was that the commingling specifically provided for in the structure that he and his colleagues had designed—the Presidential veto over legislation, the Senate's confirmation of executive and judicial officers, the Senate's ratification of treaties, the Congress's power to impeach and remove executive and judicial officers—did not violate a proper understanding of separation of powers.

*Id.* at 426 (Scalia, J., dissenting). The text of the Appointments Clause permits such "commingling" through interbranch appointments and thus may be acceptable even to Justice Scalia.

349. U.S. CONST. art. II, § 3.

350. *Mistretta*, 488 U.S. at 385 (majority opinion). But see *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1641 (2011) (stating that lack of historical pedigree can indicate constitutional infirmity); *accord* *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3159 (2010); *Printz v. United States*, 521 U.S. 898, 905 (1997).



## CONCLUSION

An interbranch appointment of ALJs is overdue. Five current Supreme Court Justices (two of whom are eminent administrative law scholars) have suggested that certain ALJs are not appointed properly. Four Justices have suggested that ALJs' tiered-tenure protections may be invalidated in future litigation. And ALJ impartiality is a continued topic of discomfort for scholars, litigants, and ALJs. Because of administrative uncertainty and distraction arising from the mere presence of those issues, Congress should not await judicial resolution of these troubling issues. Indeed, Congress has remedied past separation-of-powers problems without waiting for a definitive answer.<sup>351</sup> Moreover, even if ALJs are not constitutionally infirm, they are not necessarily in excellent health. An interbranch appointment, along with relatively minor statutory changes to the ALJ appointment and removal scheme, can both mitigate potential constitutional questions and ameliorate the current concerns about ALJ impartiality.

Key constituencies, such as federal agencies, have good reasons to support my proposal. For instance, despite losing the ability to select ALJs under my proposal, agencies would gain a way around the Rule of Three by obtaining the ability to nominate their own candidates if they are unsatisfied with the three original candidates. Because it is likely that the D.C. Circuit, in interests of comity, will carefully consider the agencies' views and proffered candidates, the agencies may actually prefer to exchange the power to select for the power to nominate. The agencies would also retain the power to seek removal of ALJs. Under either the current or proposed scheme, they must convince an independent body to remove ALJs. And, to mollify their expressed concerns over the protracted nature of ALJ-removal proceedings, agencies would receive swifter resolution of ALJ-removal proceedings because of the direct filing of an action with the D.C. Circuit.<sup>352</sup>

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351. After Professor John Duffy noted that the appointment of certain administrative judges for the Board of Patent Appeals was very likely unconstitutional, Congress altered those judges' mode of appointment without awaiting a judicial determination concerning those appointments. See John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 77 GEO. WASH. L. REV. 904, 904 n.\*, 918 n.72 (2009) (citing 35 U.S.C. § 6 (2006) (as amended Aug. 2008)).

352. Given agencies' reduced control over ALJs, as compared to other agency employees, agencies have turned to rulemaking and non-ALJ hearing officers when possible. See Wertkin, *supra* note 288, at 397–99, n.157 (citing Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 70 (1996) (stating that non-ALJs are “sprouting faster than tulips in Holland”)). Because agencies are in essentially the same, if not an improved,

Likewise, ALJs should support an interbranch-appointment solution. Despite failing to obtain Article III protections and status, they do receive clarified tenure protection that is suited to their adjudicative function, and they obtain more perceived and actual indicia of independence. An independent branch's appointment and removal of ALJs should help balance the ALJs' pro-agency bias that is said to develop and help link the administrative adjudicators with their deified judicial counterparts. No longer will a party to formal agency proceedings be the appointing and removing power.

Even the D.C. Circuit judges have reason to support the interbranch-appointment proposal. The D.C. Circuit has not been fully staffed in more than a decade, in part because of the general perception that the court is not sufficiently busy to require the number of active judges that the court is permitted to have<sup>353</sup> and because of the politicization of appointments to the "second most important court" in the country, from which several recent Supreme Court Justices have been elevated.<sup>354</sup> Vesting the appointment and removal power in the D.C. Circuit may mitigate both concerns. Proponents of having a full complement of D.C. Circuit judges could point to the court's increased duties to compensate for its low number of decisions. And they could point to the court's administrative role in protecting formal executive adjudication—by selecting neutral adjudicators<sup>355</sup>—as a means of emphasizing the court's important and necessary place in the judiciary and the administrative state, and de-emphasizing the court's unofficial status as a junior-varsity Supreme Court.

More broadly, my proposal demonstrates the potential for interbranch appointments to solve structural concerns with the modern administrative state. The clarified and simplified incongruity analysis that I have proposed is consistent with interbranch-appointment jurisprudence and perhaps may render interbranch appointment a helpful tool for Congress to remedy as-of-yet unidentified, future separation-of-powers conundrums. Congress, thereby, can improve the fairness, both actual and perceived, in the governing structures that it creates.

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position under my proposal as they are currently, an interbranch appointment will likely not alter the agencies' turning away from ALJs. The issue, instead, concerns when Congress should require formal adjudication under the APA.

353. See Bloch & Ginsburg, *supra* note 223, at 562 n.63 (discussing Congress's questioning of whether the D.C. Circuit was sufficiently busy to require twelve judges).

354. Carl Tobias, *The Urgent Need to Fill The Current D.C. Circuit Vacancies*, JUSTICA.COM (Nov. 14, 2011), <http://verdict.justia.com/2011/11/14/the-urgent-need-to-fill-the-current-d-c-circuit-vacancies>.

355. See *supra* Part IV.C.2.

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In closing, one final series of questions emerges: Should scholars, including me, bother considering solutions for these mostly formalist problems, largely arising from questionable Supreme Court precedent? For instance, does it really matter, as a functional matter, who appoints ALJs, when these ALJs may have lunch or chat around the water cooler with other employees within the agency, or when the agency can generally overrule all ALJ decisions anyway? Or, for example, should we concern ourselves with a removal-power doctrine that appears to invalidate tiered-tenure protection although one tier of tenure protection can substantially limit the President's control over the administrative state? Similarly, should we worry about independence and impartiality issues that are largely grounded on appearances of impropriety and perhaps merely theoretical effects of an agency's appointment and initiation of removal? Indeed, should we address the Court's current formalist separation-of-powers doctrines at all in light of its historical fluctuation between formalism and functionalism?

In short, the answer to these questions—all of which, at bottom, ask whether current doctrine that largely eschews functionalism for formalism should matter to normative reforms—is yes. Separation-of-powers scholars often seek to reshape or reconsider separation of powers.<sup>356</sup> Although such work has its place, the purpose of this Article is to move beyond the mere normative issues and instead define the problems and answers within the doctrinal construct that the Court has provided. Doctrine, for better or worse, matters for practicing lawyers and judges, and I seek to persuade scholars, practitioners, and Congress that my statutory solution is a serious option to consider in resolving a multifaceted problem.

Formalities can often matter both substantively and practically. For instance, the Court has repeatedly held that the vesting of the appointment power is not mere “etiquette or protocol.”<sup>357</sup> Instead, the appointing formalities are express, specific requirements in the Constitution meant to act as a bulwark for democratic government.<sup>358</sup> But formalism, as with the Court's removal-powers jurisprudence can potentially have significant, disruptive effects on

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356. See Barkow, *supra* note 289, at 16 n.2 (referring to the “vast literature” on separation of powers and agency independence).

357. See, e.g., *Ryder v. United States*, 515 U.S. 177, 182 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 125 (1976) (per curiam)).

358. *Id.*

the federal administrative state.<sup>359</sup> The proposed solution here respects the substantive underpinnings, as well as limits the disruptive effects, of the Court's formalist doctrines.

Whether one supports or disfavors the Court's formalism normatively, one cannot simply ignore the doctrine or wish for its demise. The Court has taken a decidedly formalist turn in its separation-of-powers jurisprudence for nearly twenty-five years. For instance, the Court has relied upon a more formal definition of "inferior officer,"<sup>360</sup> settled upon a new two-part definition of "department,"<sup>361</sup> eschewed a functional understanding of the President's removal powers that four dissenting Justices would have adopted,<sup>362</sup> and likely returned to more formal limits on removing disputes from Article III courts.<sup>363</sup> In light of these decisions and the lack of functional counterexamples since 1988's *Morrison v. Olson*, the Court's formal doctrines are not a mere fad, but instead a conscious jurisprudential turn that scholars ignore at their peril. These formal doctrines create, in part, the tripartite quandary that I discuss here, and a solution becomes difficult because functional concerns lose much of their salience. One must, therefore, confront the doctrine on its own terms, seek a formal solution to a largely formal problem, and—in the process—seek to suggest ways to soften the edges or unintended consequences of the formalist doctrine with permissible functional considerations. Here, I have proposed a formal interbranch-appointment-and-removal mechanism that seeks to address the formal problems of executive adjudication and account for some functional avenues where the Court's decisions permit.

Finally, statutory proposals, such as the one that I have proposed here that seeks to dull the edges of the Court's formalism, reduce the real possibility of the Court creating even more uncertainty in the law to account for the problems that its formal doctrines create. The Court's separation-of-powers doctrines are notoriously hard to reconcile, often lacking any theoretical consistency.<sup>364</sup> The Court may be tempted to decide cases in ways that avoid disruptive outcomes at the expense of whatever doctrinal coherence exists. My statutory

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359. See generally *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3177–82 (2010) (Breyer, J., dissenting) (discussing the potential consequences of the Court's ruling on the double for-cause removal clause at issue).

360. See *Edmond v. United States*, 520 U.S. 651, 662–64 (1997).

361. See *Free Enter. Fund*, 130 S. Ct. at 3163.

362. See *id.* at 3167–70 (Breyer, J., dissenting).

363. See *Stern v. Marshall*, 131 S. Ct. 2594, 2608–09, 2620 (2011).

364. See Barnett, *supra* note 117, at 1350.

solution is meant to avoid such decisions. Perhaps paradoxically, the Court's formal, inconsistent doctrines may have ultimately provided an impetus for solving both formal and functional problems that have long plagued formal administrative adjudication. And this solution may, as a consequence, give ALJs some of the deification that they have long craved.