


# Agency Adjudication 2023 Developments

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## Notice & Comment

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NOTICE & COMMENT

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### Modernizing Regulatory Review: A Compendium

*Bridget C.E. Dooling – November 29, 2023*

As part of my prep for this year's ABA Administrative Law Conference, I put a list together of policy documents that have been issued by the Biden Administration as part or (or related to) efforts to modernize regulatory review. While much of the discussion about the Biden Administration's regulatory approach has focused on, e.g., changes […]

NOTICE & COMMENT

### A Pitch for "Statutory Torts," by Matteo Godi

*Matteo Godi – November 28, 2023*

At many law schools, the common law of torts is part of the required first-year curriculum. Yet today, especially in federal court, most cases invoking tort principles—indeed, a large portion of all civil cases—do not deal with battery, trespass, or products liability. Instead, they involve statutory torts. Law schools rarely teach statutory torts, however. I know of at least one […]

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- Fifth Circuit Review

# Recent Developments

- ***Axon Enterprises v. FTC*, 143 S. Ct. 890 (2023) (9-0)**:
  - The Supreme Court held that individuals can bring constitutional challenges to FTC and SEC ALJs in district court, even though statutes say review of adjudication decisions in circuit courts.
  - Note: Meta just filed Axon lawsuit against the FTC raising five constitutional challenges!
- ***McIntosh v. Department of Defense*, 53 F.4th 630 (Fed. Cir. 2022)**:
  - Federal Circuit rejected a federal employee's claim that the MSBP's administrative judges are improperly appointed principal officers under *Arthrex v. United States*, 141 S. Ct. 1970, 1975 (2021), because they issue final decisions but are not appointed by the President with the advice and consent of the Senate.
  - MSPB always retains authority to review an unappealed decision on its own initiative. *Arthrex*, by contrast, involved a statute that provided for no such review by a properly appointed principal officer.
  - The Federal Circuit also rejected the employee's claim that the MSPB had no final review authority because it lacked a quorum when the administrative judge decided her case. The court explained that the lack of a quorum was a temporary condition, not a structural defect of any constitutional significance.




# *SEC v. Jarkesy*, No. 22-859

The Constitutional Future of Agency Adjudication?

# Fifth Circuit: Why Strike Down Agency Adjudication Just Once, When You Can Do It Three Times?

1. Whether statutory provisions that empower the SEC to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment;
2. Whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine; and
3. Whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.




# *The Right to Remove in Agency Adjudication*

With David Zaring

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4644940

# Fifth Circuit: Why Strike Down Agency Adjudication Just Once, When You Can Do It Three Times?

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# *Saving Agency Adjudication*

With Aaron Nielson and Melissa Wasserman

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4563879

# Threats to Decisional Independence of Agency Adjudicators

- **The Rise of Agency Evidentiary Hearings Outside of the Administrative Procedure Act**
  - ALJs v. AJs
  - Type A v. Type B (v. Type C) Agency Adjudication

- **The Supreme Court's Embrace of Unitary Executive Theory**
  - *Lucia v. SEC*, 138 S. Ct. 2044 (2018): ALJs are at least inferior officers, so must be appointed by agency head
  - *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010): no dual-layer removal for PCAOB—though maybe okay for agency adjudicators
  - *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), and *Collins v. Yellen*, 141 S. Ct. 1761 (2021): no removal protections for single-director agency heads

# The Big Reform Proposals To Date

- **Article III Courts**: transfer more cases to Article III judiciary, especially private rights and quasi private rights, but maybe more?
- **Article I Courts**: create more legislative courts, like Tax Court, to adjudicate more regulatory disputes
  - ABA has endorsed Article I immigration court system; House Democrats introduced bill to create that system
- **Article II "Central Panel" Administrative Judiciary**: create new agency that houses many, most, or perhaps all federal agency adjudicators
  - Last year the ABA House of Delegates passed NCALJ resolution urging Congress to create a federal central benefits panel

# Our More Modest Path Forward
# Congress's Anti-Removal Power & Impartiality Regulations

**Congress's Toolkit for Strengthening Its Anti-Removal Power**

| | Tool | Description |
|---|---|---|
| Soft Tools | Impose Removal Reason-Giving Requirement | This requires the president to report a reason (any reason or a specific good-cause reason) to Congress for the firing. |
| | Enact Statutory Signals of Agency Independence | These include labeling the agency as "independent," setting a term of years for the office, and enacting legislative findings that reinforce independence. |
| | Require Congressional Hearings on Removal | A hearing with the fired official and other witnesses could be required whenever removed or for failure to comply with reason-giving requirements. |
| Hard Tools | Heighten Senate Cloture Vote Threshold on Replacement Nominee | Senate cloture vote could be increased above a simple majority for removal, or more narrowly when the president does not provide adequate reasons. |
| | Slow Down Senate Confirmation Process on Replacement Nominee | Procedures for hearing, debate, and consideration of subsequent nominee could be drawn out if removal was not for good reasons. |
| | Impeach the President (or Threaten Impeachment) | Congress could signal in enacted legislative findings that presidential impeachment is on the table for improper removal, with impeachment being the ultimate hard tool. |
| Anti-Evasion Tools | Prevent Recess Appointments | The Senate can ensure it is never in a recess long enough to allow the president to make a recess appointment replacement. |
| | Reform the Vacancies Act for Use of Acting Officials | Congress could reform the Federal Vacancies Reform Act to increase removal costs by limiting the president's options for acting or temporary leaders. |
| | Limit Subdelegations and Acting Officials Authority | Congress can narrow the authority of an agency under an acting leader or otherwise prohibit the subdelegation of agency authority within the agency. |

Aaron Nielson Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1 (2023), https://ssrn.com/abstract=3941605

**REGULATING IMPARTIALITY IN AGENCY ADJUDICATION**

KENT BARNETT†

ABSTRACT

*Which should prevail—the Take Care Clause of Article II or the Due Process Clause? To Justice Breyer's chagrin, the majorities in* Lucia v. SEC *and* Free Enterprise Fund v. PCAOB *expressly declined to resolve whether the U.S. Constitution condones SEC administrative law judges' and other similarly situated agency adjudicators' current statutory protection from at-will removal. The crux of the problem is that, on one hand, senior officials may use at-will removal to pressure agency adjudicators and thereby potentially imperil the impartiality that due process requires. On the other hand, Article II limits Congress's ability to cocoon executive officers, including potentially agency adjudicators, from at-will removal.*

*This Article argues that the executive branch itself can and should moot or mitigate this constitutional clash. Nothing in Article II prevents the president from issuing executive orders and agencies from promulgating regulations—collectively, what I refer to as "impartiality regulations"—that require good cause for disciplining and removing agency adjudicators, as well as other means of protecting adjudicator impartiality. Indeed, the executive branch has a long-standing yet overlooked practice of using executive orders and regulations for similar purposes. Impartiality regulations are but one form of the executive branch's internal separation of powers. Such self-imposed separation provides a strong theoretical and practical solution for the agency-adjudicator dilemma.*

Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695 (2020), https://ssrn.com/abstract=3508805




# THE END (OR THE BEGINNING?)

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