

Regulatory Advantages of the Administrative Law Court System

In brief...

Administrative law judges prevent many individuals from obtaining proper due process under the law because each agency determines and operates its own system of rules governing their conduct. For certain agencies, administrative law judges may serve to advantage their regulatory interests, rather than exercise judicial discretion to render impartial legal opinions for resolving disputes.

By: Stone Washington | April 17, 2024

Article III of the US Constitution created one Supreme Court and a system of inferior courts for the judicial branch. Congress later passed the Administrative Procedure Act (APA) of 1946, the implementation of which, enabled agencies to establish their own in-house court systems. This introduced a submerged, quasi-judicial court system that adjudicates matters on behalf of select federal executive agencies.

Present day proponents defend administrative law judges (ALJs) on the grounds that the judiciary is overburdened and requires additional executive branch support to alleviate its administrative caseload. Part of the original justification for introducing ALJs is that they offer specialized technical knowledge over regulatory and policy matters inherent to the agency in question. Most Article III judges are legal generalists and tend to not possess such bureaucratic expertise.

Those opposed to administrative law courts (ALCs) argue that their ALJs can face backlogs of their own and do not operate by the same standards of fairness that govern independent judiciaries. As the Supreme Court and multiple federal courts continue to hear [emerging challenges](#) to the agency's insulation and control over ALJs, this commentary explores the various regulatory problems that arise from such agency adjudication. Depending on the outcome of major administrative law cases, we may see a shift toward more [regulations by adjudication](#). This could be a problem if agency control over ALJ decision-making comes into conflict with longstanding constitutional guarantees that ensure blind justice under the law.

Background

There are a [reported](#) 31 ALCs across the federal bureaucracy. My own estimates find that there are closer to 51 ALCs, as many agencies employ both ALJs and ALJ-like officials who oversee administrative hearings. These [proceedings](#) often involve the host agency on one side and a private party on the other. Adjudications are commonly triggered by the agency suing the non-government party over noncompliance or rule violations. Some ALCs, such as the Social Security Administration, primarily use adjudication to confer or deny public benefits pertaining to retirement. Similarly, the Department of Health and Human Services (HHS) [uses adjudication](#) to facilitate public access to healthcare benefits. ALCs are authorized by the APA to function as an in-house quasi-judiciary for the agency. As with notice and comment federal rulemaking, ALCs conduct both [formal and informal](#) adjudication. A formal adjudication is whenever the agency's statute specifically requires it to conduct its hearings on the record. The agency must follow the relevant sections of the APA (sec. 554 and 556-557) that govern how the hearing is to be conducted. The matter must be resolved by an ALJ and follow standard trial-like procedures (i.e., a formal written record, allow for witness testimony, invite direct/cross-examinations, etc.). At the end of the process, the ALJ renders a decision, which is subject to the final approval by the agency's commissioners or the head of the agency.

Informal adjudication is far more prevalent and open the door for potential issues of judicial fairness. These are administrative proceedings that adhere to the agency's own internal set of procedures, rather than the APA. Agencies with statutes that do not require hearings to be conducted on the record or that provide room for exceptions, employ informal hearings. These informal proceedings typically involve private parties—nonprofit interest groups, private corporations, and individuals—who are adjudicating issues under the agency's rules or statute. Informal hearings enable the ALC to manage cases within the agency's full control and discretion. This may frustrate an ALJ's ability to render impartial decisions as their opinions are often closely overseen and scrutinized by the agency's leadership, which has the final say on all adjudicated matters.

Both formal and informal adjudications can cover a range of policy-specific issues. These include public registration, professional licensing, compliance violations, welfare benefits, and repayment of debt. Congress [has authorized](#) certain agencies like HHS, the Environmental Protection Agency, and the Federal Deposit Insurance Corporation to levy costly civil monetary penalties from the party once an ALJ renders judgement in adjudication (formal or informal). Some of these ALCs, including those within the Department of Agriculture, Securities and Exchange Commission (SEC), and Consumer Financial Protection Bureau, have been [spotlighted](#) for approving excessive monetary penalties by the agency.

No Wall of Separation

Agencies enjoy a number of prominent regulatory advantages in adjudication. Among these is the lack of a clear separation between the enforcement and adjudicatory arms of the agency. On the contrary, some have argued that ALJs are [independent](#) from the agency based on their statutory protection from executive removal. One of the core pillars of our Constitutional republic is a strict separation of powers between the three branches of government. One of the challenges to this doctrine is when some ALCs fail to maintain

a clear wall of separation between their ALJs and enforcement officers. This has become a notable concern in [enforcement actions](#), where ALJs are often incentivized to render decisions that fully or partially favor the agency's penalties on the private party. This is because certain agencies render significant control over the process by coordinating with the ALJ on decisions, punishing ALJs for rulings that are adverse to them, and revise ALJ opinions before they are appealed to them.

For instance, certain ALCs foster an in-house system of collaborative exchange between enforcement officers and ALJs. The SEC's court was recently forced to [dismiss 42 cases](#) that were tainted by what the Commission called a "[control deficiency](#)." The commissioners found that the ALJs exchanged private bench memos and notes with the agency's prosecutors during active cases, denying that same privilege to the outside party. A similar exchange can be seen within the National Labor Relations Board (NLRB), which, under its statute, can revise the draft opinion of its ALJ at whim. Parties that wish to contest an NLRB administrative law decision must appeal to the Board itself, which, given its potential involvement in developing ALJ outcomes, is not an objective third party.

Many ALJs are employed within the same office of agency attorneys bringing cases against private parties in adjudication. For example, the United States Citizenship and Immigration Services' ALJs report directly to the Department of Homeland Security's General Counsel. The Internal Revenue Service and National Oceanic and Atmospheric Administration share similar structures. Some agencies avoid this structural issue by maintaining a separate office for ALJs. Agencies should ensure that individuals maintain their procedural due process rights during adjudication, which include being heard before a neutral decision-maker that is unconstrained by agency influence.

Denial of Due Process

Another notable advantage that agencies enjoy with informal adjudication specifically is to control the venue and procedural rules of bringing a case against a private party. This has deprived many defendants of their procedural due process rights, since participants to a case are barred from the right to be heard before a jury and in a court of their choosing. For example, the APA places the burden of proof on whomever initiates the court challenge, which is consistent with the standard for Article III cases. However, informal adjudications enable the agency to shift the burden to whomever they desire, even upon the defendant. This means that the agency can sue you before an ALJ and you must fight an uphill battle to prove your innocence; otherwise, the agency wins by default. This can result in a denial of due process.

Agencies can also select the venue for informal adjudication. In the pending case of [SEC v. Jarkesy](#), this privilege has been challenged as a legislative function in violation of the Constitution's non-delegation doctrine. Congress did not clearly grant agencies this venue-selecting authority. This ability has enabled agencies to manage the majority of their cases before ALJs in-house where they occupy a greater likelihood of success vs. adjudicating matters before an Article III court. Private litigants can only launch separate constitutional challenges against the agency in an Article III setting if they satisfy the [criteria](#) established in [Thunder Basin v. Reich](#) (1994).

Dual Insulation and Agency Influence

ALJs enjoy a dual layer of insulation because neither the agency head (first layer) nor the president (second layer) is authorized to dismiss an ALJ at will. This conflicts with the chief executive's constitutional authority to hire or fire inferior officers under Article II. While one can argue that this insulation ensures that ALJs exercise independent decision-making, it overlooks how ALJs are ultimately employees to the agency. So, even if removing an ALJ proves difficult, the agency can still render less severe punishments to ALJs that rule against it, such as through salary reductions. The agency can also pass a rule that [diminishes](#) the ALJ's decisions to mere recommendations that aren't binding. This is what the Federal Trade Commission (FTC) recently did when its Chief ALJ broke the agency's 25 year adjudicatory winning-streak by ruling against the FTC in both the [Illumina Grail](#) and the [Altria/Juul](#) Labs matters.

The APA protects ALJs from [removal](#) unless the president or agency head establishes a proper cause that is approved by the Merit Systems Protection Board (MSPB). However, there is a conflict of interest, as the MSPB occupies its own ALC to conduct adjudication and may have an incentive to protect other ALJs. The outcome of the pending Jarquesy case may finally determine whether this dual insulation is constitutional.

Recommendations for Reform

Agencies can possess many powerful, built-in regulatory advantages that govern the adjudication process. For informal adjudication, agencies set the rules for procedure, collaborate with ALJs, and in some cases can revise the draft opinions of ALJs. Controversially, there are some ALCs that are housed in the same unit as the agency's general counsel office, in addition to a number of agencies that blur the lines between their prosecutors and ALC staff. This serves to undermine the Constitutional separation of powers doctrine and the judicial independence of ALJs, while preventing many people from obtaining their due process protections prior to the governmental taking of property.

In order to remedy these issues, I recommend the following set of reforms as members of Congress consider drafting ALC legislation:

- Allow private litigants to decide whether they will have their case adjudicated before an ALJ or an Article III judge.
- Prevent ALCs from imposing civil monetary fines on private litigants in absence of any guarantee to procedural due process.
- Restore the burden of proof on the plaintiff, rather than on the defendant, in order to adhere to the rules of civil procedure.
- Accommodate the increased administrative caseload of Article III courts by moving ALJs out of the executive branch and into the judicial branch using one of [these policy models](#).